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PROTECTION OF VICTIMS OF CRIME AND WITNESSES IN SRI LANKA

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Editor's Note ... ...

The Review, in this Double Issue, publishes Bill No 306 on 'Assistance and Protection to Victims of Crime and Witnesses' presented to Parliament by the Ministry of Justice and Law Reforms on 06th June, 2008 as well as the relevant Determination of the Supreme Court upon the said Bill being referred to the Court as 'urgent in the national interest' in terms of Article 122(1) of the Constitution. Both are being published due to inadequacy of public access to the same.

As is evident in the Determination consequent to the Court considering the matter on 2nd April 2008, certain amendments, inclusions, modifications and alterations were agreed upon in respect of the several clauses of the Bill. These do not appear yet to have been reflected in the most recent version of the Bill available to the public (which is published in this Issue). The public, civil society and activists monitoring the current progress of the Bill before the House are unaware as to the revised status of the clauses or indeed, if such revisions have, in fact, taken place. In any event, the lack of adequate public consultations before the finalization of the Bill remains extremely perturbing given past practice of Bills purportedly certified as 'urgent in the national interest' being foisted upon the people without consultation and discussion and thereafter proving to be grievously flawed in their substantive content.

The Bill itself has some redeeming features as for example, in regard to the protection being offered to 'intended' testimony as well as its wide definition of a victim of crime as a person who suffers physical, mental, emotional, economic or other loss as a result of an act or omission constituting not only an offence or a fundamental rights violation but also a violation of a human right guaranteed by the International Covenant on Civil and Political Rights (ICCPR). However, some other clauses are objectionable in certain respects, some of which may not be redressed even if the revisions put forward during the Supreme Court hearing are implemented. Conceptually, while it is clear that a different rationale underlines the protection of victims of crime as differentiated from witnesses, it does not appear that the several clauses of the Bill have been formulated with this differentiation in mind though there have been attempts to meet these concerns in a piecemeal fashion. In addition, the absence of gender neutral language is a striking feature of the Bill.

Importantly however, there are fundamental concerns evident in regard to the protections offered, apart from the lack of independence of the Protection Division itself. For example, a key clause in the Bill, namely clause 7(5) relates to the prohibition against any person who, having received and/or gathered information during the commencement or the conducting of an investigation, goes on to provide,

publish or disseminate *inter alia*, such information regarding the identity of the relevant victim of crime or a possible witness or informant. This, as any competent investigator or criminal lawyer would agree, is pivotal to a good witness protection programme. However, this prohibition is substantially undercut by two ways in this same clause itself. Firstly, the prohibition applies only if the release or dissemination of such information 'places the life of such victim of crime, witness or informant in danger.' As is immediately apparent, this is an unnecessary restriction on the prohibition which should be couched in absolute terms rather than hedged about by a phrase such as 'places the life....in danger' which is subject to varying interpretations. What about release of information that results in harm qualitatively different to that of placing a life in danger? Would one action be sanctioned but the other exempt from the reach of the prohibition?

Secondly, such an action would, even if the life of that person is put in danger, (going by the unconscionably limited reasoning of the drafters), be excused by clause 7 (5) if the action was in 'good faith' which is demonstrably an exception that has no place here notwithstanding its possible applicability elsewhere. Then again, such action would be excused if it was in accordance with or in compliance with, any provision or procedures established by law, an order made by a judicial officer or a directive issued by a person duly authorised to do so by or under any law. Thus, if the release of information indicating the identity of the so-called protected person was due to, for example, a directive issued by an 'authorised person' under any emergency regulation, the entire force and effect of the protection would be diminished. This is a problematic limitation applicable not only to the protections offered by clause 7(5) but by clause 7(8) as well.

Further, in clause 29, it is provided that the evidence of a witness or a victim of crime may be secured without his personal attendance but through an audio-visual linkage from any location either inside or outside Sri Lanka. However, this clause is stripped of all its positive flavour by its stipulation that 'a competent person' should be present at such location. Neither is such a patently amorphous 'competent person' nominated by the relevant court or a Commission but instead, designated on the 'recommendation of the Attorney General and the Foreign Affairs Secretary.' It is perplexing however as to why there should be ministerial intervention in relation to the designation of an observer of this nature with authority to oversee vital testimony being given from outside Sri Lanka without sole authority being conferred in this respect on a Court or Commission.

From a different and more fundamental perspective, mechanisms put into place for the protections of victims of crime and witnesses cannot be expected to work well in isolation when the general working of the criminal justice system remains dysfunctional at several basic points. Lack of political will in apprehending,

investigating and effectively prosecuting perpetrators of grave human rights violations has been persistently evidenced during past decades.

This apathy is heightened in instances where senior law enforcement or services personnel are implicated. In some cases, as in the killing of Gerald Mervyn Perera who was tortured by police officers due to mistaken identity and then killed days before he was due to give evidence at the trial against his alleged torturers indicted in terms of the Convention Against Torture and other Inhuman and Degrading Punishment Act No 22 of 1994, the Attorney General's failure to indict the Officer-in-Charge of the relevant police station was subjected to severe criticism by the High Court which handed down an acquittal in respect of the indicted junior police officers on the basis that the evidence was insufficient to sustain a conviction. Where senior police officers are left free to pursue their practices of intimidation and torture of witnesses, thereby coercing their subordinates to do likewise, the impact upon witnesses is profoundly negative.

There is little quarrel with the assertion that the extraordinarily brutal context in which human rights violations take place as well as the full adversarial weight of the criminal justice system have been primary reasons for victim and witness intimidation in this country. Comprehensive reforms of the criminal justice system, including the laws of evidence and criminal procedure as well as effective and steadfastly independent investigative and prosecutorial processes are needed to redress this balance. Otherwise, victim and witness protection measures may be relegated to a mere theoretical boast as indeed, many of Sri Lanka's programmes of reform such as in relation to bribery and corruption, have been reduced to, despite ambitious laws passed in a spirit of parliamentary consensus. It would be undoubtedly a great tragedy if the same is evidenced in regard to the current efforts to protect victims of crime and witnesses.

Reflecting these concerns, this Issue publishes a position paper by ***Dulani Kulasinghe*** outlining further pertinent objections to clauses in the Bill as well as some brief reflections by ***Samith de Silva*** on the current crisis affecting the criminal justice process in Sri Lanka.

In response to several requests from readers of the Review, we also publish the recent majority and minority judgments of the Supreme Court in *Suranjith R.K. Hewamanne, Attorney-at-Law, (on behalf of Anthony Michael Emmanuel Fernando) vs Gayan Chrishantha, Jail Guard and Others* (S.C. (FR) Application No. 128/2003, SCM 14.05.2008).

Kishali Pinto-Jayawardena

PARLIAMENT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

ASSISTANCE AND PROTECTION TO VICTIMS OF CRIME AND WITNESSES

A

BILL

to provide for the setting out of rights and entitlements of victims of crime and witnesses and the protection and promotion of such rights and entitlements; to give effect to appropriate international norms and best practices relating to the protection of victims of crime and witnesses; the establishment of the national authority for the protection of victims of crime and witnesses and the victims of crime and witnesses assistance and protection division of the Sri Lanka Police Department; establishment of the victims of crime and witnesses assistance and protection fund and for matters connected therewith or incidental thereto.

Presented by the Minister of Justice and Law Reforms on 06th June, 2008

Ordered by Parliament to be printed

[Bill No. 306]

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L.D.—O.46/2007.

AN ACT TO PROVIDE FOR THE SETTING OUT OF RIGHTS AND ENTITLEMENTS OF VICTIMS OF CRIME AND WITNESSES AND THE PROTECTION AND PROMOTION OF SUCH RIGHTS AND ENTITLEMENTS; TO GIVE EFFECT TO APPROPRIATE INTERNATIONAL NORMS AND BEST PRACTICES RELATING TO THE PROTECTION OF VICTIMS OF CRIME AND WITNESSES; THE ESTABLISHMENT OF THE NATIONAL AUTHORITY FOR THE PROTECTION OF VICTIMS OF CRIME AND WITNESSES AND THE VICTIMS OF CRIME AND WITNESSES ASSISTANCE AND PROTECTION DIVISION OF THE SRI LANKA POLICE DEPARTMENT; ESTABLISHMENT OF THE VICTIMS OF CRIME AND WITNESSES ASSISTANCE AND PROTECTION FUND AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

BE it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows:—

1. This Act may be cited as the Assistance and Protection to Victims of Crime and Witnesses Act, No. of 2008. Short title.

PART 1

OBJECTS OF THE ACT

Objects of the Act.

2. The objects of this Act shall be to—

(a) set out the rights and entitlements of victims of crime and witnesses and to provide for a mechanism to promote, protect, enforce and exercise such rights and entitlements;

(b) provide for the rendering of assistance and protection to victims of crime and witnesses;

(c) provide for the payment of compensation to victims of crime and to enable victims of crime to obtain compensation from persons convicted of having committed offences against them;

(d) provide for obtaining redress by victims of crime, including restitution, reparation and rehabilitation of such victims;

(e) set out duties and responsibilities of judicial officers and public officers towards the promotion and protection of the rights and entitlements of victims of crime and witnesses;

(f) stipulate offences that may be committed against victims of crime and witnesses and the penal sanctions that may be imposed on persons who commit such offences; and

(g) provide for the implementation of internationally accepted norms and best practices relating to the protection of victims of crime and witnesses.

PART II

RIGHTS AND ENTITLEMENTS OF VICTIMS OF CRIME AND WITNESSES

Rights and entitlements of victims of crime.

3. (1) A victim of crime shall have the right—

(a) to be treated with fairness and with respect for his dignity and privacy;

(b) in accordance with procedures established by law, to receive adequate, prompt, appropriate and fair redress, including reparation and restitution, for and in consideration of any harm, damage or loss suffered as a result of being a victim of a crime;

(c) to be appropriately protected from any possible harm, threat, intimidation, reprisals or retaliation;

(d) to be medically treated for any mental or physical injury, harm, impairment or disability suffered as a result of being a victim of a crime;

(e) to be informed of—

(i) the remedies available in law for the redress of any harm which he has suffered;

(ii) without prejudice to any on-going investigations, the progress of an investigation being conducted relating to the alleged offence;

(iii) the dates fixed for the hearing and the progress and disposal of judicial proceedings relating to the offence, including the non summary inquiry, trial, appeal and application in revision and his rights and entitlements pertaining to such proceedings;

(iv) the release on bail and the discharge of the suspect, institution of criminal proceedings against the accused, the conviction, sentence or acquittal of he accused and release from prison of the convict, who had committed or is alleged to have committed an offence and inflicted harm or suffering on a victim of crime and the reasons therefore; and

(v) the medical and social services and any other assistance that are available for the treatment and amelioration of any harm caused to a victim of crime;

(f) without prejudice to any on-going investigation, to be represented by legal counsel during an investigation, including criminal and forensic investigations and magisterial inquiries into the alleged offence committed in respect of such victim and make necessary representations to the appropriate competent authorities who are conducting such investigations;

(g) to present written communications or make representations through legal counsel to the Attorney General, before, during and after the investigation into the offence alleged to have been committed in respect of such victim and before and during the conduct of judicial proceedings, including at the non-summary inquiry, trial and appeal;

(h) to be present at all judicial or quasi-judicial proceedings relating to the offence, including at the non-summary inquiry, trial, appeal and any application in revision, unless the court, Commission or other tribunal determines, that his evidence would be materially affected if he hears other evidence at such proceedings or the due discharge of justice could be secured only by the exclusion of such victim from being present during the hearing of certain parts of such proceedings;

(i) to receive any assistance required to attend and participate at judicial or quasi-judicial proceedings pertaining to the offence committed against him;

(j) without prejudice to the prosecution, to be represented by legal counsel at the several stages of he criminal proceedings relating to the offence, including at

the non-summary inquiry, trial, appeal and application in revision, and where a request is made, to be provided with legal assistance for such purpose and facilities to make necessary representations to court;

(k) following the conviction of the offender and prior to the determination of he sentence, either personally or through legal counsel, to submit to court the manner in which the offence concerned had impacted on his body, state of mind, employment, profession or occupation, income, family life, quality of life and property;

(l) in the event of an appeal or application in revision being presented by a person convicted of having committed an offence, either personally or through legal counsel, to submit to court that adjudicate upon such appeal or application in revision, the manner in which the offence concerned had impacted on his body, state of mind, employment, profession or occupation, income, family life, quality of life and property; and

(m) in the event of any person in authority considering the grant of a pardon or remission of sentence imposed on any person convicted of having committed an offence, to submit to the person granting such pardon or remission the manner in which the offence concerned had impacted on his body, state of mind, employment, profession or occupation, income, family life, quality of life and property.

(2) A victim of crime shall be entitled to receive a sum of money from either the Authority or from a court or a Commission, as the case may be, in consideration of the actual financial loss suffered or expenses incurred as a result of his participation in any judicial or quasi-judicial proceedings of before such court or Commission, pertaining to the alleged commission of an offence or an alleged infringement of a fundamental right or a violation of human rights.

(3) Where necessary resources are available with the State a victim of crime shall be entitled to claim and obtain from the State any required medical treatment, including appropriate medical services, medicine and other medical facilities, in respect of physical or mental injury, harm, impairment or disability suffered as a result of being a victim of crime and for necessary rehabilitation and counseling services.

(4) Where due to absence or lack of necessary resources the State is unable to provide the services claimed by a victim of crime under subsection (3), such victim shall be entitled to apply to the Authority and obtain adequate financial assistance for purpose of obtaining the required medical treatment for any physical or mental harm, injury or impairment suffered as a result of being a victim of crime and for any necessary rehabilitation and counseling services.

Entitlements of witnesses.

4. (1) A witness shall be entitled to receive from investigational quasi-judicial and judicial authorities fair and respectful treatment, with due regard to his dignity and privacy.

(2) A witness shall not be harassed during or thereafter, due to or as consequence of—

(a) providing information relating to the commission of an offence or to the infringement of any fundamental right or the violation of any human right ;

(b) volunteering to make a statement during an investigation into any offence or an investigation or inquiry into the infringement of any fundamental right or the violation of any human right ; or

(c) providing testimony in a court or before a Commission relating to the alleged commission of an offence or an alleged infringement of a fundamental right or a violation of a human right.

(3) A witness shall not be entitled to protection against any real or possible harm, threat, intimidation, reprisal or retaliation resulting from such witness having provided information or lodged a complaint or made a statement to any law enforcement authority or for having provided any testimony in any court or before a Commission or for instituting legal proceedings, pertaining to the commission of an offence or for the infringement of a fundamental right for a violation of a human right, by any person.

Persons to be entitled to protection in certain circumstances.

5. A person who may or may not be a witness, shall be entitled to claim protection against—

(a) any harassment or suffering from loss or damage in mind, body or reputation ; or

(b) any adverse change in his condition of employment,

due to, as a result of or in consequence of such person having provided information, lodged a complaint or made a statement to any law enforcement authority or to any court or Commission or of having given testimony in any court or before a Commission, pertaining to commission of an offence or an infringement of any fundamental right or of the violation of a human right, as such persons place of employment or at the employment of such person, as the case may be.

Duty of public and judicial officers to respect etc rights and entitlements.

6. It shall be the duty of every public officer and every judicial officer, to recognize, respect, give effect to, protect, promote and advance the right and entitlements referred to in section 3, 4 and 5 of this Act.

PART III

OFFENCES AGAINST VICTIMS OF CRIME AND WITNESSES

Offences against victims of crime and witnesses.

