

***Acts of torture committed by a State officer in the course of his personal pursuits is not violation of Article 11.***

VELMURUGU v. ATTORNEY GENERAL

(1981) 1 SLR 406

Petitioner, a Tamil social leader was arrested on the order of a senior officer (2<sup>nd</sup> respondent) and handed over to army officers allegedly with the comment to do what they liked with him. Petitioner was severely assaulted and assaulted inside the army jeep while being taken to the army camp. He was taken before a Magistrate but not remanded. Later he was examined by the DMO who recorded a number of injuries, and also admitted him to hospital. According to the police the petitioner was arrested on suspicion of inciting communal disharmony. The respondent to the application was only the police officer who had arrested the petitioner and it was alleged that he instigated the assault.

(Before ISMAIL J WEERARATNE J SHARVANANDA J WANASUNDERA J and RATWATTE J)

SHARVANANDA J (RATWATTE J agreeing)

"...Article 11 of the Constitution guarantees that "no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The practice of torture is prohibited in all civilized societies. The Article 11 is on the same lines as Article 5 of the Universal Declaration of Human Rights. The fundamental nature of the human right of freedom from torture is vouched not only to citizens, but to all persons, whether citizen or not. The Constitution is jealous of any infringement of this human right. This care is not to be exercised less vigilantly, because the subject whose human dignity is in question may not be particularly meritorious...

(His Lordship considered the medical and other evidence and accepted the petitioner's version of the events, and continued):

The 2<sup>nd</sup> Respondent did not become functus after taking the Petitioner into custody. The 2<sup>nd</sup> Respondent, as a Police officer endowed with coercive powers was carrying out his official duty in keeping the Petitioner in his custody until the Petitioner was produced before the Magistrate that night. In carrying out such a duty, he was acting as a Public Officer performing an essential executive function

of the State- the maintenance of law and order, and any contravention by him of the detainees' fundamental rights constitutes contravention by the Executive, as referred to in Article 126. According to the Petitioner, the 2<sup>nd</sup> Respondent had addressed the Army and Police officers that the Petitioner was the cause of all the communal violence and had asked them to take him and do as they like. The 2<sup>nd</sup> Respondent, the Police officer charged with the duty of bringing under control the communal violence in the area, appears to have conceived that if the Petitioner could be silenced by torture, the communal violence could be contained. Hence, he chose to achieve that object by having the Petitioner tortured by the Army personnel. He thus violated the fundamental right guaranteed to the Petitioner by Article 11 of the Constitution, namely freedom from torture. As stated earlier, where an officer of a State, in the exercise of the authority, which he is clothed with, uses the power to do a wrong forbidden by the Constitution, inquiry whether the State authorized the wrong is irrelevant; the State is bound by the way the 2<sup>nd</sup> Respondent exercised the coercive powers vested in him.

The European Commission on Human Rights in the 'Greek case' commented on the difficulties faced by the litigants alleging that public officers had inflicted or instigated acts of torture:

'There are certain inherent difficulties in the proof of allegations of torture or ill treatment. First, a victim or witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals upon himself or his family. Secondly, acts of torture or ill treatment by agents of the Police or Armed Services would be carried out as far as possible without witness and perhaps without the knowledge of higher authority. Thirdly, where allegations, of torture or ill-treatment are made, the authorities, whether the Police or Armed Services or the Ministries concerned, must inevitably feel that they have a collective reputation to defend, a feeling which would be all the stronger in those authorities that had no knowledge of the activities of the agents against whom the allegations are made. In consequence there may be reluctance of higher authority to admit or allow inquiries to be made into facts, which might show that the allegations are true. Lastly, traces of torture or ill-treatment may with lapse of time become recognizable, even by medical experts, particularly where the form of torture itself leaves...few external marks" *Vide* Journal of Universal Human Rights, Vol. 1, No. 4, Oct. – Dec. 1997 at p. 42.

It is well to bear the above comment in mind in investigative allegations of torture by the Police or Army.

The case discloses a shocking and revolting episode in law enforcement. If fundamental rights assured by our Constitution are to be meaningful, trampling underfoot the fundamental freedoms of subjects by law-enforcement officers should not be tolerated..."

WANASUNDERA J

(His Lordship considered that the petitioner's evidence left a serious doubt as to whether the incidents spoken of by him happened in the manner narrated by him, and continued):

"... In the instant case if liability is to be imputed to the State, it must be on the basis of an administrative practice and not on the basis of an authorization, directed or implied, or that these acts were done for the benefit of the State. If we ruled out the allegations against the 2<sup>nd</sup> respondent, we have here the case of the petitioner being roughly handled by some army personnel while the petitioner was being transported to Kalmunai town from the spot where he was taken into custody. This involved a drive of about an hour or a little more. This assaulting is alleged to have occurred on the high road, in public apparently under the cover of darkness. It may be noted that the instructions and the responsibility of the army to which he was temporarily handed over was only to transport him and hand him over to the police at the other end. The learned Deputy Solicitor-General has informed us that at this time no emergency had been proclaimed and the army authorities had no more powers over the petitioner than any civilian. This does not appear to be identical with the case of an assault or ill-treatment by, say the police, who having arrested a person, ill treats him in the confines of the police station and in the privacy of a secluded cell in the course of and for the purpose of an investigation.

This incident has also to be viewed in the context of the extraordinary conditions prevailing in the locality. It is apparent that the base passions of many persons in that area had been excited by communal passions. There was tension in the air. Counsel for the petitioner suggested that the army personnel were all Sinhala persons, but there is no definite evidence of it. That a few persons belonging to other races could have been among the personnel cannot be ruled out. As far as the police personnel were concerned, we find them not confined entirely to one race or community. The petitioner himself says that on one occasion some of the soldiers cautioned those who were assaulting him. The insinuation being that they cautioned his tormentors against their leaving tell-tale marks of violence on the petitioner's body. The petitioner has also said that at another point, on the journey, some soldiers intervened and prevented the petitioner from being shot by the others. All in all the acts complained of,

if they had taken place as alleged, seem to be in the nature of individual and personal acts due to some aberration or idiosyncrasy. They are also suggestive of the venting of some grievance of a personal or private nature or in consequence of some strong passion, prejudice or malice. They are admittedly illegal and criminal acts and not merely acts that are unauthorized and *ultra vires*. It is also not possible to characterize those acts as being incidental to the authority and powers vested in those persons nor have they been performed to further some objective of the State...

The alleged acts have not been authorized, encouraged, or countenanced or performed for the benefit of the State. The material before us shows that they would also not have been tolerated by the authorities, and redress in all probability granted if there had been a genuine complaint. In these circumstances I am of the view that no legal liability under the constitutional provisions can be imputed to the State..."

ISMAIL J in separate judgment (with WEERARATNE J agreeing) held that petitioner had failed to prove his allegations.

*Source: Goonesekere, R. K. (2003). Fundamental Rights and the Constitution II - A Case Book. Colombo: Law and Society Trust.*