

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

In the matter of an Application under
and in terms of Article 126 (2) of the
Constitution of the Republic of Sri Lanka

1. Landage Ishara Anjali (Minor)
Prosecutes this Application through
her Next Friend,

SC (FR) Application No. 677/2012

2. Wijesinghe Chulangani,

Both of,
Nilmenikgama,
Deegala, Marambha,
Akuressa

PETITIONERS

Vs.

1. Waruni Bogahawatte,
Matara Police Station,
Matara

2. Officer-in-charge,
Matara Police Station,
Matara.

3. Inspector General of Police,
Police Headquarters,
Colombo 01.

4. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: Buwaneka Aluwihare PC. J
Priyantha Jayawardena PC. J
Vijith K. Malalgoda PC. J

Counsel: J.C Weliamuna PC with Pulasthi Hewamanne
for the Petitioners

Warunika Hettige De Silva, DSG for the
Respondents

Argued on: 01.02.2018

Written 14.02.2018
submissions :

Decided on: 12.06.2019

Aluwihare PC. J,

This is a fundamental rights application by Landage Ishara Anjali a minor (hereinafter Anjali) presented through her next friend (her mother Chulangani, hereinafter the 2nd Petitioner). In the present application the Petitioners contend that the conduct of the 1st Respondent, in taking the 1st Petitioner into custody and detaining her violated her fundamental rights guaranteed under Article 11, 12 (1), 13 (1) and 13 (2). Leave to proceed was granted for all of the above mentioned Articles. Before addressing the legal questions, it is apposite to present the facts of the case.

Anjali was a grade 10 student of the Rajakeeya Maha Vidyalaya, Telijjiwila at the time of the alleged incident. She was known among the villagers for her talent for producing instant rhythmic verses (“නිවිච්ඡ කවි”). The alleged incident took place in the midst of the school term test. On or about 17 – 07 – 2012, Anjali had returned home after sitting for two question papers and was preparing herself for the question papers of the following day. Around 3.30 pm the 1st Respondent, along with 6 other officers of the Matara Police station had come to her residence on the pretext of introducing Anjali to a local media station. It is disclosed that she was alone at home at that point. The 1st Respondent had first shown interest in her ability to produce instant rhythmic verses. One officer also requested Anjali to sing a verse about the 1st Respondent with which request she complied. Anjali claims in her petition that several people in the area gathered around her house at this point, partly due to the curiosity of seeing a Police Jeep in the vicinity and partly, hearing her rhythmic verse.

Thereafter, in the presence of the said crowd, the 1st Respondent had questioned Anjali as to whether she was sexually molested by the Chairman of the Akuressa Pradeshiya Sabha. To this question, she had emphatically answered in the negative.

However, the 1st Respondent persisted in her questioning stating that they have received information that she was subjected to an alleged sexual abuse. Anjali had continued to deny being subject to any such treatment. Around this time, her grandmother and her parents (2nd Petitioner and Landage Priyantha) had arrived at the scene. After receiving the same negative answer from Anjali to the alleged sexual abuse, the 1st Respondent stated that they need to take Anjali to the Police Station for further questioning. The parents of the 1st Petitioner objected to sending their daughter alone and sought to accompany her. However, the 1st Respondent objected, stating that it was not necessary. After several pleadings and requests, the 1st Respondent agreed to allow only the girl's grandmother to accompany her to the Matara Police station.

At the police station, the 1st Respondent had taken Anjali inside her office to question her alone. She claims that she was shouted at and threatened to divulge the truth about her relationship with the said chairman of the Akuressa Pradeshiya Sabha. Anjali had repeatedly asserted that she had no relationship with the Chairman. She also alleges that the 1st Respondent showed inappropriate photos to her during the questioning.

The 1st Respondent thereafter locked Anjali in a cell where she spent the night along with another female detainee. She had not been provided with any food or water during her overnight detention. The following morning her parents visited her and her father (Landage Priyantha) upon finding out that his daughter had not eaten from the previous night, brought her some snacks. Around 9. 30 am, Anjali had been taken to the 1st Respondent's office and she was told that serious consequences would follow if she fails to reveal the truth. She once again denied having any relationship with the Chairman. Thereafter, Anjali alleges that she was forced to sign a statement the content of which was not made known to her.