7. (1) Any person who—

(a) threatens a victim of crime or a witness with injury to his person, reputation or property or to the person or reputation or property of any other in whom such victim of crime or witness has interest, with the intention of causing alarm to such victim of crime or witness or to cause such victim of crime or witness to refrain from lodging a complaint against such person with a law enforcement authority or testifying at any judicial or quasi-judicial proceedings or to compel

such victim of crime to withdraw a complaint lodged or legal action instituted against such person ; or

(b) voluntarily causes hurt to a victim of crime or a witness, with the intention of causing such victim of crime or witness to refrain from lodging a complaint against such person with a law enforcement authority or testifying at any judicial or quasi-judicial proceedings or to compel such victim of crime to withdraw a complaint lodged or legal action instituted against such person or in retaliation for a statement made or testimony provided by such victim of crime or witness in any court of law or before a Commission, against such person,

commits an offence and shall on conviction by a High Court, be sentenced to a term of imprisonment not less than three years and not exceeding ten years and to a fine of rupees fifteen thousand.

(2) Any person who—

(a) voluntarily causes grievous hurt to a victim of crime or a witness ; or

(b) wrongfully restrains a victim of crime or a witness,

with the intention of preventing such victim of crime or witness from lodging a complaint against such person with a law enforcement authority or from testifying in any judicial or quasi-judicial proceedings against such person, or compelling such victim of crime or witness to withdraw a complaint lodged or a legal action instituted against such person or in retaliation for a statement made or testimony provided by such victim of crime or witness in a court of law or before a Commission against such person, commits an offence, and shall on conviction by a High Court be sentenced to a term of imprisonment not less than five years and not exceeding twelve years and to a fine of rupees twenty five thousand.

(3) Any person who—

(a) by force compels or by any deceitful means, abuse of authority or by any other means of compulsion, induces, any victim of crime or a witness to leave any place ; or

(b) intends to cause or knowing that he is likely to cause wrongful loss, damage or destruction to the property of a victim of crime or a witness, cause such loss, damage or destruction to the property of that victim of crime or witness,

with the intention of preventing such victim of crime or witness from lodging a complaint or making any statement against such person with a law enforcement authority or testifying against such person in any judicial or quasi-judicial proceedings or in retaliation for a statement made to a law enforcement authority or the testimony made against such person in any judicial or quasi-judicial proceedings by such victim of crime or witness, commits an offence and shall on conviction by the High Court be sentenced to a term of imprisonment not less than five years and not exceeding twelve years and to a fine of rupees twenty five thousand.

(4) Any person who causes—

(a) any harassment, physical or mental suffering, loss or damage to the reputation of another person ; or

(b) an adverse change being made to the condition of employment in the place of employment of such other person,

due to or as a result or consequence of such other person having provided any information or lodged a complaint or made a statement to any law enforcement authority or to any court or Commission or having provided testimony in any court or before a Commission or instituted legal proceedings pertaining to the commission of an offence or the infringement of a fundamental right or the violation of human right of such person, commits an offence and shall on convictions by a High Court be sentenced to a term of imprisonment not less than two years and not exceeding seven years and to a fine of rupees ten thousand.

(5) Any person who—

(a) having received information given for the purpose of commencing or conducting an investigation into an offence;

(b) having gathered information in the course of an investigation into an offence ; or

(c) having received such information referred to in paragraph (a) and (b) from any other person,

provides, issues or gives to a third person or publisher or otherwise disseminates any such information or part thereof regarding the identity of the relevant victim of crime or a possible witness or informant who provided such information and thereby places the life of such victim of crime, witness or informant in danger, other than in good faith and in accordance with or in compliance with —

(a) any provisions or procedures established by law ;

(b) an order made by a judicial officer ; or

(c) a directive issued by a person duly authorized to do so by or under any law,

commits an offence and shall on conviction by the High Court be sentenced to a term of imprisonment not less than two years and not exceeding seven years and to a fine of rupees ten thousand.

(6) Any person who is alleged, suspected or accused of having committed an offence, offers, provides or gives any gratification to any other person who is —

(a) intending or preparing to institute legal proceeding against such person for having committed such offence ; or

(b) likely to provide information or testimony against such person to any law enforcement authority, Commission or court,

with the view to preventing, discouraging or dissuading such other person from instituting legal proceedings or providing truthful information or testimony against such first mentioned person who is alleged, suspected or accused of having committed the offence, commits an offence and shall on conviction by the High Court be sentenced to a term of imprisonment not less than two years and not exceeding seven years and to a fine of rupees ten thousand.

(7) Any person who with the intention of obtaining any protection or assistance from the Authority, the police including the Division, a court or a Commission, provides any information knowing or having reasonable ground to believe that such information is false, commits an offence and shall on conviction by the High Court be sentenced to a term of imprisonment not exceeding seven years and to a fine of rupees five thousand.

(8) Any person who is in charge of or participating or assisting in providing protection to a victim of crime or to a witness or who otherwise is in possession of information relating to the protection being afforded to a victim of crime or a witness, provides, issues or gives to another person such information and thereby places the life of such victim of crime or witness in danger, other than in good faith and in accordance with or in compliance with —

(i) any provisions or procedures established by law ;

(ii) an order made by a judicial officer ; or

(iii) a directive issued by a person duly authorized to do so by or under any law,

commits an offence and shall on conviction by the High Court be sentenced to a term of imprisonment not less than two years and not exceeding seven years and to a fine of rupees ten thousand.

Attempting or instigating the commission of an offence under section 7 to be an offence.

8. Any person who attempts to commit, instigates of intentionally aids any other person to commit or engages in any conspiracy for the commission of any offence referred to in section 7, shall be guilty of an offence and shall be upon conviction by the High Court be sentenced to the same punishment provided for that offence, by that section.

Offence under section 7 and 8 to cognizable and non-bailable.

9. (1) An offence under section 7 and section 8 shall be cognizable and non-bailable and no person suspected, accused or convicted of such an offence shall be enlarged on bail, unless under exceptional circumstances by the Court of Appeal. When enlarging a person on bail, the Court of Appeal shall have the power to impose a condition prohibiting communication with or coming into close proximity with the person in respect of whom the suspect is alleged to have committed the offence and with any other persons who may be specified in the order granting such bail.

(2) A Trial against a person accused of having committed any offence under section 7 or under section 8, shall be taken up before any other business of that court and shall be held on a day to day basis and not be postponed during the course of such trial, except due to unavoidable circumstance which shall be specifically recorded.

(3) If after an inquiry by a court, it is found that there exists *prima-facie* material to conclude that a person who at the relevant point of time was on bail in respect of any offence alleged to have been committed by him, has committed an offence under section 7 or section 8 the bail granted to such person by the court which conducted the inquiry shall be confiscated and such person shall be placed on remand till the end of the trial in respect of the offence which he had been enlarged on bail.

Suspension of institution of criminal proceedings

10. (1) Where, following the commission of an offence and the conduct of an investigation into the said commission and on a consideration of the relevant notes of investigation and after notifying through the police the person who has suffered any injury, harm, impairment or disability, whether mental, physical, emotional, economic or other loss as a result of the Commission of such offence, the Attorney-General shall upon a consideration of the—

(a) nature of the offence committed and its impact ;

(b) views expressed by the person who was notified, received through the police;

(c) subsequent conduct of the person alleged to have committed the offence;

(d) relationship prevailing between the victim of the crime or the witness and the person alleged to have committed the offence; and

(e) the interests of the State,

is of the view, that interests of the person who had suffered injury, harm, impairment or disability, whether mental, physical, emotional, economic or other loss as a result of the Commission of the offence and the interests of the State, would be best met and protected by not instituting criminal proceedings against the person alleged to have committed the said offence, then, notwithstanding the provisions of the Code of Criminal Procedure Act, the Attorney-General may suspend the institution of criminal proceedings against such person alleged to have committed the offence:

Provided however, the Attorney-General shall not be entitled to suspend the institution of any criminal proceedings under this subsection, against a person alleged to have committed an offence punishable with death or life imprisonment.

(2) Where the institution of any criminal proceeding is suspended under subsection (1), the Attorney-General shall be entitled in the interest of justice and upon a reconsideration of the interests of the victim of crime or the witness concerned, to institute such criminal proceeding on a subsequent date:

Provided however, where upon the suspension under subsection (1) of the institution of any criminal proceedings such proceedings are not instituted by the Attorney-General subsequently within ten years thereof, no criminal proceedings shall thereafter be

instituted against such person in respect of the offence alleged to have been committed by him and such person shall be deemed to have been discharged from such proceedings.

(3) During the period of suspension of the institution of criminal proceedings under subsection (1), the Attorney-General may recommend to the Magistrate who has territorial jurisdiction over the place where the alleged offence is said to have been committed, the imposition of certain conditions to be complied with by the alleged offender, in respect of the victim of crime or the witness, as the case may be, including a condition prohibiting the communication with or coming into close proximity with, any other persons, to be specified in the order that is made by the Magistrate on such recommendations.

(4) A Magistrate to whom any recommendations are made under subsection (3) shall, upon a consideration of such recommendations, make an appropriate order after affording opportunity both to the person in respect of whom such order is to be made and to the counsel representing the Attorney-General, to explain reasons why such order should or should not be made.

(5) Where under subsection (4) the Magistrate decides against the imposition of the conditions recommended by the Attorney-General under subsection (3), he shall record his reasons therefore and communicate his decision to the Attorney-General.

(6) Any conditions imposed by an order made by a Magistrate under subsection (4), shall be deemed to have the effect of conditions of bail.

(7) any person who after inquiry is found to have acted in violation of any conditions imposed by a Magistrate by an order made under subsection (4), shall be dealt with as if he has committed contempt of court and such person would be liable to be remanded. Any bail furnished may also be confiscated.

(8) The suspension of the institution of criminal proceedings in respect of any person under subsection (1), shall not have the effect of an acquittal.

PART IV

ESTABLISHMENT OF THE NATIONAL AUTHORITY FOR THE PROTECTION OF VICTIMS OF CRIME AND WITNESSES AND THE ADVISORY COMMISSION

National Authority for the Protection of Victims of Crime and Witnesses.

11. (1) There shall be established an authority which shall be called the National Authority for the Protection of Victims of Crime and Witnesses (in this Act referred to as "the Authority").

(2) The Authority shall by the name assigned to it by subsection (1), be a body corporate with perpetual succession and common seal, and may sue and be sued in such name.

Board of Management of the Authority.

12. (1) The formulation of a policy for the Authority and the supervision of the administration, management and control of the affairs of the Authority shall be vested in a Board of Management (hereinafter referred to as "the Board") which shall consist of—

(a) for appointed members elected from among persons who are academically or professionally qualified and have experience in professions or fields of professional activity associated or connected with the criminal justice system, appointed by the Minister in charge of the subject of Justice in consultation with the President, the Chief Justice and the Attorney-General; and

(b) the following *ex-officio* members—

(i) Secretary to the Ministry of the Minister in charge of the subject of Justice or an Additional Secretary to the said Ministry nominated by such Secretary;

(ii) Secretary to the Ministry of the Minister in charge of the Police Department or an Additional Secretary to the said Ministry nominated by such Secretary;

(iii) Secretary to the Ministry of the Minister in charge of the subject of Human Rights or an Additional Secretary to the said Ministry nominated by such Secretary;

(iv) a nominee of the Attorney-General; and

(v) a nominee of the Inspector General of Police holding the rank of a Senior Deputy Inspector General of Police.

(2) The Minister in charge of the Subject of Justice shall, in consultation with the President, Chief Justice and the Attorney-General, appoint the Chairman of the Board from among the members of the Board who shall also be the Chairman of the Authority.

(3) The provisions of the Schedule to this Act shall apply to and in relation to the appointment of the members of the Board, the meetings of the Board, remuneration payable to the members and the seal of the Board.

13. The duties and functions of the Authority shall be to— Functions of the Authority.

(a) promote the recognition of and respect for the rights and entitlements of victims of crime;

(b) promote the recognition of and respect for the entitlements of witnesses;

(c) cause the protection of the rights and entitlements of victims of crime and entitlements of witnesses;

(d) on receiving a complaint or any information regarding an alleged infringement of any right or entitlement of a victim of crime or a witness, to investigate and inquire into such alleged infringement and to take such necessary action, including the submission of recommendations to any relevant authority relating to the appropriate corrective action to be taken in that regard, in order to ensure

the recognition, protection and promotion of the rights and entitlements of victims of crime and witnesses provided under this Act;

(e) provide or cause for the provision of necessary assistance to victims of crime and witnesses, including appropriate measures for their treatment, reparation, restitution and rehabilitation;

(f) develop, adopt and implement a scheme for the grant of compensation to victims of crime;

(g) create awareness among the public regarding the rights and entitlements of victims of crime and witnesses;

(h) advice and make recommendation to the Sri Lanka Police Department and any other government department, statutory institution and to public officers, either generally or on a case by case basis, on appropriate and specific measures that should be taken, adopted or implemented to give effect to the rights and entitlements of victims of crime and witnesses provided for in this Act and in particular regarding the provision of—

(i) effective protection;

(ii) necessary treatment, rehabilitation and counseling; and

(iii) other appropriate assistance,

to victims of crime and witnesses;

(i) review existing policies, legislation and the practices and procedures being adopted and followed by various authorities, to ensure their conformity with internationally recognized standards and best practices relating to the promotion and protection of the rights and entitlements of victims of crime and witnesses and based on such review, to make recommendations regarding the adoption, amendment and application of appropriate policies, legislation and practices and procedures, as the case may be;

(j) take measures to sensitize public officers involved in the enforcement of the law, including but not limited to, officers of the Sri Lanka Police, the Prisons Department, government medical officers and public officers associated with probation and social services, on the needs of victims of crime and witnesses and on any special needs of particular categories of victims of crime, arising as a result of the harm inflicted or possible harm that may be inflicted on them due to their age, gender, religion, language, cultural beliefs and practices, ethnic or social origins or disabilities or any other reason;

(k) promote and recommend the observance and application of codes of conduct and internationally recognized norms and best practices relating to the protection of the rights of victims of crime and entitlements of witnesses, by courts of law, Commissions, any other tribunals, public officers and employees of statutory bodies involved in the enforcement of the law, including but not

limited to officers of the Sri Lanka Police, the Prisons Department, government medical officers and officers of government social service institutions;

(l) conduct or promote the conduct of research into ways and means in which—

(i) incidents of crime can be reduced;

(ii) impact of specific crimes on victims could be minimized or prevented;

(iii) victims of crime can be effectively treated, rehabilitated, counseled, assisted, compensated and protected;

(iv) a conducive environment could be created for witnesses to make statements or to testify fearlessly at proceedings before courts of law and before any commissions and other tribunals; and

(v) assistance and protection could be provided to victims of crime and witnesses;

(m) recommend to appropriate government institutions, social, health, educational, economic and crime prevention policies that may be adopted by such institutions for the reduction of incidents of crime and for facilitating assistance and protection being provided to victims of crime and witnesses;

(n) recommend the development, adoption and implementation of measures of restitution to victims of crime as a sentencing option in the criminal justice system;

(o) recommend the development, adoption and implementation of measures of restorative justice system; as a method of administering criminal justice and as a sentencing option in the criminal justice system;

(p) make recommendations generally for the efficacious prevention, detection, investigation and prosecution of offences;

(q) promote community participation in crime prevention;

(r) promote, assist and coordinate the participation of non governmental organizations in providing assistance to victims of crime and witnesses;

(s) develop, adopt and implement a scheme for providing assistance and protection to victims of crime and witnesses;

(t) represent the Government of Sri Lanka in international and regional activities aimed at the development, promotion, implementation and protection of rights and entitlements of victims of crime and witnesses and of the implementation of norms and best practices pertaining to the treatment of victims of crime and witnesses;

(u) issue guidelines pertaining to the establishment and maintenance of the Victims of Crime and Witnesses Assistance and Protection Division and for the appointment, transfer and the assignment of functions to police officers attached to such Division;

(v) present annually to Parliament, a report on the—

(i) manner in which the Authority has given effect to the objects of this Act;

(ii) performance and discharge of the duties and functions of the Authority; and

(iii) proposals for necessary policy and legislative reforms;

(w) do or perform any further functions and activities that may be necessary to achieve the objects of this Act.

