ROSHANA MICHAEL
v.
SALEH, OIC (CRIMES), POLICE STATION, NARAHENPITA AND OTHERS

SUPREME COURT
FERNANDO, J.,
GUNASEKERA, J. AND
WIGNESWARAN, J.
SC (FR) NO. 1/2001
JUNE 03, 2002

Fundamental rights – Unlawful arrest and torture of the petitioner – False police entries to suppress the true facts – Articles 11, 13 (1) and 13 (2) of the Constitution – Whether the addition of an affirmation to an oath necessarily vitiates an affidavit.

The petiitoner, a visiting domestic servant worked in the house of her employer until 12.15 pm on 03. 12. 2000. At about 6 pm., the employer's wife (the complainant) observed her husband's gold wristlet watch missing. She got down the petitioner and questioned her but the wristlet watch was not found.

According to the Information Book of the Narahenpita Police Station, the complainant had made a complaint regarding the loss of the wristlet watch on 04. 12. 2000 at 9.10 am.; the 1st respondent (Inspector of Police) and another officer left for inquiry at 10.00 am, in a private vehicle; they went to the petitioner's house for investigation; arrested the petitioner at 5.10 pm on suspicion and brought her to the Police Station at 6.30 pm. Her statement was recorded on 05. 12. 2000 at 7.30 am and she was produced before the Magistrate at 11.30 am the same day.

The proved facts showed that the 1st respondent and two police officers and the complainant had visited the petitioner's house at 8 pm on 03. 12. 2000 in a private car and assaulted the petitioner and brought her to the complainant's house. After a futile search for the wristlet watch there and a lot of threatening and harassment on the way, the Police brought her to the Police Station. Whilst in Police custody she was assaulted with a rod and a pole with the object of extracting a confession of theft of the wristlet watch. A doctor also witnessed the petitioner's condition at the Police station and saw injuries. A complaint was also made to the Magistrate regarding the assault. The JMO"s evidence supported the petitioner's version of the alleged assault.

Held:

(1) The petitioner's version was the credible version which was amply supported by witnesses. The Police version was false and had to be rejected as being a cover up for the illegal arrest of the petitioner on 03. 12. 2000.

(2) By their acts the respondents infringed the petitioner's fundamental rights under Articles 11, 13 (1) and 13 (2) of the Constitution.

Obiter :

The petitioner's affidavit was not invalid for the reason that it contained an oath and an affirmation. Even if her affidavit was rejected, there was ample evidence besides that affidavit to establish her averments.

APPLICATION for relief for infringement of fundamental rights.

W. R. Sanjeewa for petitioner.

Manohara de Silva for 1st respondent.

Ms. Viveka Siriwardena de Silva, State Counsel for 2nd and 3rd respondents.

Cur. adv. vult.

August 02, 2002

FERNANDO, J.

The petitioner seeks relief from this Court for the alleged infringement 1
of her fundamental rights under Articles 11, 13 (1) and 13 (2), by reason of her arrest by the 1st respondent (the officer-in-charge (Crimes) of the Narahenpita Police) at about 8.00 pm on 03. 12 2000; her detention in Police custody thereafter until she was produced before a Magistrate shortly before noon on 05. 12. 2000; and the cruel inhuman and degrading treatment to which she was subjected whilst in Police custody.

The petitioner is a 25-year old unmarried woman living at No. 100/ 14. Dabare Mawatha, Narahenpita, with her parents. She had been working as a domestic aide in a nearby household at No. 18/95. Dabare Mawatha, Narahenpita. This case is the sequel to the alleged theft of a gold wrist-watch belonging to her employer's wife (whom I will refer to as "the complainant").

According to a statement made by the complainant to the Narahenpita Police at 9.40 am on 04. 12. 2000, all four members of her family attended a party on 02. 12. 2000, and returned home in the early hours of the 3rd. Both the complainant and her husband owned gold wrist-watches each worth Rs. 500,000. Before going to sleep the complainant left her husband's watch on the dressing table, and put her own (together with her jewellery) in a wall cupboard, in their (upstairs) bedroom. The petitioner came for work as usual at 8.00 am. While the complainant was downstairs the petitioner was working upstairs, and left at about 12.15 pm. She and her two children then worked upstairs. When she opened the wall cupboard at 10.50 am, for some other purpose, she had observed that her watch was there. It was only at about 6.00 pm that evening, when she decided to put away the two watches, that she found that her watch was missing. She checked with her husband, who said that he had not put it away. She had only one other employee, who had been on leave since 29. 11. 2000. She claimed that nobody other than the petitioner went upstairs that day, and therefore suspected that it was the petitioner who had stolen the watch. Thereupon "she *got down* the petitioner" – how, she did not say – and asked her to find the watch, but the petitioner did not. Her statement makes no mention of any complaint, written or oral, to the Police that day. The complainant, an Attorney-at-Law, gave no reason for failing to make a prompt complaint on the 3rd itself. The respondents did not submit an affidavit from her, or any member of the family.