Around 10 am, Anjali had been taken to the Matara General Hospital for a medical examination. She would remain there for another 8 days, presumably on the orders

of the Respondent. Anjali's parents remained at the police station with a view to taking their daughter home once she was brought from the hospital. However, it is stated that they were asked to leave as soon as their statements were recorded.

On 19-07-2012 Anjali was subjected to a judicial medical examination. The medico-legal report dated 19- 07- 2012 of the said examination shows that there were no signs of any sexual abuse or other ailment. Despite this, Anjali had been subjected to another medical examination about 4 days later and for a third time, 2 days thereafter. At this second referral, a medical staff member informed the Police that the girl had already been examined and that she could be discharged. Nevertheless, Anjali had been kept in the hospital for 8 continuous days. Throughout this period, 2 male Police officers and 1 female police officer remained stationed in her ward.

On 22- 07 -2012, Anjali's mother, the 2nd Petitioner lodged a complaint at the Human Rights Commission (HRC) that her daughter was detained unlawfully by the 1st Respondent. The HRC promptly intervened and secured the discharge of Anjali from the hospital on 25 - 07 - 2012. Even after the discharge the girl was first taken to the Matara Police Station and was made to wait till later that day to go home.

In her statement of objections, the 1st Respondent takes up the position that she visited the 1st Petitioner's house around 7. 30 pm on 17- 02-2012 when the parents and the grandmother were in the house. She states that she visited the house after receiving a communication from the Inspector General of Police to inquire into an alleged case of sexual abuse by the Chairman of the Akuressa Pradeshiya Sabha, where, Anjali, the 1st Petitioner was the alleged victim. She states that during the inquiry, a separate incident of sexual abuse involving one Kusumsiri was revealed to her and that she considered it fit to further inquire into the said incident. She decided to take Anjali to the Police station that night as they could not finish recording the statement pertaining to the said incident allegedly

committed by one Kusumsiri. The 1st Respondent also alludes that Anjali's apparent unease at disclosing all relevant facts in front of her parents prompted her to take the 1st Petitioner to the Police Station. She denies disallowing the parents to accompany the girl and claims that it was she who suggested that someone should accompany the child when the 2nd Petitioner was reluctant to accompany Anjali as the son (brother of Anjali) was suffering from influenza. The 1st Respondent also denies that she ill-treated the girl; that she was keeping her in a cell; did not provide food; showed inappropriate photos and made Anjali sign a statement.

There are a number of discrepancies in the version presented by the 1st Respondent. Although the 1st Respondent claims that she arrived at the Petitioner's house around 7 pm when the parents were at home, affidavits produced by two neighbours of the Petitioners (marked "P5 (a), P5 (b)") disclose that they saw a Police jeep parked in front of the petitioner's house around 4 pm on the said day. These affidavits also affirm that the parents arrived at the house some time later and that they were not at first allowed to enter. The allegation that the 1st Respondent objected to parents accompanying Anjali to the Police station is also corroborated by these affidavits. Secondly, the affidavit produced by Anjali's grandmother (marked "P3") -who accompanied the girl to the police station and was physically present at the Police station the night the detention took place—discloses that Anjali was in fact kept in the cell overnight. Her affidavit also lends credence to the affidavits produced by the neighbours (P5 (a) and (b)) and to the contents in the Petition, *i.e.* that the 1st Respondent objected to allowing anyone accompanying Anjali, the 1st Petitioner. Their statements refute the claims made by the 1st Respondent in her objections and places the veracity of the Respondent's version at peril. Although the 1st Respondent had ample opportunity to discredit the content of the affidavits, she had failed to present before this Court the "In and Out" entries made on that day or the record containing details of the detainees kept in the cell as maintained by the Reserve. Furthermore, it is to be noted that the Respondent has not denied that the Human Rights Commission initiated an

investigation against her for violating the fundamental rights of the 1st Petitioner. Her responses in the statement of objections only seek to explain the failure to appear before the HRC.