Powers of the Authority.

14. The Authority shall have the power to—

(a) for the purpose of conducting an investigation into an alleged infringement of a right or entitlement of a right or entitlement of a victim of crime or witness—

(i) require any person other than a judicial officer or a Commissioner of a Commission to appear before the Authority and to participate in an investigation or inquiry;

(ii) require any person other than a court or a Commission, to produce before the Authority any document, a certified copy thereof or other material in his or its possession or custody, including the notes of investigations, information books extracts and officers visiting book extracts of the police, for examination and copying;

(iii) require any person other than a court or a Commission to provide to the Authority in writing, any information which it or he is likely to possess;

(iv) record the statement of any person other than that of a judicial officer or a Commissioner of any Commission; and

(v) make an application to any court or Commission and be entitled to obtain certified copies of any proceedings of any case, action or other proceedings of such court or Commission and documents and other material that may be filed of record in a case record or a file of such court or Commission;

(b) acquire, hold, take or give on lease or hire, mortgage, pledge, sell or otherwise dispose of any movable or immovable property;

(c) enter into such contracts as may be necessary for the performance and discharge of it's duties and functions;

(d) invest moneys lying to the credit of its Fund in an appropriate and secure manner and open and maintain current, savings or deposit accounts in banks;

(e) appoint, dismiss and exercise disciplinary control over officers, contractors, consultants and advisors as may be necessary for the proper performance and discharge of it's duties and functions;

(f) solicit, accept and receive donations, gifts, bequests and grants from sources within or outside Sri Lanka and to apply the same for the proper discharge of it's duties and functions;

(g) determine the remuneration payable, including the salaries, allowances and other conditions of employment applicable to Director General, officers, contractors, advisors and consultants appointed by the Authority; and

(h) exercise all such other and further powers as may be necessary for the proper performance and discharge of it's duties and functions under this Act.

Director General

15. (1) There shall be a Director General of the Authority who shall be a person professionally qualified and experienced in a professional activity associated with the criminal justice system or law enforcement.

(2) The Director General shall be appointed by the Board in consultation with the Advisory Commission:

Provided that the Board may appoint a public officer to function as the Director General, either full time or on a part time basis for such period to be specified by the Board, in consultation with the appointing authority of such public officer.

(3) the Director General shall be the chief executive officer of the authority and shall be responsible for carrying out all such duties necessary for the management and administration of the affairs of the Authority.

Fund of the Authority and its financial year.

16. (1) The Authority shall have its own Fund.

(2) There shall be credited to the Fund of the Authority—

(a) all such sums of money as may be voted from time to time by Parliament for the use of the Authority; and

(b) all such sums of money as may be received by the Authority by way of donation, gifts, bequests and grants from sources within or outside Sri Lanka.

(3) All sums of money required to defray expenditure incurred by the Authority in exercise and performance of its duties and functions under this Act, shall be paid out of Fund of the Authority.

(4) The Board shall cause proper accounts to be kept of the receipts and expenditure, assets and liabilities and all other transactions of the Authority.

(5) The financial year of the Authority shall be the calendar year.

Advisory Commission

17. (1) There shall be an Advisory Commission on Victims of Crime and Witnesses (in this Act referred to as "the Advisory Commission") to advise the Board and the Director General on—

(a) the policy and overall direction to be adopted by the Authority;

(b) the general performance and discharge of the duties and functions of the Authority; and

(c) the manner in which the duties and functions of the authority should be given effect to.

(2) The Advisory Commission shall consist of—

(a) the following *ex-officio* members :—

(i) the Chief Justice or his nominee who shall be the Chairman of the Advisory Commission;

(ii) the Attorney-General or his nominee;

(iii) the President of the Bar Association of Sri Lanka or his nominee;

(iv) Inspector General of Police or a nominee holding the rank of Senior Deputy Inspector General of Police; and

(v) the Chairman of the Legal Aid Commission;

(b) following appointed members:—

(i) five members appointed by the Minister of Justice in consultation with the Ministers in charge of the subjects of Health, Human Rights, Social Service and Probation, from among those who are academically or professionally qualified and experienced in medicine and more particularly in psychological medicine, promotion and protection of human rights and fundamental rights, social service and welfare, probation or rehabilitation of victims of crime; and

(ii) one person appointed by the Minister of Justice in consultation with the Minister in charge of the subject of Social Service, who has experience in voluntary social service in the area of assisting, promoting and protecting the rights and entitlements of victims of crime, who shall represent nongovernmental organizations working in the field of providing assistance and protection to victims of crime.

(3) The provisions of the Schedule to this Act, shall, *mutatis mutandis*, apply to and in respect of the members of the Advisory Commission.

(4) The Advisory Commission shall meet once in every three months or more frequently where necessary. The Director General shall be entitled to attend and participate at all the meetings of the Advisory Commission, unless specifically excluded for reasons to be recorded by the Commission.

(5) It shall be the duty of the Board and the Director General to act on any advice given by the Advisory Commission.

(6) The Advisory Commission shall not less than once in every six months meet with the Board and jointly consider the manner in which the duties and functions of the Authority may be efficaciously executed. The Director General shall be entitled to attend and participate at all such meetings.

PART V

VICTIMS OF CRIME AND WITNESSES ASSISTANCE AND PROTECTION DIVISION

Victims and Witnesses Assistance and Protection Division.

18. (1) The Sri Lanka Police Department shall, in consultation with and following such guidelines as shall be issued by the Authority for the purpose, establish and maintain a Division to be called the Victims of Crime and Witnesses Assistance and Protection Division (in this Act referred to as the "Division"), for the purpose of providing assistance and protection to victims of crime and witnesses and drawing and implementing a program to provide effective measures for the protection of victims of crime and witnesses from existing or potential threats, harm, reprisals, retaliation or intimidation.

(2) In appointing police officers to function in the Division, assigning functions to police officers in the Division and transferring any such police officer, the appointing authority shall take into consideration any guidelines that may be issued by the Authority for that purpose.

(3) The Senior Deputy Inspector General of Police appointed as a member of the Board shall be placed in charge of the Division.

(4) It shall be the duty of the Division to—

(a) provide effective and necessary protection to victims of crime and witnesses; and

(b) investigate by itself or with the assistance of any other police officers, into any complaints, allegation or information pertaining to threats, reprisals, intimidation, retaliation or any harm or harassment being committed on victims of crime and witnesses and their property and any offence committed under section 7 and section 8 of this Act.

19. (1) The Division shall draw up and implement on guidelines issued by the Authority for that purpose, a Victims of Crime and Witnesses Assistance and Protection Programme

with a view to taking effective measures to provide all necessary assistance and protection to victims of crime and witnesses, from potential or existing threats, harm, reprisals, retaliation and intimidation.

(2) The Division may undertake the admission of a victim of crime or witness into its Victims of Crime and Witnesses Assistance and Protection Programme, on—

(a) a request made by a victim of crime or a witness ;

(b) a recommendation made by the Authority ;

(c) a report submitted by any law enforcement agency or a public officer ; or

(d) a notification received from a court or a Commission.

(3) The provision of assistance and protection to a victim of crime or witness shall be effected by the Division after the conduct of a threat assessment and with the consent of the victim of crime or witness concerned.

(4) Prior to the implementation of the Victims of Crime and Witnesses Assistance and Protection Programme, the Division may require the victim of crime or witness concerned, to enter into a memorandum of understanding with the Division.

Nature, commence--ment, duration and termination of the grant of protection.

20. (1) Upon a consideration of the need for protection and the availability of necessary resources, the measures that the Authority, the Division or a Commission, as the case may be, shall provide to victims of crime and witnesses may include—

(a) security to the person and property ;

(b) temporary housing or accommodation ;

(c) permanent re-location, including housing ;

(d) temporary or permanent employment;

(e) necessary finances;

(f) re-identification; and

(g) any other measure which the Authority, the Division or a Commission, as the case may be, shall consider necessary.

(2) The Authority, the Division or a Commission, as the case may be, may provide protection to any victim of crime or any witness immediately upon the receipt of any information, communication or complaint from such person, whether during or after the conduct of a criminal investigation, before, during or after any investigation or inquiry by a Commission and before, during or after any judicial proceedings.

(3) When providing protection or assistance to any victim of crime or witness, the Division shall act in accordance with the advice and recommendations made by the Authority.

(4) Where a request is made by the Division to any Ministry, Government Department, statutory institution or any public officer for assistance in providing protection or assistance to any victim of crime or a witness, it shall be the duty of such Ministry, Government Department or statutory institution or such public officer, as the case may be, to provide the protection or assistance directly to the victim of crime or the witness concerned or to provide the assistance requested for to the Division, as the case may be.

(5) The Authority, the Division or a Commission shall cease to provide protection or assistance to any victim of crime or witness, where—

(a) the need for such protection or assistance no longer exists ; or

(b) such victim of a crime or a witness—

(i) request that such protection or assistance be terminated ;

(ii) refuses to receive such protection or assistance;

(iii) abuses the protection or assistance granted ;

(iv) commits any breach of the peace or commits an indictable offence ;

(v) act contrary to the terms of the memorandum of understanding entered into ; or

(vi) is found to have provided any false information, statement, complaint or testimony in order to obtain protection or assistance or having obtained assistance or protection in terms of this Act, provides false information, statement, complaint or testimony to any law enforcement agency, court or Commission.

PART VI

ENTITLEMENTS OF VICTIMS OF CRIME AND WITNESSES TO OBTAIN PROTECTION

Duty to provide protection to victims of crime and witnesses.

21. (1) A victim of a crime or a witness who has reasonable ground to believe that any harm may be inflicted on him due to his cooperation with or participation in any investigation or inquiry into an offence or into the infringement of a fundamental right or the violation of a human right being conducted or his intended attendance at or participation in any judicial or quasi-judicial proceedings, shall be entitled to seek protection from any real or possible harm arising out of a retaliation, reprisal or intimidation caused due to or in consequence of his cooperation with a law enforcement authority or the providing of any testimony before any court of law or any Commission or

an intended testimony to be given in a court of law or any Commission, as the case may be.

Protection to be prescribed by courts and Commission

(2) A request for protection under subsection (1) of this section may be made to the Authority, the Division, a court before which relevant judicial proceedings are scheduled to commence or when proceeding are pending or have been conducted, to a Commission or to the officer-in-charge of any police station.

(3) An officer-in-charge of a police station who is in receipt of a request made under subsection (2) of this section, shall take necessary steps to forthwith investigate or inquire into the request received and if circumstances so require, immediately provide any necessary protection and communicate the receipt of such request and information pertaining to action taken by him following the receipt of such request, including his findings pertaining to information received, to the Authority and to the Division.

Authority or a Commission to protect vulnerable victims and witnesses.

22. (1) With the view to protecting the interests of particularly vulnerable victims of crime or witnesses, under exceptional circumstances the Authority may, either acting on a notification received from a court of law or from a Commission or on its own motion, by itself or with the assistance of any designated public officer or any other person or organization, as the case may be, directly provide protection to such a victim of crime or a witness. In such a situation, the Division shall not without the prior approval of the Authority, provide any protection or assistance to such a victim of crime or a witness, as the case may be.

(2) With the view to protecting the interest of particularly vulnerable victims of crime or witnesses, a Commission may after prior notice to the Authority, acting on a request by a victim of a crime or a witness or on its own motion by itself or with the assistance of any designated public officer, directly provide protection to such a victim of crime or a witness, as the case may be, whose statement or testimony the Commission intends to record or has already recorded. In such a situation, the Division shall provide protection to such victim of crime or witness, only with the prior approval of the Commission concerned and after the issue to the Authority of a notice pertaining to the same. In a situation where a Commission decides by itself or with the assistance of a designated public officer to provide protection to a victim of crime or witness, the Commission shall not obtain for such purpose the advice, services or assistance, including resources, from any person other than a public officer:

Provided however the Commission may at any time transfer the responsibility of providing protection to such a victim of crime or a witness, as the case may be, to either the Authority or the Division, and where the responsibility is so transferred, it shall be the duty of the Authority or the Division, as the case may be, to undertake to provide the necessary protection to such victim of crime or witness, as the case may be.

(3) The Authority, the Division or a Commission shall not obtain the assistance of any foreign government or foreign or international organization, in providing assistance or protection to a victim of crime or a witness, without the prior sanction of the Attorney-General and the Secretary to the Ministry of the Minister in charge of the subject of Foreign Affairs.

23. (1) A court or a Commission which has reasonable grounds to believe that a victim of crime or a witness in any judicial or quasi-judicial proceedings before such court or before such Commission, requires assistance or protection from harm, threat, reprisal,

retaliation or intimidation or assistance to attend and participate in such judicial or quasi-judicial proceedings, such court or the Commission, as the case may be, shall, subject to the provisions of subsection (2), take all necessary steps to cause such assistance and protection to be provided to such victim of crime or witness, as the case may be.

(2) The protection and assistance that may be provided to any victims of crime or witnesses under subsection (1), shall not cause any prejudice to the rights and entitlements of the person suspected or accused of the offence concerned or the infringement of the fundamental right or the violation of the human right as the case may be, of the relevant victim of crime or witness.

(3) The protection and assistance that may be provided under subsection (1), shall include—

(a) the adoption of special measures to protect the rights of children and to ensure the best interests of child victims of crime and child witnesses ;

(b) the conduct of either the entirety or part of the judicial or quasi-judicial proceedings in camera ;

(c) the adoption of measures necessary to prevent the victim of crime or the witness concerned from being unnecessarily harassed, intimidated or influenced by seeing the accused present at the venue of the trial or inquiry ;

(d) the prevention of the identity of and the background information pertaining to the victim of crime or the witness from being disclosed ; and

(e) the adoption of appropriate measures to prevent disclosure of the identity and the entirety or part of the testimony of such victim of crime or witness, to persons other than the accused concerned and his pleader. The measures adopted shall include the power to direct media institutions, media personnel and other specified persons from publishing, broadcasting, telecasting or otherwise disseminating information pertaining to the identity of the victim of crime or the witness concerned.

(4) Notwithstanding the provisions of subsection (1), a court or a Commission may by a notification issued in that behalf, request the Authority or the Division, as the case may be, to provide to a victim of crime or a witness the protection referred to therein. On receipt of such a request, it shall be the duty of the Authority or the Division, as the case may be, to take all necessary measures to provide the protection requested for to the victim of crime or the witness concerned, where after conducting any necessary inquiries it is of the view that the need to provide such protection, is well founded.

Protection to be provided by law enforcement authorities and public officers.

24. A law enforcement authority or any public officer including a government medical officer, who has reasonable ground to believe that a victim of crime or a witness requires assistance or protection from any possible harm, threat, reprisal, retaliation or intimidation in attending and participating in any judicial or quasi-judicial proceedings, such law enforcement authority or the public officer, as the case may be, shall forthwith issue a communication to that effect to the Authority and to the Division.

25. Any victim of crime or a witness who has received any assistance or protection under this Act, shall not—

Duties of victims of crime and witnesses receiving protection and assistance.

(a) abuse such assistance or protection granted ;

(b) compromise such assistance or protection being received ;

(c) provide false information or testimony to any investigating agency, a court of law or a Commission ; or

(d) act contrary to the terms of the memorandum of understanding entered into with the Authority, the Division or the Commission, as the case may be, which provided the assistance or protection concerned.