According to his "Out" entry made at 10.00 am on the 4th, the 1st respondent set out to investigate the theft in a private vehicle

(the registration number and ownership of which was not disclosed) accompanied only by constable Tissera. According to Tissera's notes, they reached the complainant's residence only at 11.00 am – taking one hour for that short journery.

In his affidavit the 1st respondent described the subsequent events with the utmost brevity :

> ". . . I went with *two* other police officers to the [complainant's] residence and commenced investigations. At about 5.10 *hours* [*sic*] on the same day I went to the residence of the petitioner and arrested [her] on suspicion and thereafter brought her to the Narahenpita Police and [she] was handed over to the officer on duty. Thereafter, the petitioner was in the custody of the officer-in-charge." [*emphasis added*]

According to his "In" entry made at 6.30 pm, the 1st respondent returned in a *private* vehicle; handed over the petitioner to the officer on duty to await the orders of the officer-in-charge; and directed Tissera to record her statement. At 6.40 pm it was recorded that she was examined by a Police matron and that she had no visible injuiries.

For some unexplained reason Tissera did not record the petitioner's statement that day, and waited until 7.30 am the next day. According to the certified copy produced by the 1st respondent the concluding portion of her statement was a follows :

> ". . . Thereafter the *lady* [*nona*] came on the night and asked me whether I took her watch. I said no. Accordingly, having gone to the house I searched. I did not find. I did not see the watch. What I have to say further is that I did not take that watch. *That is all I have to say* about that incident. *Read over and accept as correct.* Further, some Police officers in civvies came. Further, the Inspector gave me two slaps. *That is all I have to say. Read over and accepted as correct.* (signed) . . . "

This gives the impression that the complainant came alone on the 3rd. However, on perusing the Information Book itself, it was found that the petitioner had actually referred to the complainant "with others" (*nona-la*) and had said "Further *on that occasion* some Police officers in civvies came." The petitioner also claimed in her counter-affidavit that Tissera had refused to record that the Police had assaulted her, saying that that was not necessary; that thereupon she refused to sign the statement; and that it was only then that Tissera had recorded the next few sentences. That is borne out by the repetition of the phrases. *"That is all I have to say"* and *"Read over and accepted as correct".*

It is common ground that the petitioner was produced in the Chief Magistrate's Court, Colombo, on the 5th at about 11.30 am. The Court record shows that Counsel on her behalf had submitted that she had been in Police custody for two days and had been assaulted, resulting in contusions to her chest and elsewhere. There is no doubt that she did have injuries, as it is recorded that she opened her blouse slightly and showed injuries. As directed by the Magistrate, the JMO examined her on the 7th, and reported that she had seven contusions : on the left shoulder (4" x 3"), left upper arm near the armpit (2" x 2"), back of the left upper arm (3" x1"), right shoulder (3" x 3"), left buttock (3" x 1.5"), left buttock extending to the upper left thigh (2.5" diameter), and right buttock (3" x 1.5"). The JMO was of the opinion that these injuries had been caused by an assault with a blunt object and were around two to four days old, consistent with an assault on the 3rd night. I must add that the dimensions of the contusions do not suggest that each was the result of just a blow or two.

No criminal proceedings were instituted against the petitioner.

There were no affidavits, apart from his own, in support of any part of the 1st respondent's version.

The petitioner's affidavit discloses a very different picture. At about 8.00 pm on the 3rd, a neighbour called out to the petitioner that some persons had arrived in a vehicle and were inquiring for her. She and her mother came out of the house. She saw "the black vehicle belonging to the lady of the house where she worked", and standing nearby were the complainant and two unknown men, not in uniform. The complainant said that her watch was missing, and that was why she had come with those Police officers. The petitioner later came to know that one of the two men was the officer-in-charge (Crimes) of the Narahenpita Police.

They asked her to get into that vehicle and took her to the complainant's residence. There she was told to search everywhere for the watch. The complainant said "there is no point in searching in those places", and left the room, whereupon the 1st respondent slapped the petitioner twice, saying "this is not the way you will be beaten if you are taken to the Police station". The petitioner searched, unsuccessfully, and the complainant asked her to say if she had taken the watch. When she denied having taken it, the complainant said there was nothing she could do, and "to settle it with the Police". She was then taken in a white vehicle driven by one Gamini. She saw her mother and sister standing at the gate. Her sister asked the 1st respondent to take her mother along with the petitioner, whereupon the 1st respondent raised his hand, threateningly, to strike her sister.