Apart from these, there are a number of infirmities in the Respondent's version. Of particular interest are the reasons adduced by the 1st Respondent that prompted her to take the 1st Petitioner to the Matara Police Station. The 1st Respondent claims that she took the girl child to the Matara Police to record the statement as she seemed uneasy to speak the truth before the parents. It is difficult to believe that the 1st Petitioner who apparently showed signs of unease of speaking in front of her parents, in her own house, in a familiar background, would behave any differently, and particularly more forthcoming about the information in a completely unfamiliar background as a Police station. The 1st Respondent has further stated that it was necessary to take the girl child to the Police station as they did not have sufficient time to finish recording the statement at the 1st Petitioner's house. I fail to understand how a change of location would better facilitate recording the statement if the 1st Respondent's concern was with regards to the lack of time. In my opinion, taking Anjali to the Matara Police station, which was approximately 30 kms away from her house, would have had precisely the opposite effect. The purported reasons therefore appear wholly counter-intuitive and unconvincing. The 1st respondent has only produced an extract of the notes taken during the investigation at 8.15 pm on 17 – 07 – 2012. In the said extract, it is stated that the 1st Respondent took her to the Batapola junction to inquire into the alleged sexual abuse by the three-wheeler driver. This investigation relating to the scene had taken place at 10 pm on the same day. The 1st Respondent has failed to explain why there was such an urgency to take all these steps during the remaining hours of the same day. In the absence of any such reasons, the urgency displayed by the 1st Respondent in taking the 1st petitioner away from her home to record a statement, and inspect the scene at such an hour appears rather unusual. Furthermore, the notes taken by the 1st Respondent do not disclose the events that

transpired at the police station. The failure to produce the statements recorded and the notes of investigation add to the infirmities in the Respondent's version.

Apart from Section 109 (6) of the Code of Criminal Procedure Act no 15 of 1979, there is no other provision under the Code that empowers a police officer making investigations, to order the attendance of a person acquainted with the circumstances of the case, before that officer. Even such a request has to be in writing, under the said provision. The provisions of the Code do not in any manner empower a police officer to restrict the liberties that are recognized and enjoyed by the public. In terms of Article 4 of the Constitution one manner in which Sovereignty is to be enjoyed by the people is through the fundamental rights which are by the Constitution declared and recognized.

Paragraph (d) of Article 4 of the constitution declares *“the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided”* (Emphasis added).

Admission on the part of the 1st Respondent, that she decided to take Anjali to the Police station that night as they could not finish recording the statement pertaining to the said incident allegedly committed by one Kusumsiri and that it was necessary to take the girl child to the Police station as they did not have sufficient time to finish recording the statement at the 1st Petitioner's house are clear instances where the 1st Respondent had failed to respect the fundamental rights of Anjali. If there was no time to conclude recording her statement on that day, the 1st Respondent could easily have adjourned recording the statement for another day. These are steps taken by the police in the course of investigations day in and day out. Anjali was in the midst of sitting for her term test at the relevant time. She was not only removed from her home by the 1st Respondent but also made

her stay at the hospital for no ostensible reason, even after a medical examination clearing her from being subjected to a sexual assault.

On the other hand, this was not a complaint made by Anjali or her parents but by a third party ostensibly who had no connection to Anjali's family. The moment Anjali and her parents denied the occurrence of any such incident, I cannot understand the undue enthusiasm on the part of the 1st Respondent to pursue with the investigation. The only conclusion, this court can draw is that 1st Respondent was purely acting in order to satisfy the desires of her superiors or a third party. Thus, the conduct of the 1st Respondent cannot be condoned by any measure and must be frowned upon.

In contrast, I find that the version narrated by the 1st and 2nd Petitioner is consistent, supported by the affidavits of the others, and is intrinsically more probable. The Respondent's version when assessed against the Petitioners' version impress upon us that the 1st Respondent took the girl child away from her house not to finish recording the statement, but to coerce her to make a different statement to that made by her at her place.

With that in mind, it is pertinent to examine whether the conduct of the 1st Respondent amounts to a violation of Article 11, 12 (1), 13 (1) and (2).

Violation of Article 13 (1)

The 1st Petitioner claims in the Petition that the 1st Respondent subjected her to arbitrary arrest and detention and thereby violated Article 13 (1) of the Constitution.

Article 13 (1) of the Sri Lankan Constitution declares the rights relating to personal liberty and criminal procedure. It reads; "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest." The Article guarantees freedom from arbitrary arrest and mandates that any deprivation of liberty should strictly follow the procedure

established by law. These procedural safeguards are set in place to avoid rule by whim or caprice and to prevent the abuse of judicial process for individual gain and for political purposes.