PART VII

ENTITLEMENT TO COMPENSATION

Compensation

26. (1) Notwithstanding anything to the contrary in the Judicature Act and the Code of Criminal Procedure Act, every High Court and every Magistrates Court may upon conviction of a person by such Court, in addition to any penal sanction that may be imposed on such person in respect of the offence for which he is being convicted, order the convicted person to pay—

(a) (i) an amount not exceeding one million rupees as compensation ; or

(ii) a sum, of money not exceeding twenty *per centum* of the maximum fine payable for that offence ' or

(b) both such compensation and a sum not exceeding twenty *per centum* of the maximum fine payable referred to in paragraph (a).

(2) Prior to arriving at a determination on the quantum of compensation to be imposed under subparagraph (i) of paragraph (a) of subsection (1), the Presiding Judge of the High Court or the Magistrate, as the case may be, shall call for, examine and consider—

(a) all relevant information relating to the victim of crime, including the report of the Government Medical Officer who has examined the victim, that may enable the Court to determine the nature and the extent of the damage, loss or harm that the victim of crime may have suffered as a result of being subjected to the offence the person convicted of had been charged with ;

(b) representations or submissions made by the victim of crime or his legal representative, relating to the impact of the crime on such victim ; and

(c) information pertaining to any compensation that may have already been paid to such victim of crime by any court, by the Authority or otherwise received by him from any other source.

(3) The Presiding Judge of the High Court or the Magistrate, as the case may be, shall remit the sum of money paid as compensation by the convicted person to the victim of crime concerned, his dependents or to his next of kin, as the case may be.

(4) Where any sum of money as specified in subparagraph (ii) paragraph (a) of subsection (1) is paid, the Court which imposed such payment shall upon receipt of the same, remit the money to the Victims of Crime and Witnesses Assistance and Protection Fund, established by section 27 of this Act.

(5) In the event of a person convicted filing to make any payments imposed under subsection (1), the Presiding Judge of the High Court or the Magistrate, as the case may be, shall determine and pronounce a default term of imprisonment the convict shall be required to serve, in lieu of the non-payments of such sums of money:

Providing that, where the Presiding Judge of the High Court or the Magistrate, as the case may be, upon inquiry is satisfied that the person convicted does not have necessary financial resources to make the payment imposed under subsection (1), such Presiding Judge or the Magistrate, as the case may be shall enter a community based correction order and where such an order is enfered, the provision relating to community based correction orders contained in the Community Based Correction Act, No. 46 of 1999, shall *mutatis mutandis*, apply in regard to that order.

(6) The receipt of compensation by a victim under subsection (3) of this section shall not prejudice such victim from claiming damages in any civil proceedings, provided that when determining the quantum of damages to be awarded, such civil court shall take into consideration the compensation received by such victim, under subsection (3) of this section.

Victims of Crime and Witnesses Assistance and Protection Fund.

27. (1) There shall be a fund called the Victims of Crime and Witnesses Assistance and Protection Fund (hereinafter referred to as the "Protection Fund").

(2) The Protection Fund shall be administered and managed by the Board.

(3) There shall be paid into the Protection Fund—

(a) all such sums as may be voted by the Parliament for such Fund ;

(b) all such sums as may be received by the Authority to be remitted to the Protection Fund by way of any gift, donation, contribution, bequest and grant, from any local or foreign sources ; and

(c) all such moneys remitted by a Court under of subsection (4) of section 26 of this Act.

(4) There shall be paid out of the Protection Fund all such sums as may be determined by the Board for the payment of—

(a) compensation to victims of crime who as a result of being a victim of a crime have sustained bodily injury, impairment of physical or mental health or loss or damage to property ;

(b) compensation to dependant family members, dependent next of kin and any other persons dependent on a victim of crime who had died or been physically or mentally incapacitated as a result of being a victim of crime ;

(c) expenses incurred in by a victim of crime in receiving medical treatment, rehabilitation and consulting and counseling services, where the State could not provide necessary medical treatment and other necessary medical services ;

(d) expenses incurred in providing necessary assistance to victims of crime ;

(e) moneys necessary to provide protection to victims of crime and witnesses ; and

(f) a part of the sum of money that may be required by the Authority for the performance and discharge of its duties and functions under this Act.

(5) The Director General shall be the principal accounting officer of the Protection Fund and shall cause proper accounts to be kept of the income and expenditure and assets and liabilities, of such Fund.

(6) The financial year of the Protection Fund shall be the calendar year.

Entitlements to apply for compensation and assistance.

28. (1) A victim of crime shall be entitled to apply the Authority—

(a) for the payment of compensation in respect of any physical or mental injury or impairment caused and for any loss or damage to property, suffered as a result of being a victim of a crime; and

(b) for the payment of moneys required to obtain medical treatment or rehabilitation or counseling services, in relation to any physical or mental injury or impairment suffered by such victim as a result of being a victim of a crime.

(2) In determining the amount of compensation to be paid to a victim of crime who makes an application under subsection (1), the Authority shall take into consideration any sum of money already received by such victim of crime as under subsection (3) of section 26 or received by him on an order made by any court or otherwise received by him from any other source.

(3) Where any compensation or expense is paid to a victim of crime under subsection (1) prior to an award being made by a court for the payment of compensation to such victim of crime, the payment made by the Authority under subsection (1) shall be deemed to be an interim relief being granted to such victim of crime, pending the award of compensation by a court.

(4) In the grant of compensation and any expenses to a victim of crime under subsection (1) of this section, it shall be the duty of the authority to comply with the requirements of any regulation that may be made in that behalf.

PART VIII

GENERAL

Testimony through contempora--neous audio-visual linkage.

29. A court conducting a non summary inquiry or trial or a Commission conducting an inquiry may in the best interest of a victim of crime or witness or with the view to expeditiously securing the evidence of a victim of crime or witness, secure the testimony of such person without his personal attendance before such court or the Commission, as the case may be, through technical means by which contemporaneous or near contemporaneous audio-visual links between such court or Commission and any location, whether within or outside Sri Lanka from where such person testifies, could be established. The court or the Commission, as the case may be, shall however satisfy itself that such linkage is reliable and—

(a) where such location is situated within Sri Lanka, a judicial officer or a public officer designated by such court or the Commission; or

(b) where such location is situated outside Sri Lanka, a competent person designated by such court or the Commission of the recommendation of the Attorney- General and the Secretary to the Ministry of the Minister in charge of the subject of Foreign Affairs, .

is present at the location concerned, where such victim of crime or witness seeks to testify.

Secrecy.

30. (1) Unless it becomes necessary for the purpose of giving effect to the provisions of this Act, no person shall in any judicial or quasi-judicial proceedings, be compelled to divulge whether a victim of crime or a witness is receiving or has received assistance or protection under this Act.

(2) No person shall otherwise than for the purpose of giving effect to the provisions of this Act or in compliance with the provisions of any other law, divulge to any other person whether a victim of crime or witness is receiving or has received assistance or protection under this Act.

Assessment of credibility of a testimony.

31. In assessing the credibility of a testimony given by a victim of crime or witness in any court of law or a Commission, the fact that a victim of crime or a witness is receiving or has received any assistance or protection under this Act, shall not be a criteria.

Audit of Accounts

32. (1) The provisions of Article 154 of the Constitution relating to the audit of the accounts of public corporations shall apply to and in relation to the audit of the accounts of the Fund of the Authority and the Protection Fund.

(2) The provisions of Part II of the Finance Act, No. 38 of 1971 shall *mutatis mutandis* apply to the financial control and accounts of the Funds referred to in subsection (1).

Officials of the Authority deemed to be public officers.

33. Members of the Board, the Director-General and all other officers and employees of the Authority, members of the Advisory Commission, contractors, consultants and

advisors appointed by the Authority, shall be deemed to be public officers within the meaning and for the purposes of the Penal Code.

Regulations

34. (1) The Minister in charge of the subject of Justice may on the recommendation of the Authority, make regulations under this Act in respect of all such matters as are necessary to be provided for in order to give effect to the provisions of this Act.

(2) Every regulation made under subsection (1) shall be published in the Gazette and shall come into force on the date of such publication or on such later date as may be specified in such regulation.

(3) All regulations made under this section shall as soon as convenient after their publication in the *Gazette,* be brought before the Parliament for approval. Any such regulation which is not so approved shall be deemed to be rescinded as from the date of its disapproval, but without prejudice to anything done thereunder.

(4) Notification of the date on which a regulation is deemed to be rescinded shall be published in the *Gazette*.

Sinhala text to prevail in case of inconsistency.

35. In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.

Interpretation

36. In this Act, unless the context otherwise requires—

"child victim of crime" and "child witness" respectively means, a person who is less than eighteen years of age and who is either a victim of crime or who is a witness;

"Code of Criminal Procedure Act, means the Code of Criminal Procedure Act, No. 15 of 1979;

"Commission" means—

(a) a Commission of inquiry appointed under the Commissions of Inquiry Act, (Chapter 393);

(b) a Special Presidential Commission of Inquiry established under the Special Presidential Commissions of Inquiry Law, No. 7 of 1978;

(c) the Commission to Investigate Allegations of Bribery and Corruption established by the Commission to Investigate Allegations of Bribery or Corruption Act, 19 of 1994; and

(d) the Human Rights Commission of Sri Lanka established by the Human Rights Commission of Sri Lanka Act, No.21 of 1996;

"law enforcement authority" means any statutory authority, a public officer or any other person authorized by or under any written law to investigate into the commission of an offence;

"Judicature Act" means the Judicature Act, No. 2 of 1978;

"victim of crime" means a person who has suffered any injury, harm, impairment or disability whether physical or mental, emotional, economic or other loss, as a result of an act or omission which constitutes an offence under any law or an infringement of a fundamental right guaranteed by the Constitution or the violation of a human right referred to in the International Convention on Civil and Political Rights (ICCPR) Act, No. 56 of 2007 and includes a person who suffers harm as a result of intervening to assist such a person or to prevent the commission of an offence and the parent or guardian of a child victim of crime and any member of the family and next of kin of such person, dependents and any other person of significant importance to that person;

"witness" means any person who—

(a) has provided information or lodged a complaint with any law enforcement officer and based upon such information or complaint, an investigation or inquiry could or has commenced or is likely to commence, in connection with the alleged commission of an offence or the infringement of a fundamental right or the violation of a human right;

(b) in the course of an investigation or inquiry conducted by a law enforcement authority into the alleged commission of an offence or infringement of a fundamental right or the violation of a human right, has provided information or made a statement containing an account of matters in respect to which such person had been questioned;

(c) has provided an affidavit or submitted a statement in support of a complaint made or any legal action instituted by a victim of crime;

(d) has provided information or any communication to a Commission;

(e) has reasonable ground to believe that he shall be summoned by a court or a Commission to make a statement or testify in any judicial or quasi-judicial proceedings against a person, based on information provided or a statement made to a law enforcement authority or a Commission by such person;

(f) has received summons from a court or a Commission to make a statement, testify or produce any document, report or object in any judicial or quasi-judicial proceeding before such court or Commission; or

(g) being a public officer, has investigated into the alleged commission of an offence or an alleged infringement of a fundamental right or the violation of a human right,

and includes a victim of crime, the parent or guardian of a child witness, a family member or dependent of such witness or any other person of significant importance to such person, an expert witness and a person who has been summoned to testify before a court or a commission on behalf of a person suspected or accused of having committed an offence or an alleged infringement of a fundamental right or a violation of a human right.

Schedule [Sections 12(3) and 17(3)]

1. A person shall be disqualified from being appointed or continuing as an appointed member of the Board or of the Advisory Commission, as the case may be—

(a) if he is or becomes a member of Parliament, a Provincial Council or any local authority;

(b) if he is not or ceases to be a citizen of Sri Lanka;

(c) if he is under any law in force in Sri Lanka or in any other country, found or declared to be of unsound mind; or

(d) if he is serving or has served, a sentence of imprisonment imposed by any court in Sri Lanka or any other country.

2. Every appointed member of the Board or the Advisory Commission, as the case may be, shall, unless he vacates office earlier by death, resignation or removal, hold office for a term of three years from the date of his appointment and unless he has been removed from office, be eligible for reappointment:

Provided that a member appointed in place of a member who had vacated office by death, resignation or removal, shall hold office for the unexpired term of office of the member whom he succeeds.

3. The Minister may by Order published in the *Gazette*, remove from office an appointed member of the Board or the Advisory Commission, as the case may be, for misconduct in the performance of his duties or where such member has been found guilty of an offence involving fraud or dishonesty, in consultation with those persons who are required to be consulted for the appointment of such appointed member under paragraph (a) of subsection (1) of section 12 or paragraph (b) of subsection (2) of section 17, as the case may be. An appointed member who is removed shall cease to hold office from and after the date of publication of such Order in the *Gazette*.

4. An appointed member of the Board or the Advisory Commission, as the case may be, may at any time resign from his office by letter to that effect addressed to the Minister and such resignation shall take effect upon it being accepted by Minister in writing.

5. In the event of the vacation of office by death, resignation or removal of an appointed member of the Board or the Advisory Commission, having regard to the provisions of paragraph (a) of subsection (1) or section 12 or paragraph (b) of subsection (2) of section 17, as the case may be, another person may be appointed to succeed such member. Any person so appointed in place of such member, shall hold office during the unexpired part of the term of office of the member whom he succeeds.

6. Where an appointed member of the Board or the Advisory Commission, as the case may be, by reason of illness, infirmity or absence from Sri Lanka for a period not less than three months, is temporarily unable to perform his duties, it shall be the duty of such member to inform the appointing authority in writing, of such inability. Thereupon, having regard to the provisions of paragraph (a) of subsection (1) of section 12 or paragraph (b) of subsection (2) of section 17, as the case may be, another person may be appointed to act in his place during such period.

7. The members of the Board and the Advisory Commission, as the case may be, may be paid such remuneration out of the Fund of the Authority as the Minister may determine.

8. (1) The Chairman of the Board and the Chairman Advisory Commission, as the case may be, shall, if present, preside at every meeting of the Board or the Advisory Commission, as the case may be. In the absence of the Chairman from any such meeting, the members present shall elect one of the members present to preside at such meeting.

(2) The quorum for any meeting of the Board or the Advisory Commission, as the case may be shall be five members.

(3) The person presiding at any meeting of the Board or the Advisory Commission, as the case may be, shall, addition to his own vote have a casting vote.

(4) subject to the provisions of this paragraph, the Board or the Advisory Commission, as the case may be, may regulate the procedure in regard to its meetings and the transaction of business at such meetings.

9. No Act, decision or proceeding of the Board or the Advisory Commission, as the case may be, shall be deemed to be invalid by reason only of the existence of any vacancy therein or any defect in the appointment of any member thereof.

10. (1) The seal of the Authority may be determined and devised by the Board and may be altered in such manner as may be determined by the Board.

(2) The seal of the Authority shall be in the custody of such person as the Board may determine from time to time.

(3) The seal of the Authority shall not be affixed to any instrument or document except with the sanction of the Board and in the presence of two members of the Board, who shall sign the instrument or document in token of their presence.

(4) The Board shall maintain a register of the instruments and documents to which the seal of the Board has been affixed.

11. (1) If the Chairman of the Board is, by reason of illness or absence from Sri Lanka temporarily unable to perform the duties of his office, having regard to the provisions of subsection (2) of section 12, another member of the Board shall be appointed to act in his place.

(2) The Chairman of the Board may at any time resign from the office of 'Chairman by a letter addressed to the Minister. Such resignation shall take effect upon it being accepted by the Minister in writing.

ENDORSEMENT UNDER ARTICLE 122 OF THE CONSTITUTION

It is hereby certified that in the view of the Cabinet of Ministers the above Bill is urgent in the national interest.

Act. Secretary to the Cabinet of Ministers.

28th March, 2008.