The vehicle was then stopped at a dark spot, the 1st respondent threatened her, asking her to admit it if she had taken the watch, and saying that she would be beaten if they took her to the Police station. At the Police station, she was beaten all over her body by the 1st respondent and another officer, with a rod and a pole, for about two hours. She was also abused and threatened in crude and obscene language. The complainant's husband was present. The

petitioner's father and sister state that they came to the Police station, and the 1st respondent told the father *that the watch was in their house and to bring it;* and when the father replied that the petitioner was not that kind of child, the 1st respondent asked him to get out.

The petitioner was then taken again to the complainant's house in the black car, and again asked to search. Her mother and sister stated that they too went to that residence, whereupon they were told by the Police officers not to create problems but to go and wait at the Police station.

Thereafter, the petitioner was taken back to the Police station at about 2.15 am., and from the vehicle she saw her mother, sister and neighbour outside the entrance. Her mother and sister, stated that when the mother asked about the petitioner, the 1st respondent replied "*You have the article, when you bring it we will give your child*".

At about 7.00 am her father brought breakfast for her, and she informed him that she had been assaulted. Thereafter, her mother and sister came, and her sister applied *Siddhalepa* and gave her Panadol. The petitioner showed her sister the officers who had beaten her. The petitioner's mother stated that she informed Dr. Nalin Swaris. Later, Dr. Nalin Swaris and Counsel came to the Police station to see her.

At around 1.30 pm the 1st respondent, with a Police party, took the petitioner to her home, and searched the entire place, and then brought her back to the station. That night there was a Police matron present.

The petitioner's version is fully corroborated by the detailed affidavits of her neighbour, father, mother and sister. Those affidavits refer to

events and statements (particularly the two statements italicized above) between 8.00 pm on the 3rd and 7.00 am on the 4th – *before* the time at which the petitioner was arrested according to the 1st respondent's version. The 1st respondent has contented himself with a bare denial of those affidavits, and has not even made an attempt to show that he was not on duty between 8.00 pm on the 3rd and 7.00 am on the 4th, or that he was engaged in other duties. As for the visit of Dr. Swaris and the petitioner's Counsel, he simply stated that he was "unaware".

In response to the 1st respondent's affidavit, the petitioner filed a counter-affidavit, together with supporting affidavits, obtained in October, 2001, from Dr. Swaris, and two priests and a nun to whom the fact of the petitioner's arrest and ill-treatment is said to have been communicated, who are said to have visited her at the Police station before the 4th afternoon. The petitioner's first affidavit made no reference to the priests and the nun, and the 1st respondent has not had an opportunity of replying to their affidavits. It would not be fair to the 1st respondent to act on those affidavits. However, Dr. Swaris' visit was clearly mentioned in the first set of affidavits; and the 1st respondent did not deny that visit. Accordingly, I would accept Dr. Swaris' affidavit as confirming his visit. That affidavit also refers to any other matters, including alleged conversations between Dr. Swaris and others at the Police station, to which the 1st respondent has not had an opportunity of responding. I will, therefore, ignore those averments.

The principal issue is whether the petitioner was arrested at 5.10 pm on the 4th. If so, there was by then a complaint of theft against her, which would probably have given rise to a reasonable suspicion justifying arrest. The petitioner did not allege any assault after 5.10 pm, and she was produced in Court within 24 hours. If she had been arrested at that time this application has to be dismissed.

There are several reasons why the 1st respondent's version is unacceptable, while the petitioner's is credible.

The petitioner's position that the complainant came with two Police officers in civvies on the 3rd night is amply corroborated by her neighbour and her mother, and is inherently probable. It is to some extent confirmed by the complainant's statement that she "got down" the petitioner to her residence. It is, of course, possible that the complainant "got her down" in some other way – by sending a message, or sending someone else – but there is no evidence of any such thing. Her only other employee was away on leave. The petitioner was hardly likely to have come alone, and gone back alone, at that time of the night.

The supporting affidavits establish that at several subsequent points of time the petitioner was observed to be in Police custody – at the complainant's residence and at the Police station. As against those, the 1st respondent has failed to submit affidavits from the complainant or any member of her family, or from Tissera or any other Police officer.