Was there arrest:

In the present case, there is no evidence of formal arrest by the 1st Respondent. Facts disclose that the 1st Respondent took the 1st Petitioner to the Police station to record a statement, detained her overnight in the cell, and made her stay in the hospital for 8 days for a judicial medical examination. Prior to answering whether there was a violation of the procedure, it is appropriate to first determine whether the present circumstances amount to an ‘arrest’ within the meaning of the Article.

The procedure for Arrest is provided in section 23 (1) of the Code of Criminal Procedure Code No. 15 of 1979. “In making an arrest the person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action and shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested.” The explanation to this provision reads;

“Explanation. -

Keeping a person in confinement or restraint without formally arresting him or under the colourable pretension that an arrest has not been made when to all intents and purposes such person is in custody shall be deemed to be an arrest of such person”

What is needed therefore is not a strictly formal legal procedure of arrest. Restraining or subjugating somebody in a way that impedes freedom of movement falls well within the meaning of arrest in the Code. There is no question that when the 1st Respondent took the 1st Petitioner to the Police Station and kept her inside the cell overnight, she arrested the 1st petitioner. Even during the period of 8 days the 1st Petitioner spent at the hospital, she was under the custody of the 1st

Respondent. The apprehension of arrest is irresistible when there are 3 police officers stationed throughout.

The question whether a deprivation of liberty would amount to an ‘arrest’ within the meaning of Article 13 (1) only if such deprivation is for the purpose of being dealt with under the law was raised in *Namasivayam v Gunawardena (1989) 1 SLR 394*. In that case, the Petitioner alleged that he was arrested by the third respondent while he was travelling in a bus and that he was not informed of the reason for his arrest. The 3rd Respondent denied the arrest and stated that he was investigating into a case of robbery and had reasons to believe that the petitioner was acquainted with the facts and circumstances relating to the robbery. He therefore required the petitioner to accompany him to the Police Station for questioning and released him after recording his statement at the Police station. Sharvanada CJ, with Athukorale and H.A.G. de Silva JJ agreeing stated;

“In my view, when the 3rd Respondent required the Petitioner to accompany him to the Police Station and took him to the Police Station, the Petitioner was in law arrested by the 3rd Respondent. The Petitioner was prevented by the action of the 3rd Respondent from proceeding with his journey in the bus. The Petitioner was deprived of his liberty to go where he pleased. It was not necessary that there should have been any actual use of force; threat of force used to procure the Petitioner's submission was sufficient. The Petitioner did not go to the Police Station voluntarily. He was taken to the Police by the 3rd Respondent, in my view the 3rd Respondent's action of arresting the Petitioner and not informing him the reasons for his arrest violated the Petitioner's fundamental rights warranted by Article 13 (1) of the Constitution.” (p. 401)

Similarly, in the present case the 1st Petitioner did not go to the police station on her own volition. She was taken to the police station by the 1st Respondent against her and her parents’ will. If the parents did not keep agitating to accompany her, the 1st Respondent would have taken the 1st Petitioner alone to the Police station.

She was detained in a cell in the police station that night and on the following day was referred to the hospital where she would stay for 8 days. From the time she was taken away from the custody of her parents up to the point where she was able to return home, she was at all times under the authority of the 1st Respondent. Accordingly, I have no hesitation in holding that the conduct of the 1st Respondent in taking the 1st Petitioner to the Police station for the ostensible reason of completing the statement and compelling her to stay in the hospital for 8 days amount to an arrest.

Was the arrest carried out according to the procedure established by law?

Article 13 (1) contains a prohibition on deprivation of liberty that no person shall be arrested. However, there is an exception, that such deprivation of liberty may be effected "according to the procedure established by law". In *Kapugeekiyana v Hettiarachchi and two others (1984) 2 SLR 153*, it was held that the "procedure established by law cannot mean any other than the procedure established by the Code of Criminal Procedure Code Act No. 15 of 1979". Section 32 (1) the Code of Criminal Procedure Act No. 15 of 1979 lays down the instances in which a peace officer may without an order from a Magistrate and without a warrant arrest any person. The section prescribes, *inter alia*, that a peace officer could arrest a person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned.