RIGHTS AND ENTITLEMENTS OF VICTIMS OF CRIME AND WITNESSES

In the matter of a Reference under Article 122(1) (b)

S.C. Special Determination No. 1/2008

Present:

Ms S. Tilakawardene, J
S. Marsoof, PC, J; &
A Somawansa, J

Counsel:

Yasantha Kodagoda, *Deputy Solicitor General*, for the Attorney-General.
Upali A. Gunerathne, with Mahesha de Silva for the Intervenient Petitioner
Nuwan Peiris for the Legal Aid Commission

Court assembled for the Hearing:

At 10.00 am on 02nd April, 2008

SHIRANEE TILAKAWARDANE, J.

The Act is titled "Protection to Victims of Crime and Witnesses Act, No ....of 2007. The preamble sets out the objectives as;

AN ACT TO PROVIDE FOR THE SETTING OUT OF RIGHTS AND ENTITLEMENTS OF VICTIMS OF CRIME AND WITNESSES AND THE PROTECTION AND PROMOTION OF SUCH RIGHTS AND ENTITLEMENTS; TO GIVE EFFECT TO APPROPRIATE INTERNATIONAL NORMS AND BEST PRACTICES RELATING TO THE PROTECTION OF VICTIMS OF CRIME AND WITNESSES; THE ESTABLISHMENT OF THE NATIONAL AUTHORITY FOR THE PROTECTION OF VICTIMS OF CRIME AND WITNESSES AND THE VICTIMS OF CRIME AND WITNESSES PROTECTION DIVISION OF THE SRI LANKA POLICE DEPARTMENT; ESTABLISHMENT OF THE VICTIMS OF CRIME AND WITNESES ASSISTANCE AND PROTECTION FUND AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

By letter dated 29th of April 2008, sent by the President to the Chief Justice, information was given that the Cabinet of Ministers had decided that, in its view the Bill titled "Assistance and Protection to Victims of Crime and Witnesses Bill" is urgent in the national interest in terms of Article 122(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka. Accordingly, the special determination of the SC under Article 122(1)(b) was made as to whether the Bill or any provisions thereof was inconsistent with the Constitution.

This Bill is to be presented in Parliament and is to be published in the Government Gazette as required by law and thereafter be placed on the order paper of Parliament. Two petitions have been filed by the Centre for the Protection of Victims of Crime and the Legal Aid

Commission of Sri Lanka seeking to be heard in terms of Rule 63(3) of the Supreme Court Rules and learned Counsel representing these institutions and learned Deputy Solicitor General made submissions.

A justice system depends upon the evidence being collected and brought before the court. If fear prevails, or in some way victims of crime or witnesses are precluded from giving evidence or such evidence cannot otherwise be collected, such evidence cannot be considered, as the Judge is able to consider only what is brought before the Court and the unfortunate consequences are either that the case is not taken up or the charges against the accused are dismissed. In this manner, sometimes even in offences pertaining to Human Rights, those who perpetrate torture, are exonerated and thereby the problems of a democratic society are eroded and there is a concomitant increase in crime. The importance of this Act deals with the necessity to protect and provide assistance to victims and witnesses and is based on the foundational principal of accessibility and transparency.

It is to be noted that there is a division of responsibilities but such division needs to also include the expert witnesses in dealing with protection issues. Furthermore the responsibilities where multi-bodies are made accountable is that for the same to function with efficacy provision should be made for the cooperation of the different bodies. Whilst the clear division of responsibility is important for efficient functioning of bureaucracy the lines of responsibility must be patently transparent and understandable to victims and witnesses referred to in the Act.

Special mention must be mentioned of the fact that Section 14 refers to the recommendation of the Authority and does not suggest that the Authority does not make final decisions. This is compounded by the fact that Section 14(4) states that the protection division will admit victims and witnesses to the programme "after the conduct of a threat assessment which further strengthens the notion that a recommendation by the Authority is not final but reliant of the determination of the Protection Division. It is further unclear whether the risk assessment is the same as the inquiries made by the Police if the request is made at a Police Station. Additionally Section 14(4) refers to communications under Section 15, so it is not clear whether communication from courts, commissions and law enforcement officers are to be forwarded to the Authority or the Protection Division or a final decision on their own.

The process through which a decision to grant protection is made must be clarified to ensure that one body does not grant protection only to have it removed by another and to ensure that victims and witnesses have confidence in the process. And a streamlining of the process is also critical to minimize private and sensitive information of victims and witnesses being passed to a number of hands as such would optimize the opportunity for leaks. It is suggested by court that the determination to grant protection is made by an application to court and these could be considered by the Attorney-General. It is also important for there to be independence of the Protection Division. It is also suggested by the Court that the Protection Division should be a separate division that is independent of the functions of investigations and prosecution. Clarification is also not specific as to what factors would be considered in threat assessment or what would be considered as reasonable grounds in order to curtail the discretion of decision makers to be swayed by extraneous circumstances. The specific protections have also not been set out. It is also recommended that the Act should define which body is responsible for the formulation of the protection programme, responsible for the implementation of the programme and where the division of responsibilities lies. The Act lacks specificity as to on what criteria will protection be granted, and what protection mechanisms are available, how long protection will continue and whether appeals from such decisions would lie.

This Court analyzed the Bill in its entirety and dealt with several specific provisions in terms of the Reference set out above. This Determination is in relation to a Bill that was urgent in the national interest of the Democratic Socialist Republic of Sri Lanka and in terms of 122(1)(b) as to whether the Bill is inconsistent with the provisions of the Constitution.

In these circumstances, having considered the provisions of the Bill, the following amendments, inclusions, modifications and alterations thereto were agreed upon with the cooperation and consensus of all parties including the Attorney-General and the Legal Draftsman.

The definition of the term "victims of crime" is amended to read as:

"Victims of crime" inclusive but not limited to a person who has suffered any injury, harm, impairment or disability whether physical or mental, emotional, economic or other loss, as a result of an act or omission which constitutes an offence under any law or an infringement of a fundamental right guaranteed by the Constitution or the violation of a human right referred to in the International Convention on Civil and Political Rights (ICCPR) Act, No.56 of 2007, and includes a person who suffers harm as a result of intervening to assist such a person or to prevent the commission of an offence, and the parent or guardian of a child victim of crime and any member of the family and next of kin of such person, dependents and any other person of significant importance to that person; and

The Preamble:

The words *"THE ESTABLISHMENT ALSO OF THE ADVISORY COMMISSION WITH THE AWARD OF COMPENSATION TO SUCH VICTIMS OF CRIME AND WITNESSES"* are to be added after the words *"THE ESTABLISHMENT OF THE VICTIMS OF CRIME AND WITNESSES ASSISTANCE AND PROTECTION FUND."*

Section 2(a): The words *"set out"* are to be replaced by *"create, implement and uphold."*

Section 2(b): The words *"the rendering of"* are to be removed such that this subsection of the provision shall read: *"provide for assistance and protection to victims of crime and witnesses."*

Section 2(e): The words *"the State"* is to be added after *"duties and responsibilities of"* such that this subsection of the provision shall read: *"set out duties and responsibilities of the State judicial officers and public officers towards the promotion and protection..."*

Section 2(g) The word *"standards"* is to be added such that this subsection of the provision shall read: *"Provide for the implementation of internationally accepted norms, standards and best practices relating to the protection of victims of crime and witnesses."*

Section 3(1)(a) The word *"equality"* is to be added such that this subsection of the provision shall read: *"To be treated with equality, fairness and with respect..."*

Section 3(1)(c) The words, *"including, but not limited to,"* are to be added such that this subsection of the provision shall read: *"to be appropriately protected from any possible harm including, but not limited to, threat, intimidation, reprisals or retaliation."*

Section 3(1)(e): The words "*by the relevant authority*" are to be added after *"to be informed of"*

Section 3(1)(e)(i): The words "*including civil remedies for obtaining damages"* are to be added such that this subsection shall read: *"the remedies available in law for the redress of any harm which he has suffered including civil remedies for obtaining damages."*

Insertion of New Section 3(1) (F): This subsection is to be inserted after subsection (e), with the remaining subsections to be re-lettered appropriately. This section shall read: *"to present written communications including, but not limited to, the ability to present or have recorded his complaint pertaining to the commission of an offence, by any police officer in any police station or other unit or division of the Police Department.*

Section 3(1)(f): The words "*appropriate competent*" are to be replaced by "relevant investigative" such that this subsection of the provision shall read: *"... make necessary representations to the relevant investigative authorities who are conducting such investigations."*

Insertion of New Section 3(1)(h): This subsection is to be inserted after subsection (g), with the remaining subsections to be re-lettered appropriately. This section shall read in its entirety: "*Without prejudices to any on-going or concluded investigation to obtain certified copies of any reports that may have been prepared as a consequence of such investigations conducted with regard to the commission of an offence from such investigation."*

Insertion of New Section 3(1)(i): This subsection is to be inserted after subsection (h), with the remaining subsections to be re-lettered appropriately. This section shall read in its entirety: "*to present written communications or make representations through legal counsel to an investigator or an officer to whom he is subordinate with regard to an ongoing or concluded investigation."*

Section 3(1)(h): The words *"for reasons to be recorded"* are to be added after the words "Commission or other tribunal determines" Further the word "appeal" is to be made plural.

Section 3(1)(i): The words *"and information"* is to be added such that this subsection of the provision shall read: *"to receive any assistance and information required to attend and participate..."*

Section 3(1)(j): The word "*appeal"* should be made plural.

Section 3(1)(k): The words "*life including, but not limited to"* is to be inserted after "*the offence concerned had impacted on his"* and the words "*or any other aspect of his circumstances"* should be added after the word "*property"* such that this subsection of the provision shall read: *".. which the offence concerned had impacted on his life included, but not limited to his body, state of mind, employment... quality of life or any other aspect of his circumstances."*

Section 3(1)(l): The word "*adjudicate"* should be made plural. Further, the changes put forth above with respect to Section 3(1)(k) are also made in this subsection.

Section 3(1)(m): The words *"through the Authority"* are to be added after *"to submit."* Further, the changes put forth above with respect of Section 3(1)(k) are also to be made in this subsection.

Section 6: The words "police officer, member of any of the Armed Forces," are to be added after *"the duty of every"*

Section 10(1): The words *"after notifying through the police"* should be deleted, so that Section shall read: *"after notifying the person who has suffered any injury, harm"* and to add after the words *"as a result of the commission of such offence"* the words *"the Authority"* should be inserted.

Section 9(3): The word *"confiscated"* should be replaced by *"cancelled."*

Section 10(1): The words "and the Authority" should be inserted after the words "Commission of such offence." The words "through the police" should be removed. Further, toward the end of the provision the words '*Attorney General"* that follow *"Code of Criminal Procedure Act"* should be deleted and the sentence modified such that this part of the provision shall read: *"notwithstanding the Code of Criminal Procedure, the Court may suspend, after the hearing of the Authority, criminal proceedings against such person alleged to have committed the offence. This provision is also subject to an appeal on the decision by the aggrieved party to the High Court."*

Section 10(1)(b): The words *"received through the police"* should be removed.

Insertion of New Section 10(1)(e): This subsection is to be inserted after subsection (d), with the provision to be re-lettered and formatted as appropriate. This subsection shall read: *"the views of the Authority; and"*

Insertion of New Section 10(3): This subsection is to be inserted after subsection (2), with the remaining subsections to be re-numbered appropriately. This subsection shall read in its entirety *"Where any person who is aggrieved by the decision of the Attorney-General to suspend the institution of criminal proceedings under subsection (1) shall have the right to appeal against such decision to the Court of Appeal. The Court of Appeal shall have called upon the Attorney-General to express his views on the appeal, rescind or affirm the order of the Attorney-General on which such appeal is made."*

Section 14, Generally: It is important to advert to the fact that in terms of this Section, certain powers and functions are assigned to the Authority including rights to participate in the inquiry. However, there is no provision which provides for the adverse consequences which should follow a lack of cooperation with the Authority. Without this, the powers granted to the Authority are ineffective and inapplicable and it is important for the objectives and the purposes of the Act that a provision dealing with non-cooperation be added that (1) confirms the independence of the Authority, (2)confirms the existence of adequate funding, and (3) provides that non-compliance with the Authority will have penal repercussions.

Section 14(1)(f): The words *"subject to the provisions of subsection (3) of section 23"* are to be added at the beginning of this subsection.

Insertion of New Section 14(2): This subsection is to be inserted after subsection (1), with the remaining subsections to be re-numbered appropriately. This subsection shall read: *"Any person who fails to comply with any requirement imposed by the Authority under paragraph (a) of subsection (1) shall be guilty of an offence punishable with a term of imprisonment not exceeding two years and a fine not exceeding ten thousand rupees."*

Insertion of New Section 15(4): This subsection is to be inserted after subsection (3), with the remaining subsections to be re-numbered appropriately. This subsection shall read: "*The Board may delegate to the Director-General any of the duties and functions of the Authority.*"

Section 22(3): The following section is to be amended such that it shall read in its entirety: "*The Authority, the Division or a Commission shall not solicit, obtain any assistance from any foreign government or national, foreign or international organization, in providing assistance or protection to a victim of crime or a witness, without the prior sanction of the Attorney-General and the Secretary of the Ministry of the Minister in charge of the subject of Foreign Affairs, the grant of which shall be considered and decided upon by the Attorney-General and such Secretary, as expeditiously as possible.*"

Insertion of New Section 29: This section shall read in its entirety: *"Any person who without lawful authority interferes with the performance or discharge of any duty or function or the exercise of powers under this Act by any Court, Commission, Authority, the Board, the Advisory Commission, the Division or any public or judicial officer shall be guilty of an offence under this Act and shall on conviction by the High Court be liable to a term of imprisonment not exceeding seven years and to a fine not exceeding twenty thousand rupees."*

Insertion of New Section 35: The section shall read in its entirety as follows:

Where an offence under this Act is committed by a body of persons, then:

(a) If that body of persons is a body corporate, every director, manager, chief executive officer or secretary of that body corporate;

(b) If that body of persons is a firm, every partner of that firm and its chief executive officer;

(c) If that body of persons is an unincorporated body, every individual who is a member of such body; and

(d) If that body of persons is a local authority or any other authority appointed by or under any law relating to local authority to act on behalf of such local authority the Chairman of such local authority,

Shall be guilty of an offence:

Provided that Director, Manager, Chief Executive Officer or Secretary of any body Corporate, or the Partner or Chief Executive Officer of such firm or the Chairman of a local authority or a member of an unincorporated body shall not be deemed to be guilty of such offence if he proves that such offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of such offence.

Definition of "written communication": *"written communication"* is to be defined to include a letter transmitted in any medium whatsoever, such as by ordinary or registered post, by facsimile and electronic mail.

"Harassment": It has been agreed that wherever the word *"harassed"* or its derivatives appear in the Act, the words *"harassed, intimidated, coerced or violated in any manner whatsoever"* or the appropriate grammatical derivate must replace it.

In conclusion we wish to place on record our deep appreciation for the valuable assistance rendered by the Deputy Solicitor General, the Counsel representing the Legal Aid Commission of Sri Lanka, and the Legal Draftsman who made submissions on behalf of the Petitioner and Intervenient-Petitioner.

JUDGE OF THE SUPREME COURT

MARSOOF, J
I agree.

JUDGE OF THE SUPREME COURT

SOMAWANSA, J
I agree.

JUDGE OF THE SUPREME COURT

OBJECTIONS TO THE ASSISTANCE AND PROTECTION TO VICTIMS OF CRIME AND WITNESSES BILL

Dulani Kulasinghe[*]

Introduction

Sri Lanka's criminal justice system suffers from a dearth of successful prosecutions. One reason often cited for this is the failure of witnesses to come forward to give evidence, in particular when the State has been implicated in the crime. Also cited is witnesses' withdrawal from the legal process after commencement of trial due to threats and intimidation coupled with interminably delayed trial processes.