Finally, the 1st respondent's affidavit is not worthy of credit. He averred that he set out to investigate with *two* officers, although his "Out" entry refers only to one. He gave the time of arrest as 5.10 *hours* which his Counsel says was mistake for 5.10 pm. He did not explain how he came to use a private vehicle, for over eight hours – from 10.00 am till 6.30 pm. Who was the owner of that vehicle, and who drove it? Why did he make it available? Were official vehicles not available? Besides, the 1st respondent does not explain why it took him over seven hours to arrest the petitioner. Considering that the complainant had already delayed fifteen hours to make a complaint, it was essential that he should have acted promptly to question the

suspect and to try to recover the watch. Further, the petitioner had averred that the 1st respondent and a Police party had searched her house at 1.30 pm. The 1st respondent simply denied that, and said nothing whatever about a search – but his notes, purportedly written at 5.10 pm, do refer to a search before arrest.

In an attempt to explain the delay in arresting the petitioner, his Counsel referred to the 1st respondent's "In" entry which mentioned a telephone call, supposed to have been received at 11.30 am on the 4th to the effect that a suspect who was already under arrest on a charge of rape had pointed out the scene of the alleged offence, and that the 1st respondent had gone to the scene and made his observations. That was a matter which should have been averred in the affidavit, and it is unsafe to rely on the Police statements and notes, which are by no means the best evidence, as substantive evidence. However, in the certified copy of his notes produced by the 1st respondent, the portion relating to the period between 11.30 am and 5.10 pm has been omitted. The delay has not been satisfactorily explained. It is far more likely that entries were made to cover up an illegal arrest on the 3rd.

I hold that the 1st respondent's claim that he had arrested the petitioner on 04. 12. 2000 was false, and I hold that the petitioner has established beyond reasonable doubt that the 1st respondent arrested her at about 8.00 pm on the 3rd although there was then no complaint which could have given rise to a reasonable suspicion of theft. Further, the 1st respondent failed to make a correct entry in regard to her arrest, and subjected her to cruel, inhuman and degrading treatment. In direct consequence of his failure to make a correct entry, the petitioner was detained for a period in excess of that permitted by law. I grant the petitioner a declaration that her fundamental rights under Articles 11, 13 (1) and 13 (2) have been

infringed by the 1st respondent, and I award her compensation and costs in a sum of Rs. 100,000 payable on or before 30. 09. 2002, of which Rs. 70,000 shall be paid by the State and Rs. 30,000 by the 1st respondent personally.

I must now deal with a "preliminary objection" taken at the outset by learned counsel for the 1st respondent, that the petitioner's affidavit was defective and that the application should therefore be dismissed *in limine*. He referred to the following portions of her affidavit :

" . . . do sincerely, truthfully and solemnly swear *and affirm* . . .
1. I am *the affirmant* named above . . .

I have read and understood the above declaration and have signed it under oath on 31st day of December, 2000. (signed)

(*Affirmant*"

It was submitted that a person could not both swear and affirm; that it was contradictory for the petitioner to purport to take an oath and yet to describe herself as an "affirmant"; and that the jurat should have contained a statement *by the Commissioner for Oaths* that the petitioner had read, understood and sworn to the affidavit (and not a statement by the petitioner herself in the first person).

Even if the petitioner's affidavit was ignored, the material averments in the petition were amply supported by the affidavits of the petitioner's neighbour, father, mother and sister, the Magistrate's Court record and the JMO's report. The objection therefore fails.

Although a person who makes an affidavit is usually described as a "deponent", it would not be incorrect to describe him as a "declarant"

(see sections 181 and 438 of the Civil Procedure Code). The use of the word "declaration" in the jurat does not vitiate the affidavit. While it is inappropriate for a person to take an oath or swear, if for him an oath has no binding force, or if he has a conscientious objection to make an oath, the converse is not true. A person who does believe in the binding force of an oath may make, without doing violence to his beliefs, a solemn declaration or affirmation. Of course such an affirmation alone may not suffice to constitute a valid affidavit, but the addition of an affirmation will not vitiate an otherwise valid oath; and the description of the petitioner as an "affirmant" did not invalidate the oath which she took. As for the jurat, it is true that it is the person administering the oath or affirmation who must state in the jurat that the oath or affirmation was administered in his presence, and the place and date. The jurat is defective as it purports to be the petitioner's statement. However, the Commissioner's attestation confirms that the document was signed under oath in his presence. Had that affidavit been vital, I would have adjourned the hearing and given the petitioner an opportunity of correcting that formal defect, but that was unnecessary as the other affidavits were more than adequate.

GUNASEKERA, J. – I agree.

WIGNESWARAN, J. – I agree.

Relief granted.