As disclosed in the statement of objections, the 1st respondent arrived at Anjali's house upon receiving a communication (marked "1R1") by the IGP that the Chairman of the Akuressa Pradeshiya Sabha allegedly has sexually abused her. The complaint therefore was made against the said Chairman and not against the 1st petitioner. By the 1st Respondent's own admission, the 1st Petitioner was only the 'alleged victim.' Therefore, there could not have been any circumstance that permitted the 1st Respondent to arrest her let alone detain her in the cell overnight.

The Constitutional jurisprudence of this country has always placed a high premium on personal liberty. It has been our judicial opinion throughout that *“This liberty should not be interfered with, whatever the status of that individual be, arbitrarily or without legal justification”* (Justice Sharvananda in the case of **Namasivayam** supra). Children, who are vulnerable to exploitation and abuse of power, must in particular be guaranteed these safeguards. Under Article 27 (13) of the Constitution, the State has an obligation to promote with special care the interest of children and youth and to protect them from exploitation and discrimination. **Article 9** of the **UN Convention on the Rights of the Child (CRC)**, which Sri Lanka ratified in 1991, states that *“a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with the applicable law and procedures, that such separation is necessary for the best interest of the child”*. This is reinforced by **Rule 2** of the **UN Rules for the Protection of Juveniles Deprived of their Liberty** (General Assembly Resolution 45/113, 14 December 1990) which states that *“Deprivation of the liberty of a juvenile should be a disposition of last resort and to the minimum necessary period and should be limited to the exceptional cases.”* Officials charged with the duty of preserving and promoting these interests should not flout these safeguards as they please. Arrest is legal only if it is clearly permitted by law. There is no provision in our law which allows a police officer to arrest or take into custody a victim of an alleged offence. The 1st Respondent took the 1st Petitioner into custody to interrogate her. Whatever her reasons for the action may have been, the 1st Respondent was not empowered by law to detain the 1st Petitioner in a cell overnight when she was only the ‘alleged victim’ of an offence. There was no information or grounds warranting her detention. She was further detained in the hospital for 8 days, despite the initial medical reports clearly indicating that there were no signs of abuse. The young girl child was prevented from attending school, and returning to her normal life and there is no material placed before us explaining why such deprivation of liberty

was necessary. Accordingly, I hold that the 1st Respondent's actions amount to a violation of Article 13 (1) of the Constitution.

Violation of Article 13 (2)

Article 13 (1) prohibits not only the taking into custody, but also the keeping of persons in a state of arrest by imprisonment or other physical restraint except according to procedure established by law. Where a person is deprived of personal liberty without being brought before the judge of the nearest competent court according to the procedure established by law, there is a violation of Article 13 (2) of the Constitution.

The obligation to produce every person held in custody or otherwise deprived of personal liberty before the judge of the nearest competent court is one that should be carried out according to procedure established by law. The said procedure is found in Sections 36 and 37 of the Code of Criminal Procedure Act which deal with persons arrested without a warrant.

“36. A peace officer making an arrest without warrant shall without unnecessary delay and subject to the provisions herein contained as to bail take or send the person arrested before a Magistrate having jurisdiction in the case.

37. Any peace officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate”

As these statutory provisions clearly indicate, any person arrested under the regular procedure cannot be detained for longer than 24 hours. Adhering to this time frame is primordial as it is linked to the detainee's corollary right to challenge the legality of the deprivation of liberty. Article 13 (2) does not draw any distinction between types of people held in custody. It applies with equal force to

everyone held in custody, detained or otherwise deprived of liberty, whether the same person be a suspect, victim or otherwise. It is a human right that has found expression in core international human rights instruments to which Sri Lanka is a party; such as Article 9 (4) of the International Covenant on Civil and Political Rights and article 37 (d) of the Convention on the Rights of the Child. Every person, including a child whose liberty is deprived, must be allowed to claim the benefit of the said right.

Regrettably, the 1st Petitioner to the present application was not guaranteed the protection accorded by the said provisions of law. There is not an iota of evidence present before us to suggest that the 1st Respondent took measures to bring the 1st Petitioner before a Magistrate within 24 hours of the arresting. Neither has any reasons been adduced to justify the delay in this regard. It is also a matter of high concern that the 2nd Respondent subjected the 1st Petitioner to a medical examination without producing her before the Magistrate. Under section 122 (2) and 137 of the Code of Criminal Procedure Act No. 15 of 1979 it is the Magistrate who can make an order authorizing a medical examination. There is no evidence that the Respondents sought an order prior to subjecting the 1st Petitioner to a medical examination, nor have they consulted the parents or the guardian to obtain their consent. On the contrary, I find that the 1st Respondent continued to detain her in the hospital for 8 more days without allowing any judicial intervention to determine the legality of such detention. In these circumstances, I have no hesitation in holding that the 1st Respondent and the 2nd Respondent patently violated the law by failing to produce the 1st Petitioner before a Magistrate. The failure amounts to a violation of Article 13 (2) of the Constitution.