Failure to testify and withdrawal from trial processes are motivated specifically by well documented harassment and killings of victims and witnesses who have been brave enough to risk their lives to seek justice. Gerard Perera is only the best known of a long tragic list of such witnesses who have paid severe penalties for taking such risks, which in this particular instance, involved the loss of the very life of the witness. An effective and strong witness protection scheme has thus been a long standing need in Sri Lanka.

The need for such a scheme has been acknowledged by a former Attorney General himself, namely Mr KC Kamalasabayson who made the following observation in an address of 2 December 2003:

> *Another important feature that requires consideration is the need for an efficient witness protection scheme that would ensure that witnesses are not intimidated and threatened. No doubt this would involve heavy expenses for the State and amendments to the law. I will only pose a simple question. Is it more important in a civilized society to build roads to match with international standards spending literally millions of dollars rather than to have a peaceful and law abiding society where the rule of law prevails?*[1]

The imperative need for a good witness protection mechanism has been repeatedly made by international human rights monitors, as in 2003 when the United Nations Human Rights Committee, examining Sri Lanka's combined fourth and fifth periodic report, stated:

> *The authorities should diligently enquire into all cases of suspected intimidation of witnesses and establish a witness protection program in order to put an end to the climate of fear that plagues the investigation and prosecution of such cases* [2]

Though the need for a witness protection scheme has been evident for many decades, no concrete steps had been taken to fill this lacuna in our law. The draft Bill affording Assistance and Protection to Victims of Crime and Witnesses manifest an attempt to fill the gap.

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[*] Researcher, Human Rights in Conflict Programme, Law & Society Trust.

[1] See remarks made during the 13th Kanchana Abhayapala Memorial Lecture as reported in *The Right to Speak Loudly*, Asian Legal Resource Centre, 2004.

[2] Concluding Observations/Comments-CPR/CO/79/LKA, 01/12/2003.

Key Concerns Regarding the Bill

Though the Bill is welcomed in principle, there are serious concerns regarding some of its provisions, which appear to fatally undermine its stated purpose of protecting victims of crime and witnesses, especially in regard to crimes implicating State actors.

Key concerns:

- "Good faith" and "following orders" get-out clauses (clauses 7(5), 7(8), 10(1))
- Control of Board of newly created National Authority for Protection of Victims of Crime and Witnesses by Government, judiciary and police (clause 12(1))
- Location of Protection Division within Police Department (clause 18(1)
- Requirement that the Authority and Commission may not accept foreign governments' assistance which appears to cast retrospective aspersions upon actions of the Presidential Commission of Inquiry to investigate and inquire into serious violations of human rights (clause 22(3))
- Requirement that a public officer be present in locations where witness is testifying whether in Sri Lanka or outside undermines the fundamental need to protect whereabouts of threatened and vulnerable persons, especially in crimes implicating State actors
- Process by which the Bill has been rushed through Parliament with no opportunity for public consultation

"Good faith" and "following orders" get-out clauses (clauses 7(5), 7(8), 10(1))

Clauses 7(5) and 7(8) sanction the leaking of information regarding a protected person, with the exception of someone who was acting in "good faith" or "in accordance with or in compliance with" orders. Thus, in the event of a violation by a person with direct responsibility for protecting a witness or victim, such a person may plead that he was only "following orders" and therefore be excused for his crime. In the absence of legislation enabling command responsibility, the twice-over victim is robbed of recourse, though his life is endangered by this act of "good faith". It is also not clear how this "good faith" is to be proved, or to what standard.

Of further concern is the fact that even where an alleged perpetrator may be prosecuted, the Attorney General is given discretion as to suspending the institution of criminal proceedings (clause 10(1)), having regarding to both the interests of the person who has suffered injury *and* the interests of the State. It seems illogical that the interests of the State should weigh at all in this equation, particularly where a State actor may be implicated. If such interests must be taken into account, counterweight must be provided by someone other than the State's own counsel.

Control of Board of newly created National Authority for Protection of Victims of Crime and Witnesses by Government, judiciary and police (clause 12(1))

The nine-person Board created by the Bill does include four persons who are not explicitly members of any branch of government, however they are outnumbered by *ex officio* members – either the Secretary or Additional Secretary – from the Ministries of Justice and Human Rights, as well as the Ministry in charge of the Police Department (currently the Ministry of Defence), and nominees of the AG and IGP. The Board will set policy and provide guidelines for the actions of the Authority, as well as appoint a Director General.

Given the provisions already outlined and the established history of problems in cases where the State is implicated in a crime, the composition of the Board is of concern.

Location of Protection Division within Police Department (clause 18(1))

There is no explicit provision that police officers assigned to the Protection Division of the Authority will have no other duties, nor be involved in inquiry / investigation or other police activities, and have no communication with other police officers acting in those capacities. The risks of lack of clear separation of duties and the absence of a dedicated and non-transferable category of police officers in this regard are self evident.

This is also a matter of concern under the Emergency Regulations now in force, as the Police Department is currently under the authority of the Ministry of Defence.

Requirement that the Authority and Commission may not accept foreign governments' assistance appears to attempt to make illegal past actions of the current Presidential Commission of Inquiry to investigate and inquire into serious violations of human rights (clause 22(3)).

It appears that this provision was drafted with specific reference to the current Commission of Inquiry in an attempt to render its ground-breaking use of video conferencing in April 2008 illegal in retrospect and prevent further such use of video.

The second round of video-conferencing which, like the first round, was funded and facilitated by foreign governments with the full knowledge and therefore presumed consent of the AG and Foreign Ministry, was to have begun on 2 June 2008 and continued for two weeks. However this second round was stopped due to the refusal of the Presidential Secretariat to release funds for the use of video facilities at SLIDA. The reason given for the refusal of funds was reportedly the dubious status of the law relating to evidence received via video. The letter is then said to state that the Commission should await passage of the Bill and act in accordance with it thereafter, to ensure the legality of its proceedings.

The timing of this letter, read together with the provision in question, provides a valid basis for suspicion that the provision was drafted with the primary intention of preventing further video conferencing by this Commission.

Requirement that a public officer be present in location where witness is testifying whether in Sri Lanka or outside undermines the fundamental need to protect whereabouts of threatened and vulnerable persons, especially in crimes implicating State actors (clauses 29(a) and (b))

While it is accepted that it must be possible to safeguard and ensure the credibility of witnesses who are not giving evidence in Court, the presence of a public officer where a

witness within Sri Lanka (clause 29(a)) seeks to give evidence gravely undermines the safety of that witness where a State actor may have been involved in the offence in question.

Clause 29(b), relating to witnesses who have been forced to give evidence from outside Sri Lanka, is even more problematic, as it requires the presence of a "competent person" recommended by both the AG and the Foreign Ministry in the location where a witness is testifying. However, consider the case of the families of the students killed in Trincomalee: where the witness has fled Sri Lanka due to a well founded fear of persecution by State actors and there is no sufficiency of protection in-country for that person due to the inability or unwillingness of the Government to ensure it – as in the case of these families who sought and were granted refugee status in the respective countries where they now live – there can be no argument made in favour of the presence of an official of that very Government from which they have fled.

Process by which the Bill has been rushed through Parliament with no opportunity for public consultation

It might be easier to believe in the good faith of the Government in drafting this Bill if the process by which it had been tabled was more transparent. The declaration of this Bill as an urgent Bill eliminated any possibility of a fundamental rights challenge once it was tabled on 6 June – which it most definitely would have attracted. The wall of silence around the Committee stage of the Bill has also prevented any input from the public, or more importantly, affected persons, into this landmark legislation. Finally, the fact that it has been brought for second reading, with no announcement and therefore no final opportunity for public consideration, suggests that any suspicions one may have had about the drafting of the Bill – in particular that it was drafted with an eye to ensuring that State actors are protected, even at the expense of victims of crime and witnesses – are not merely justified, but correct.

The need for thorough public consultations in advance of draft legislation of this nature that have a direct bearing on the rights of Sri Lankan citizens is clearly evidenced.

SOME THOUGHTS ON THE CURRENT CRISIS AFFECTING SRI LANKA'S CRIMINAL JUSTICE PROCESS

Samith de Silva[*]

Introduction

These short reflections will contain some critical observations on Sri Lanka's criminal justice system. It is however essential to understand the several roles played by different actors involved in the legal process in order to formulate a clear picture of the crisis affecting the criminal justice system and the prosecutorial function in particular. These roles will be examined in the initial part of this paper followed by practical analysis of the investigative cum legal process based on cumulative observations made by this writer during his tenure as a High Court judge in Sri Lanka.

The prosecutorial process

The prosecutorial process generally begins with a statement to the investigating authority—in other words, to the police—by the victim of some wrong (hereinafter the complainant). On investigation by the police, other actors such as witnesses, judicial medical officers, government analyst, finger print experts, examiner of questioned documents and other professionals get involved with the process as and when necessary.

In cases of homicide, an inquest—that is, an inquiry into the apparent cause of death—is conducted by an inquirer into sudden deaths. From the point that suspects are produced before a court of law, judges and other court staff will necessarily become involved in the process. Minor crimes are tried before the Magistrates Court while graver crimes are tried before the High Court (in some grave crimes a preliminary recording of depositions are made before the Magistrate). Criminal actions (except bribery) are instituted before the High Courts by the Attorney General; i.e., indictments forwarded to the Attorney General and prosecuted by State Counsel (and state law officers higher in rank) who are officers under the supervision of the Attorney General.

Other criminal actions are instituted in the Magistrates Courts by law enforcement agencies such as the police and statutory or government authorities under the powers vested by enabling statutes. In all these instances, the Attorney General's assistance and advice may be sought and the Attorney General may intervene to remedy any injustice. Besides the aforementioned officials, other actors involved in the prosecutorial process are defense lawyers and prison authorities.

Deterioration of the system

While the above is a mere detailing of various actors who take part in the criminal justice system at some stage or another, a commonplace observation is that the system is not working to its full potential, or as may be critiqued, not even to half of that potential.

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[*] Former Senior Prosecutor, High Court judge, Sri Lanka and Judge of the United Nations Special Court for Serious Crimes in East Timor.

The prosecutorial part of this process has been, without doubt, the most deeply affected. This deterioration of the prosecutorial process in Sri Lanka did not occur over a short period of time. Instead, its decline has been gradual, creeping upon a society that was almost unaware of the impending crisis. The decline became evident over three or four decades and was exacerbated during the last seven to eight years. Notably, we see the deterioration of the integrity, honesty, impartiality and the knowledge of judges and the deterioration of the legal system as a whole.

The contributory factors to this deterioration may be assessed to a great extent by observing day-to-day proceedings in courts. Some time ago, the Chief Justice publicly said, that the rate of convictions has sharply fallen to a mere 4 percent from about 40-45 percent, within only a couple of years. This same conclusion was reached by a government committee that recently sat to recommend amendments to the practice and procedure in Investigations and Courts.[1] The question therefore becomes relevant—to what exactly is owed this decline in the rate of convictions? Are we to assume that Sri Lanka's defence lawyers have been endowed with a vast amount of acumen in recent years so as to be astoundingly successful in defending their clients? Or are we to assume that the extremely low rate of convictions is due to the steep decline of standards in the prosecutorial and/or criminal justice process?

It is apparent to any reasonable critic that the decline in convictions is due to a drastic deterioration in the skill and the overall standards of the actors in the prosecutorial process, such as investigators, prosecutors and others, and the inability on the part of judges to perform their judicial as well as administrative functions in day-to-day court administration.

Some of these questions will be dealt with below.

Complainants

Often an investigation commences with a statement made to the investigating authority by some person (the complainant). The law requires that the statement made by the person who makes the statement should be reduced in writing. However, in many cases, this does not happen. Police officers record statements in their own words and the narrative is adjusted to suit what they think best. Classic examples of this practice are statements made by rape victims. Often similar patterns are seen in statements of rape victims wherever they are recorded. Sri Lankan judges are inclined to acquit suspects in rape cases with much lesser hesitation than in other cases.

Insofar as the police functions are concerned, lack of commitment, impartiality, proper training and experience, over-estimation of authority, carelessness, lethargy and stress due to overwork, are some of the factors that adversely impact on the proper discharge of their duties. Nonetheless, corruption is not excluded.

Meanwhile the complainant's rights are largely excluded in the pre-trial process. Indeed, the complainant is not even entitled to a copy of his or her own statement as a matter of right. However, our law, as judicially interpreted, has attempted to secure some of these rights to the accused, at least at the stage of a trial.

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[1] *'The Eradication of Laws Delays'*, Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, Final Report, 2 April 2004, at point 13.1.

In *Danwatte Liyanage Wijepala v The Attorney General*[2], the Supreme Court articulated the principle that Article 13(3) of Sri Lanka's Constitution not only entitles an accused to a right to legal representation at a trial before a competent court. In addition, it entitles the accused to a fair trial. This would mean anything and everything necessary for a fair trial, including copies of statements made to the police by material witnesses. South African law was applied in this respect, in regard to the right to information read with the right to a fair trial.

It was judicially observed that though South Africa had an independent right to information and Sri Lanka lacked such a right, this does not make a difference as the right to a fair trial is recognised by Article 13(3) of the Sri Lanka's Constitution and this right includes the ancillary right to all information necessary for a fair trial.

The facts of this particular case are somewhat relevant to the nature of the judicial reasoning thereof. Here, a man named Wijepala and his brother Carolis were charged with the murder of the deceased in regard to which the sole eye witness was the deceased's father, Senaratne. Senaratne claimed to have been walking alongside his son on the night in question and testified that an exchange of words took place between his son and Wijepala together with Carolis and five others. After this verbal exchange, the father and son continued to walk on but Senaratne had then seen Wijepala running towards his son and stabbing him. With Carolis shouting that the father should not escape as well, Senaratne had taken to his heels and hidden in the thicket nearby. After some time had passed, he returned to where his son lay on the road and taken him to hospital where he passed away.

Senaratne's evidence was acted upon by the trial judge who convicted Wijepala of the offence of culpable homicide not amounting to murder, sentencing him to ten years rigorous imprisonment. Carolis was acquitted. The conviction was upheld by the Court of Appeal. However, the decision of the Court of Appeal was reversed by the Supreme Court which found that Senaratne's evidence was not credible due to significant discrepancies. The Court reiterated the *cursus curiae* that the evidence of a single witness, if cogent and impressive, could be judicially acted upon. However, whenever there are circumstances of suspicion, then corroboration is needed. Yet, Senaratne's version of the facts was not supported by other evidence, direct or circumstantial.

It was observed that an error had been committed by the Court of Appeal in declining to interfere with the finding of the trial judge on the basis that the appellate court is not entitled to engage in a re-appraisal and re-trial on questions of fact which come up before a judge in his capacity as "the trier of facts." The Supreme Court observed that though this may be the case when an appellate court is considering a charge to a jury, different considerations would apply to trial before a judge sitting alone. In the latter instance, the decision of the trial judge on questions of fact based on the demeanor and credibility of witnesses must necessarily carry great weight. However, an appellate court must subject the evidence in the case to close scrutiny. If a doubt is cast on the guilt of an accused, the benefit of that doubt should be given to him. On the facts of the present case, doubts were in fact cast upon the veracity of the evidence and Wijepala's conviction was consequently reversed.

Agreeing with this view expressed by Justice Ameer Ismail, Justice Mark Fernando elaborated on further reasons as to the said reversal. The first information given by Senaratne as to the stabbing of his son was fundamental to Senaratne's evidence that he saw the stabbing and could identify the assailant. Senaratne stated that at 9.30PM. he had made a statement to the police post at the hospital. Yet, this 9.30PM.-statement was not annexed with the

[2] SC Appeal No. 104/99, SCM 12.12.2000, Judgment of Ismail J. and Fernando J. (with Wadugodapitiya J. agreeing).

documents listed in the indictment nor included in the documents supplied to the defence in terms of the law. Consequently, it was judicially opined that failure to supply this document occasioned the violation of the accused's right to a fair trial secured to him in terms of Article 13(3) of the Constitution.

As has been observed, this decision was a good illustration by which "the concept of 'equality of arms' in a criminal trial was brought in, in a novel way, under the protection of the Constitution."[3] The decision is also important in terms of the professional duties that it lays on prosecuting counsel where a constitutional right to a fair trial is concerned. Citing South African law, the Supreme Court emphasized the principle that there is a general duty on the state to disclose to the defence all information which it intends to use and even which it does not intend to use but could assist the accused in his defence. This is however, subject to the limitation excluding privileged information and when information is delayed due to the investigation not being complete.[4]

In relation to the facts of the case, it was concluded that the failure to disclose to Wijepala, the existence and contents of the first information in the present case, possibly casting serious doubts on the credibility of Senaratne's evidence, may well have caused a miscarriage of justice, this leading the Court to reverse the conviction.

While this judgment has to be applauded for its clear-sightedness in securing the constitutional rights to a fair trial of an accused, it must be stated that its principles are not commonly observed by investigative or prosecutorial authorities in Sri Lanka today. This discussion brings us to another important facet of the problem; namely, the superior probability of guilt and its application by the Sri Lankan police.

The presumption of innocence

The presumption of innocence is an integral part of the criminal law in all Common Law countries. The basic principle is that a person accused of a criminal offence is innocent until he is proved guilty beyond reasonable doubt. The sanctity of the presumption is exemplified by Lord Sanky's dictum in *Woolmington vs Director of Public Prosecutions,* where he stated that:

> *Through the web of English Criminal Law, one golden thread is always to be seen that it is the duty of the prosecution to prove the accused persons guilty. No matter what the charge is, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.*[5]

While the sacred nature of the presumption is often spoken of in Common Law countries, it is a matter for concern that in many of these countries, not much attention is paid to the importance of upholding the presumption at the initial stages of its application. Scant regard is also paid to guaranteeing basic human rights associated with the presumption.

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[3] Pinto-Jayawardena, Kishali, *'Ensuring Due Process in Sri Lanka in the Context of Life and Liberty Rights; Domestic and International Efforts'* in LST Review, Volume 15, Joint Issue 203 & 204 September & October 2004.

[4] *ibid*

[5] A.C. 462, [1935] AER Rep. 1, p. 405

What must be realized is that the presumption of innocence is not invoked only when a criminal trial commences before a court of law, and its implications are not limited to the confines of trial proceedings in a courtroom. As Wills puts it:

> *When incriminatory evidence is investigated and estimated, this antecedent prima facie presumption operates in favor of the party accused. This presumption must prevail until it is destroyed by such a countervailing amount of legal evidence of guilt accumulated to produce the opposite belief.*[6]

Therefore, the application of the presumption is not limited to the confines of the courtroom. Its application begins from the moment that a person is investigated.

Sri Lanka is among the countries where the presumption of innocence has received constitutional recognition in Article 13(5), in addition to it being recognized as a legal principle in criminal law. However, this constitutional provision is violated by the foremost law enforcement authority of the government: the police. Activists have documented several instances where the police have mercilessly assaulted and tortured persons from the time of arrest, even before considering whether some evidence may exist against them.

It must be recalled that not every criminal case ends with conviction. From country to country the conviction rate varies, depending on the legal system and the ability of its crime investigation authorities. As Wills puts it (with reference to England):

> *Generally the number of convictions exceeds the acquittals, and more persons who are accused of crime are guilty than innocent. But according to statistics a considerable number of persons who are put on trial are legally innocent. In any particular case, therefore, a party may not be guilty, and it is impossible without a violation of every principle of justice, to act upon the contrary presumption of a superior probability of guilt. It is for this reason the law provides as a settled and inviolable principle, that until the contrary is proved, the accused shall be considered to be innocent, and his case shall receive the same dispassionate and impartial consideration, as if he were really so.*[7]

As observed earlier in this paper, the conviction rate of criminal cases in Sri Lanka stood at around 40 percent several years ago whereas it has fallen to below 10 percent today. Yet, police assaults are on the increase. If torturing were an effective way to tackle crime, then obviously the crime rate would have come down and the conviction rate would have gone up under the present circumstances. But this has not happened.

What has gone wrong here? The point to be reiterated is that the Sri Lankan police today do not use legally authorized investigation methods but are interested only in extracting a confession after giving a couple of blows to a suspect, perhaps while introducing some piece of 'evidence' that they think may help to prove the case and close the investigation. This is far less trouble for a police officer than to enter in to a prolonged interrogation that might last till late hours. It is natural for most people to admit guilt after a few blows by a police officer in his premises.

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[6] Principles of Circumstantial Evidence, 7th ed, p. 265

[7] *Ibid*

Many investigations end with that: the police report their findings to court, and although they do not have sufficient evidence to prove the suspect's guilt, they move to keep the person in remand. The period of remand is extended a couple of times and eventually the suspect is discharged. This is the manner in which what we may term as 'the superior probability of guilt' is used as the basis for police investigations in Sri Lanka in defiance of the once sacred principle of 'the presumption of innocence.'

The trial process

Today, inordinate delays before the commencement of a trial occur as a matter of course in criminal trials before High Courts. These delays sometimes range from three to ten years or even more. Quite often, even after the commencement of a trial, it is dragged on for a couple of years until the case eventually finds its end.

There is no doubt that long delays help interested persons to approach the witnesses and get them to go back on their evidence. Delays also help suspects to approach the witnesses and intimidate them. Sometimes rape victims from poor families are offered foreign employment by suspects or their relatives. Such cases drag on for long periods and eventually result in acquittals, because by then the victims are paid money, or in the meantime have settled the problem through inducement, threat or promise by the suspects. Quite often, an adjournment between two dates of testimony given by the same witness could extent to a couple of months and in some cases, even up to two years or more. These long adjournments obviously help interested parties to influence the witness and coerce them to change their testimony. From a different perspective, differences in testimony may occur also due to forgetfulness as a result of long delays.

Delays such as these are particularly detrimental in respect of cases of torture where police officers or armed forces personnel are accused. Given the position of authority these officers are situated in, they employ various tactics to get around witnesses. Then again, socio-economic factors such as poverty, difficulties in traveling may compel witnesses to keep away from court. Administrative procedures in paying travel expenses to witnesses are tedious or non-operative and, in any event, witnesses have to wait until the case is concluded to receive travel expenses. Proper adherence to payment procedures is generally not observed.

Absence of a witness protection program

The absence of an effective witness protection program has been a main contributory factor in the deterioration of the system. The only mechanism a witness can resort to in terms of protection is to complain to court of any threat, interference or any other matter in regard to which they feel unsafe, and seek the intervention of courts in order to direct the police to confer protection to him or her.

In ordinary cases, it is extremely rare for a judge to order the police to give protection to a witness. Where a complaint of interference is made, the judge will warn the party against whom the complaint is made not to interfere in the future or remand such person. The making of such an order depends on the gravity of the complaint and even other far less predictable factors such as the judge's mood on that day in question. Even so, it is clear that such directions will not afford adequate protection to a witness, especially in the long term. On the contrary, making such complaints in open court could lead to further exposure of the victim and aggravate the threat, particularly if the complaint is against the police.

Investigators

Incompetence of police officers is mainly due to lack of discipline and training. Over-estimation of authority, ignorance, corruption and lack of impartiality by police officers are some of the other main factors that have impacted adversely on the investigational process. These infirmities are evident right from the top to bottom in the police service, though perhaps with a very few exceptions.

It must be stressed in this regard that concluding an investigation does not mean that it is a successful investigation that helps to present a good case. Often the police are only interested in recording statements from witnesses and instituting criminal cases against a person where some evidence can be found or suspicion exists. The outcome of the cases is immaterial to them. In other words, the officers are not interested to carry out a proper and well planned investigation. Often the method adopted is to subject the suspect to torture and coerce him to admit the offence and to then start looking for evidence that fits these forced admissions. This method often ends with negative results, especially in complicated cases.

Adoption of this practice is well seen in cases under the Prevention of Terrorism Act (PTA) and in cases of robbery and theft. In most cases of organized robbery, persons are accused and kept on remand for long periods of time although there is no evidence to link them with the crime. Often the only evidence is that their name may have transpired in the statements by some other suspects or it may be an imagined suspicion. As noted previously, the police keep on moving for further time from the Magistrate to complete investigation with no meaningful outcome. After a year or two (or more) the case is withdrawn due to lack of evidence and the suspect is released. Indulgence in such practices not only keeps legally innocent persons behind bars but helps the real wrongdoer to escape court.

It is unfortunate that the police resort to misusing the investigative process to harass whom they dislike by preferring false accusations such as that of possessing drugs or offensive weapons. When such accusations are made, it is comparatively difficult to obtain bail. Police officers frequently make false entries, specially pertaining to the time of arrest and make belated investigation notes which have been commented upon by the Supreme Court in some instances.

For example, notes supposed to be made at the crime scene are made at the police station after a day or two under the pretext that they were made at the scene of the crime. As a result, some important observations may not be in the notes resulting in two contradictory versions between the police and an important witness, sometimes the key witness who may eventually be disbelieved resulting in an acquittal.

A few decades ago, where the Court was satisfied that either incorrect notes or bogus entries have been made by a Police Officer, action against such an officer was taken by the judge himself or reported to the police hierarchy for disciplinary action. This does not happen at present.

> *[T]he manner in which the GCIBs, RIBs, etc. have been altered with impunity and utter disregard of the law makes one wonder whether the supervising ASPs and SPs are derelict in the discharge of their duties or in the alternative condone such acts. In my view, it is unsafe for a Court to accept a certified copy of any statement*

or notes recorded by the police without comparing it to the original."[8]

Impact of decades of 'enforced disappearances'

It is well known that drastic decline in the standards of discipline of the police service took place during the Southern insurrectionist disturbances during the period1987-1991. Abductions, disappearances and killings were evidenced without proper inquires and in some cases with no inquiries at all. The police gave no explanation for these disappearances. No officers were held responsible for the abductions, disappearances or killings. A large number of high ranking police officers as well as junior officers were involved in these acts. Many of these cases are still pending in courts. This same pattern was evidenced in cases involving the conflict in the North-East.

Minimizing abuse

In the report, '*The Eradication of Laws Delays*' by the Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts[9], referred to earlier, two important recommendations are made to minimise torture and cruel, inhuman or degrading treatment during interrogation, arrest and detention. First, it has been recommended that magistrates take on a greater supervisory role in the investigation process and that Section 124 of the Code of Criminal Procedure Act be amended for that purpose.

The second recommendation states that:

> *The Committee recommends the incorporation of (there needs to be) a mandatory legal provision requiring Magistrates to visit Police Stations at least once a month for the purpose of ensuring the detention and interrogation of suspects are according to law. It is also suggested that provision be introduced to empower Magistrates to visit Police Stations at any time, in order to inspect and/or monitor the lawful detention and interrogation of suspects.*[10]

It is also recommended that the practice of day-to-day trials be strictly observed with the Attorney General being empowered with the right to request a magistrate to take up specific trials and non-summaries without delay.[11] A Witness Protection Authority was remarked upon as being extremely necessary.[12]

The prosecutorial role

It is a bounden duty on the part of the officers of the Attorney General's Department to present facts in their proper perspective when they present a case before court. However, there are lapses in this practice as well.

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[8] *Kemasiri Kumara Caldera v. Somasiri Liyanage and others,* SC (FR) App. No. 343/99, 06.11.2001.

[9] *'The Eradication of Laws Delays'*, Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, Final Report, 2nd April 2004.

[10] ibid.

[11] ibid.

[12] ibid

For example, one well known fact is the lack of impartiality of the Attorney General when handling *habeas corpus* applications in the eighties during the Southern insurrection. During this period, the Department had a special unit to handle *habeas corpus* applications which was a brainchild of the then-Attorney General. It was impressed upon the outside world that this special unit was created in order to handle the workload systematically and quickly. However, the actual truth was that the unit was comprised of handpicked officers who were prepared not only to do a 'quick job' but also 'any job.' The police were coaxed to swear diabolically false affidavits in court. The police officers did so to save their skins. Later, the police mastered the art. This is the manner in which the deterioration of the prosecutorial function quickened in pace.

Today, the adverse effects of such practices on the credibility of the prosecutorial system in this country have become apparent.

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

S.C. (FR) Application

No. 128/2003

Suranjith R.K. Hewamanne,
Attorney-at-Law,
530/7, Havelock Road,
Colombo 06.

Petitioner

Anthony Michael Emmanuel Fernando,
187/70A, Jayasamagi Mawatha,
Hospital Road,
Kalubowila.

presently of
13442 – 79 Avenue,
Surrey V3W 2Y8 B C
Canada.

Substituted – Petitioner

Vs.

1. Gayan Chrishantha,
   Jail Guard,

2. W.A. Priyashantha,
   Jail Guard,

   both of Welikada Prison,
   Colombo 8.

3. The Superintendent,
   Welikada Prison,
   Colombo 8.

4. Commissioner General of Prison
   Prison Headquarters,
   Colombo 08.

5. The Secretary,
   Ministry of Interior,
   Baladaksha Mawatha,
   Colombo 3.

6. Hon. The Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

BEFORE	:	Shirani A. Bandaranayake, J. N.G. Amaratunga, J. & Jagath Balapatabendi, J.
COUNSEL	:	Desmond Fernando, P.C., with K.S. Ratnavel, Sandamal Rajapakse and Priyalal Sirisena for Petitioner
		W. Prematillake for 1st and 2nd Respondents
		Harshika de Silva, S.C., for 3rd to 6th Respondents
ARGUED ON	:	03.07.2007

WRITTEN SUBMISSIONS

TENDERED ON	:	Petitioner	: 29.08.2007
		1st and 2nd Respondents	: 31.08.2007 & 02.10.2007
DECIDED ON	:	14.05.2008	

SHIRANI A. BANDARANAYAKE J.

This petition was filed by an Attorney-at-Law on behalf of Anthony Michael Emmanuel Fernando, (hereinafter referred to as Anthony – Fernando), who was sentenced to a term of one year's rigorous imprisonment for contempt of Court on 06.02.2003. The petitioner stated that Anthony Fernando's fundamental rights guaranteed in terms of Articles 11, 12(1) and 14(1)e of the Constitution were violated and this Court granted leave to proceed for the alleged infringement of his fundamental rights guaranteed in terms of Article 11 of the Constitution.

This matter had come up for hearing on several occasions since leave to proceed was granted by this Court on 28.04.2003. Finally when it was taken for hearing on 03.07.2007, no preliminary objections were raised by the learned Counsel for the 1st and 2nd respondents and the learned State Counsel for the 3rd to 6th respondents and accordingly this application was heard on its merits.

The facts of this application relating to the alleged violation of Article 11 of the Constitution, according to the petitioner, *albeit* brief, are as follows:

On being taken to Welikada Prison on 06.02.2003, Anthony Fernando, had developed a serious asthmatic condition and was taken to the Prison Hospital. As his condition was not satisfactory, he was taken to the National Hospital, Colombo and was admitted to the

Intensive Care Unit. Anthony Fernando was transferred to Ward No. 44 on 08.02.2003 and later to Ward No. 75. During this period his leg was shackled to the bed.

On 10.02.2003, Anthony Fernando experienced severe pain all over his body, but was not given any medical attention. His condition was so critical that his father, who visited him brought a priest to give the final sacrament given only to persons, who are about to die.