Violation of Article 11

The next issue that requires the consideration of this Court is, whether there was a violation of the fundamental right guaranteed to the Petitioner by Article 11 of the Constitution. Article 11 reads as follows; “*No person shall be subjected to torture or cruel, inhuman or degrading punishment or treatment.*” Apart from the Constitution, **The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 Of 1994** prohibits inflicting torture or subjecting persons to cruel, inhumane and degrading treatment or punishment. **Article 37 (a) of the UN Child Rights Convention** also obliges the state parties to ensure that “*a child shall not be subjected to torture or cruel, inhuman or degrading treatment*”. Apart from these, all notable international declarations of human rights prohibit torture as well as cruel, inhuman or degrading treatment or punishment. **Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** are in similar terms.

In analysing the contours of Article 11 of the Constitution, Dr. Amerasinghe J in his separate judgment in *Silva v. Chairman, Fertilizer Corporation (1989) 2 SLR 393* observed that; “*The treatment contemplated by Article 11 wasn't confined to the realm of physical violence. It would rather embrace the sphere of the soul or mind as well.*” Thus, this Court has given a broad definition of the right not to be subjected to inhumane treatment, extending beyond physical violence into emotional harm as well.

In the present case, the 1st Petitioner alleges that the 1st Respondent’s conduct during the entire investigation, *i.e.* the act of questioning her in the presence of neighbours about an alleged sexual relationship between the chairman of the

Akuressa Pradeshiya Sabha, arresting her, and keeping her in custody overnight, amounts to a violation of Article 11.

In ascertaining whether this behaviour is in contravention of Article 11, this Court must consider the degree of proof necessary. In *Vivienne Gunawardena v. Perera (1983) 1 SLR 305*, where violations of Articles 11 and 13 (1) were alleged, Soza J. held that a high degree of probability is required where it is alleged that the petitioner had been subjected to cruel, inhuman or degrading treatment. In *Channa Peris and Other v. Attorney General and Others (1994) 1 SLR 01*, Amerasinghe J held that in considering whether Article 11 has been violated, three general observations apply:

- I. “The acts or conduct complained of must be qualitatively of a kind that a Court may take cognizance of. Where it is not so, the Court will not declare that Article 11 has been violated.
- II. Torture, cruel, inhuman or degrading treatment or punishment may take many forms, psychological and physical.
- III. 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.”

Further, in *W. Nandasena v. U. G. Chandradasa, OIC police Station, Hiniduma & 2 others* reported in 2005 [B.L.R] 104, Shirani Bandaranayake, J held that when there is an allegation based on violation of fundamental rights guaranteed in terms of Article 11 of the Constitution, it would be necessary for the petitioner to prove his position by way of medical evidence and/or by way of affidavits and for such purpose it would be essential for the petitioner to bring forward such documents with a high degree of certainty for the purpose of discharging his burden.

Along with the high degree of certainty, a very high degree of maltreatment is also required to make a finding on cruel, inhumane, degrading treatment under Article 11. As Jameel J. enunciated in *Silva v. Chairman, Fertilizer Corporation (1989) 2 SLR 393* “*ill-treatment per se, whether physical or mental, is not enough; a very high degree of maltreatment is required*”.

Nevertheless, this Court recognizes that what amounts to a ‘high degree of maltreatment’ in relation to an adult does not always resonate with the mental constitution of a minor. Therefore, when a minor complains of degrading treatment, the Court as the upper guardian must not be quick to dismiss the claims for failing to meet the same high threshold of maltreatment. Instead, it must carefully consider the impact the alleged treatment may have had on the mentality and the growth of the child. In *Bandara v. Wickremasinghe (1995) 2 SLR 167* where the petitioner who was a Minor and a student of Sri Subhuthi Vidyalaya alleged that he was assaulted during school hours by the Principal, Deputy Principal, Vice Principal and a teacher, Kulatunga J. holding that the Respondent's conduct was violative of the Petitioner's rights under Article 11 stated that; “*This Court has hitherto been deciding cases of torture by police officers. However, the victims of such torture generally belong to a different class. Here it is a student with an unblemished record. This Court must by granting appropriate relief reassure the petitioner that the humiliation inflicted on him has been removed, and his dignity is restored. That would in some way guarantee his future mental health, which is vital to his advancement in life.*”

In the present application Anjali, the 1st petitioner was 14 years of age at the time of the incident. Being a young girl who was well known among the villagers, it is very likely that she suffered humiliation when the 1st Respondent questioned her whether she was the victim of an alleged sexual abuse in front of the villagers. Affidavits marked P5 (a) to (c) clearly indicate that there were several villagers gathered around the 1st Petitioner's house when the said questioning took place.

Though the 1st Petitioner emphatically denied being subjected to any abuse, it was to no avail. In the end, despite being the ‘alleged victim’, she was taken to the Police station in front of the said crowd. The stigma attached to cases of this nature is a concern which the 1st Respondent ought to have factored in before deciding her course of action. Where a school child living in a close-knit community is concerned, an even greater sensitivity must be displayed. Regrettably, the 1st Respondent, when she initiated the investigation in public, failed to appreciate the effect her actions may have on the dignity of the child. She also treated the 1st Petitioner in a degrading manner in the Police station. As corroborated by the affidavit of the 1st Petitioner’s grandmother (marked P3), the 1st Petitioner was made to spend the night in the cell along with another female detainee. Not only was this act degrading, it also constitutes a violation of **section 13 of the Children and Young Persons Ordinance**, which obligates the authorities to make arrangements to prevent a child or young person from associating with an adult (not being a relative) who is charged with any offence while detained in a police station. The same section also requires to ensure that a girl (being a child or young person) while so detained be under the care of a woman. The right to humane treatment also finds expression in Article 37 (c) of the Convention on the Rights of the Child. Article 37 (c) of the Convention provides “*every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age*”. The positive right to humane treatment is in general also expressly guaranteed by Article 10 (1) of the International Covenant on Civil and Political Rights to which Sri Lanka is a party.

It is understood that the civil rights of detained persons are also applicable to children. However, the arrested, detained or imprisoned children have additional rights on account of their age. **Article 3 (2) of Sri Lanka’s Charter on the Rights on the Child** states that “*the best interest of the child shall be the primary consideration in any matter, action or proceeding concerning a child, whether*

undertaken by any social welfare institution, court of law, administrative authority or any legislative body". I am of the view that the treatment meted out to the young petitioner of this case did not conform to these standards. The 1st Respondent does not appear to have regarded the circumstances particular to the child, her age or her educational and social concerns when she questioned her, arrested her and detained her for over a week. In those circumstances, this Court while stressing the importance of treating children with dignity, finds that the treatment meted out to the 1st Petitioner amounts to degrading treatment within the meaning of Article 11 of the Constitution.

The Court further observes that the conduct of the 1st Respondent in arresting and detaining the 1st Petitioner in violation of the procedure established by law also deprived the 1st Petitioner of her right to equal protection of the law under Article 12 (1) of the Constitution.

Liability of the Respondents

While the State is responsible for all violations of Fundamental Rights, this Court has observed that an individual officer could be held personally liable where there is clear evidence to this effect. To quote Sharvananda CJ. In *Mariadas v Attorney General (1983) 2 SLR 461, 469*: "*The relief granted is principally against the state, although the delinquent official may also be directed to make amends and/or suffer punishments*".

In the present case, the 1st Respondent was responsible for the 1st petitioner's unlawful arrest and deprivation of liberty; her unjustified detention without production before a Magistrate and subjecting her to degrading treatment.

I hold that the 1st Respondent infringed the petitioner's fundamental rights under Articles 11, 12 (1), 13 (1) and 13 (2). The 1st Respondent being the inquiring officer of the alleged case of sexual abuse, had a mandatory duty in terms of section 113 of the Code of Criminal Procedure Act to report the result of the

investigation to the Officer-in-Charge of the police station, the 2nd Respondent and in the ordinary course of events, this court, in the absence of any contrary material, can presume that the 2nd Respondent had the knowledge of the steps taken by the 1st Respondent in relation to the impugned investigation. As such, I hold that the 2nd Respondent acquiesced in and condoned the 1st Respondent's actions and I therefore further hold that the 2nd Respondent infringed the Petitioner Anjali's fundamental right under Article 12 (1) of the Constitution. The 1st Respondent's conduct not only infringed the fundamental rights of the Petitioner but displayed a callous disregard for the law.

The circumstances do not warrant her being excused or exempted from personal liability. Accordingly, I order the State to pay a sum of Rs, 50,000 (Fifty Thousand) as compensation to the 1st Petitioner. I further order the 1st Respondent personally to pay the 1st Petitioner a sum of Rs.100, 000 (one hundred thousand) in instalments of Rs 25,000 within 12 months, commencing from the date of the delivery of this judgement.

This Court also takes an opportunity to note with concern the increasing number of incidents of abuse of power by law enforcement authorities. There is no doubt that what is brought before Courts is a fragment of the totality of incidents taking place across the country. In view of the pervasive practice, the Court considers this to be an opportune moment to direct the 3rd Respondent the Inspector General of Police to lay down guidelines to be followed by law enforcement authorities if such guidelines are already not in place. Guidelines that are thus formulated must reflect the legal safeguards in our law, international instruments and global best practices. The objective is to reinforce the content of the law, clarify any obscure areas and shed light on the rights and obligations of concerned parties. This Court stresses that law enforcement authorities must adhere to those guidelines in addition to the law and take every possible measure to end the abuse of power.

Guidelines should broadly cover the following aspects and may include any other area which the Inspector General of Police, the 3rd Respondent deems necessary, in furtherance of securing and advancing the rights of the public that are recognized under the Constitution and under the law.

- Law Enforcement Officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.
- Law enforcement officials shall respect the principles of legality, necessity, non-discrimination, proportionality and humanity.
- Law enforcement officials shall at all times protect and promote, without discrimination, equal protection of law. All persons are equal before the law, and are entitled, without discrimination, to equal protection of the law.
- They shall not unlawfully discriminate on the basis of race, gender, religion, language, colour, political opinion, national origin, property, birth or other status.
- It shall not be considered unlawful or discriminatory to enforce certain special measures designed to address the special status and needs of women (including pregnant women and new mothers), juveniles, the sick, the elderly, and others requiring special treatment in accordance with international human rights standards.
- Children are to benefit from all the human rights guarantees available to adults. In addition, children shall be treated in a manner which promotes their sense of dignity and worth; which facilitates their reintegration into society; which reflects the best interests of the child; and which takes into account the needs of a person of that age.
- Detention or imprisonment of children shall be an extreme measure of last resort, and detention shall be for the shortest possible time.
- Children shall be detained separately from adult detainees.

- Detained children shall receive visits and correspondence from family members.
- Law Enforcement Officials shall exercise due diligence to prevent, investigate and make arrests for all acts of violence against women and children, whether perpetrated by public officials or private persons, in the home, in the community, or in official institutions.
- Law Enforcement Officials shall take rigorous official action to prevent the victimization of women, and shall ensure that revictimization does not occur as a result of the omissions of police or gender-insensitive enforcement practices.
- Arrested or detained women shall not suffer discrimination and shall be protected from all forms of violence or exploitation.
- Law Enforcement Officials shall not under any circumstance use Torture and other cruel, inhuman or degrading treatment.
- No one shall be subjected to unlawful attacks on his or her honour or reputation.
- Law Enforcement Officials shall at all times treat victims and witnesses with compassion and consideration.
- Law Enforcement Officials shall at all times promptly inform anyone who is arrested of reasons for the arrest.
- Law Enforcement Officials shall maintain a proper record of every arrest made. This record shall include: the reason for the arrest; the time of the arrest; the time the arrested person is transferred to a place of custody; the time of appearance before a judicial authority; the identity of involved officers; precise information on the place of custody; and details of the interrogation.

- Anyone who is arrested has the right to appear before a judicial authority for the purpose of having the legality of his or her arrest or detention reviewed without delay.
- Law Enforcement Officials as far as possible shall take every possible measure to separate juveniles from adults; women from men; and non-convicted persons from convicted persons.
- Law Enforcement Officials shall at all times ensure to obey and uphold the law and these rules.

Application allowed

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE VIJITH MALALGODA PC

I agree

JUDGE OF THE SUPREME COURT