Later on 10.02.2003, Anthony Fernando was taken on a stretcher to a Prison bus to be taken to Welikada Prison. As the steps of the bus were too narrow for the stretcher to be carried inside, the stretcher was placed on the ground with Anthony Fernando lying on it in pain. There were prison guards seated inside the bus and one of the guards had alighted from the bus, had shook him by the shoulder and had dragged him inside the bus. Anthony Fernando had started screaming in pain and calling for his father, who was close by. The prison guard had dragged him inside the bus stating that, "You are pretending to be ill. If you call your father, I will kill you." Thereafter, Anthony Fernando was dropped on the floor of the bus. The prison guards, who were seated inside the bus, had kicked him on the stomach, the back and spine, on the face and the body and he was writhing in pain.

As a result of the said attack, Anthony Fernando had fainted and on arrival at the Welikada Prison he was dragged out of the bus and had taken on a stretcher to the Prison Hospital and kept near the toilets, where he remained until the next morning, when he was examined by a doctor.

On 16.02.2003 he was transferred from Prison Hospital to the National Hospital, Colombo for further treatment and he had been under treatment in Ward No. 72 initially and later in Ward No. 75 of the National Hospital at the time this petition was filed which was on 13.03.2003.

The petitioner stated that Anthony Fernando had suffered immense physical agony consequent to the assault by the Prison Guards and he was not in a position to move as he was assaulted on the spine. He was vomiting blood frequently, had difficulty in the intake of food, experienced pain all over his body and especially in the stomach as a result of being kicked.

Accordingly, the petitioner stated that Anthony Fernando had suffered mental agony as a result of cruel, inhuman and degrading treatment meted out to him by the Prison Guards and alleged that his fundamental rights guaranteed in terms of Article 11 of the Constitution had been violated by such actions.

Learned Counsel for the 1st and 2nd respondents contented that five (5) Prison Guards were assigned to five (5) prisoners, who were receiving treatment in Ward No. 44 of the National Hospital on 10.02.2003 and the 1st and 2nd respondents were among those Prison Guards. Anthony Fernando and another prisoner were discharged from the hospital on that day and the respondents were to take both of them to Welikada Prison in the Prison bus. According to the learned Counsel for the 1st and 2nd respondents, when Anthony Fernando was brought near the Prison bus he had started screaming aloud, pleading not to take him back to Welikada Prison. At that time he was referred back to the doctors in charge of the ward, who had confirmed that Anthony Fernando was fit to be taken back to the Prison. The hospital attendants had carried him on a stretcher to the Prison bus. Since Anthony Fernando had complained of an inability to be seated and had resisted sending him back to the Welikada Prison, the 1st and 2nd respondents had to keep him straight on the floor of the bus. After taking the prisoners back to the Prison the 1st and the 2nd respondents had handed over the prisoners to the jailor, who was on duty. Accordingly, the 1st and 2nd respondents denied allegations of assault on Anthony Fernando.

Considering the aforementioned submissions, let me now turn to examine the alleged violation of Article 11 of the Constitution.

Article 11 of the Constitution reads as follows:

> "No person shall be subjected to torture or to cruel inhuman or degrading treatment or punishment."

The contention of the learned President's Counsel for the petitioner with regard to the violation of Anthony Fernando's fundamental rights guaranteed in terms of Article 11 of the Constitution was chiefly two fold. Firstly, learned President's Counsel submitted that, Anthony Fernando was assaulted by the 1st and 2nd respondents and secondly, it was contended that he was subjected to degrading treatment.

In support of his contention, learned President's Counsel for the petitioner referred to the Medico Legal Report, the affidavit filed by the Chaplain of Hospital Ministry, Rev. Fr. Henry Marian Ashok Stephen and the provisions of the Prisons Ordinance.

Accordingly the first question that has to be examined is whether there had been any violation of Anthony Fernando's fundamental rights due to any assault on him.

As referred to earlier, Anthony Fernando had complained of assault on him on 10.02.2003, at the time he was taken back to the Prison. Referring to this incident, he had averred in paragraph 11 of his affidavit that,

> "I was dropped on the floor of the bus, where I lay flat on the floor. Thereafter I was kicked on my stomach, the back and spine and I was writhing in pain. I was assaulted on the face and the body by Prison Guards seated inside the bus."

As a result of this assault, Anthony Fernando had fainted and on arrival in Prison, he was taken to the Prison Hospital. He had described the said events in paragraph 23 of his affidavit, where he had averred that,

> "I have suffered immense physical agony consequent to the said assault. I am not in a position to move as I was assaulted on the spine and I vomit blood frequently. I lose consciousness and feel dehydrated. I have difficulty in the intake of food, experience pain all over my body, especially the stomach region as a result of being kicked on the stomach."

Learned Counsel for the 1st and 2nd respondents submitted that the injuries suffered by Anthony Fernando cannot be attributed to the alleged assault as there is a finding that Anthony Fernando had had a fall, where he had struck his back on a bed.

Except for the mere statement that the said injuries suffered by Anthony Fernando could have been due to a fall, the 1st and 2nd respondents had not tendered any affidavits in support of their submission. In fact the two respondents had only tendered affidavits from Emarappullge Upali (R1), who was a hospital attendant, from Wasantha Nanayakkara (R2), who was a jailor on duty and from K.P. Ajith Anil Kumarasiri (R3), who was the Driver of the Prison bus. All

three (3) had averred in their affidavits that Anthony Fernando was not assaulted by the 1st and 2nd respondents.

Learned Counsel for the 1st and 2nd respondents contended that there is a finding by the Medical Officers that Anthony Fernando had a history of a fall, where he had struck his back on a bed. Learned Counsel for the 1st and 2nd respondents referred to the Medical Report bearing Registered No. 574816. The said statement is included not in a medical report, but in one of the treatment sheets maintained by the National Hospital. In that record, references was made to fall, where Anthony Fernando had hit his back and that incident was mentioned with reference to his backache. Thereafter reference was also made to the alleged assault. The relevant portion of the said record, reads as follows:

> "Fallen down accidentally in ward 44 in NHSL and hit his back on a chair.
>
> Whilst he was transferred to prison hospital assaulted by an unknown person with his shoes."

Anthony Fernando was admitted to the National Hospital, according to the Admission Sheet on 06.02.2003. On admission the Diagnosis by the Physician at ward no.44 of the National Hospital had been Bronchial Asthma. In fact, the petitioner in his petition had stated that, Anthony Fernando had developed a serious asthmatic condition on 06.02.2003 and was taken to the Prison Hospital and as his condition was unsatisfactory he was taken to the National Hospital. He was discharged on 10.02.2003 and was taken to Welikada Prison.

Anthony Fernando was admitted to the National Hospital for the second time on 16.02.2003. On that occasion, the Diagnosis refers to backache. Reference has also been made regarding either a fall or assault. A Medical Officer on 18.02.2003 has thus recorded that;

> "H/O : ? fall or assault
>
> C/O – Backache
> And numbness of both legs."

The treatment sheets maintained by the Ward nurses, had described the condition of Anthony Fernando and one such record kept on 17.02.2003 stated that,

> "Pt. complains of not passing urine since after 2 p.m..... Red colour urine. Apply Ice water pack lower abdomen at 9 p.m.
>
> .....
>
> Pt. complains H/O assault? Police informed at 10.45 p.m."

Prior to the grant of leave to proceed, this Court had called for the Medico-Legal Report of Anthony Fernando and the Assistant Judicial Medical Officer had tendered to this Court the said Report on 25.04.2003. By that time all the investigations were completed and he was in a position to analyse the investigation referrals and further referrals carried out on Anthony Fernando. The Assistant Judicial Medical Officer, in his report stated thus;

"The above named patient was examined by me commencing at 2.15 p.m. on 25/2/2003 at the Ward 75 of National Hospital Sri Lanka, Colombo, for medico legal examination and report of his illness, following a Court order, received by me on 25/02/2003. A medico legal examination From No. 360/03 was also issued by the Hospital Police Post on 25/02/03."

The said Medico-Legal report refers to the examination and the conclusion and opinion of the Judicial Medical Officer which is stated as follows:

Examination

2.1.1. Injuries

Contusion – 7 x 6 c.m. size, resolving (faded blackish – brown), was situated in lower back, in the midline, corresponding to the fourth and fifth lumber vertebrae. The area was tender on palpation.

.....

Conclusions and Opinions

The patient said that the injury described under No. 2.1.1 was caused by kicking upon the back. Contusion could be caused by a blunt force as mentioned by the patient. Blackish brown colour of the skin could appear in the healing process of a contusion.....

Consultant Psychiatrist, Dr. B. Waidyasekera was of the opinion that he was very depressed, paranoid, confused and agitated. He is being treated with antidepressant drugs and he needs more freedom in ward to help his mental state."

This Court on many occasions had called for medical reports and even has given directions for the petitioner to be medically examined and the medical reports to be submitted along with any other relevant documents pertaining to the petitioner. These steps have been taken for the purpose of ascertaining whether the injuries are consistent with the acts complained of by the petitioner. Such reports have assisted this Court in deciding whether there had been a violation of the petitioner's fundamental rights guaranteed in terms of Article 11 of the Constitution.

It is to be borne in mind that at the time Anthony Fernando was taken for treatment to the National Hospital on 06.02.2003, there was no record of injuries sustained by him. He had been suffering from Bronchial Asthma. This diagnosis was consistent with the allegations made by Anthony Fernando at that time. There were no records of injuries sustained by Anthony Fernando at the time he was discharged from the National Hospital on 10.02.2003.

It is not disputed that Anthony Fernando was in the custody of the Prison officials since 06.02.2003. More importantly he was handed over to Prison officials on 10.02.2003 to be taken back to Welikada Prison. At that point of time he had not complained of any injuries due to assault. He was admittedly taken from the National Hospital to Welikada Prison in a

Prison vehicle by Prison officials. When he was re-admitted for the second time on 16.02.2003, Anthony Fernando was complaining of a backache and pain due to assault, whereas respondents were claiming that this would have been due to a fall. Except for the aforementioned statement of a fall no supporting evidence was forthcoming, and there was only a bold denial by the respondents.

In a situation, where there are allegations of assault, while in the custody of the respondents, would a mere denial be sufficient to overrule such allegations? I do not think so. In **Pitakandalage Gamini Jayasinhe v P.C. Samarawickrama and others** (S.C. (Application) No. 157/91 – S.C. Minutes of 12.01.1994) the petitioner was in perfect health, at the time he was taken into custody by the police. Later he had to be admitted to the hospital. Considering the circumstances and the allegations of torture, Kulatunga, J. stated that,

> "It is to be noted that at the time the petitioner was handed over to that Police, he had no injuries and was in perfect health. But when he was admitted to the hospital ..... he was a physical wreck and almost comatose. I therefore hold that the allegation of torture has been established."

It is thus apparent that, in situations where there are allegations of assault and torture against the respondents and there is only silence from the respondents regarding the incident in question, this Court would have to rely on the available medical evidence, which has been accepted as sufficient to prove the alleged act of assault. Referring to this situation, Dr. A.R.B. Amerasinghe (Our Fundamental Rights of Personal Security and Physical Liberty, Sarvodaya Book Publishing Services, 1995, pg. 47) has stated that,

> "....a total denial supported by a conspiracy of silence, the medical evidence is very often sufficient to prove that the acts complained of did take place."

In such circumstances, it is apparent that, the medical evidence plays a pivotal role in deciding as to how the acts complained of did take place. Further it is important to note that as stated by Dr. A.R.B. Amerasinghe *(supra)* citing **Pitakandalage Gamini Jayasinghe** *(supra)*, where it appears that the injuries were caused while a person was in detention, the burden of adducing evidence to show that the persons having custody were not responsible shifts to them.

Considering the aforementioned facts and circumstances, it is clear that whilst, there is evidence to indicate that Anthony Fernando had suffered injuries during the time he was in the custody of the officers of the Welikada Prison, the 1st and 2nd respondents had merely stated that the injuries could have been due to a fall.

It is not disputed that in a situation, where allegations are leveled against the Prison authorities that injuries were caused on Anthony Fernando, whilst he was in Prison, the 3rd and 4th respondents, who have the overall supervisory power of the Welikada Prison had not adduced any evidence to discharge their burden.

In these circumstances, considering the allegations leveled against 1st and 2nd respondents and the Medico-Legal Report submitted by the Assistant Judicial Medical Officer, it is apparent that Anthony Fernando had suffered injuries, whilst he was a prisoner, who was kept under the supervision of Prison authorities of the Welikada Prison.

It is also to be borne in mind that, in addition to the injuries, he was complaining of, Anthony Fernando had made allegations against several other incidents, which the petitioner stated was degrading considering their nature. He thus complained of being kept without clothes only with a hospital bed sheet to cover himself and making him to sleep with his leg shackled to the bed.

Learned President's Counsel for the petitioner had relied on the affidavit of Hospital Chaplain Rev. Fr. Henry Marian Ashok Stephen, the Hospital Chaplain of the Hospital Ministry, who had visited Anthony Fernando on several occasions in February and March 2003 to give him, Holy Communion. His position was that, on several occasions he was prevented from seeing the patient and giving him the Holy Communion. On one occasion he was allowed to see Anthony Fernando and at that occasion he had noticed that he was without any clothes. He had described this in paragraph 5 of his affidavit, which stated thus:

> "I state that a few days later I met the said patient in ward 75. On this occasion the prison guards did not object to my speaking to the said patient and I blessed him and prayed with him. I was with him for about 15 minutes and found him to be a devout Catholic and eager to receive Communion and to pray with me. I notice that he was without any clothes and was covered only with a hospital bed sheet. I inquired from him whether he needed any clothes; he answered in the affirmative. The same evening I took a sheet, sarong, towel, a box banion, soap and toothpaste and was allowed to give the same to the said patient."

The said affidavit, also speaks of Anthony Fernando's leg being shackled. Accordingly, in paragraph 9, Rev. Fr. Ashok Stephen had averred that,

> ".... The nurses mentioned to me that they were prevented by the prison guards on duty from treating him the way they treat other patients and that sometimes they are even prevented from giving him water. **Further, Anthony Fernando's leg was chained to the bed throughout the day and night and it was tightly shackled around the ankle causing him immense pain** and he used to moan in pain and on one occasion the doctor himself came and loosened the holder" (emphasis added).

Assault, and inhuman and degrading treatment on a prisoner, by Prison officers, who are officials of the State, whilst the victim is in their protective custody should be considered as a grave form of ill-treatment as stated in **Wewalage Rani Fernando and others v Officer-in-Charge, Seeduwa and others** (S.C. (Application) No. 700/2002 – S.C. Minutes of 26.07.2004). Such kind of ill treatment indicates that the officers concerned have exploited the vulnerability of the victim.

The Rules relating to Jail Guards contained in the Prisons Ordinance refer to the duties of such officers and section 132 states clearly that,

> "It shall be the duty of all Prison Officers, without exception, to treat the prisoners with kindness and humanity, to inform the Jailor at his next visit of any Prisoner who desires to see him."

There are several International Covenants, Declaration and Resolutions, which deal with the rights of the prisoners. For instance, the General Assembly Resolution No. 43/173 of 09.12.1988 adopted the UN Body of Principles for the protection of all persons under any form of detention or imprisonment. Principle 1 of the said Body of Principles, clearly stated that,

> "All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person."

The United Nations Congress on the Prevention of Crime and the Treatment of Offenders had adopted the UN Standard Minimum Rules for the treatment of prisoners (adopted at the Congress held in Geneva on 30.08.1955 and approved by the United Nations Economic, and Social Council by its resolution 663c(XXIV) of 31.07.1957 and new rule 95 added by Economic and Social Council Resolution 2076(LXII) of 13.05.1977). These Standard Minimum Rules refer to Discipline and Punishment and stated that,

> "Rule 27 - Discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life ....."

The Standard Minimum Rules for the Treatment of Prisoners also referred to the Instruments of Restraint, and Rule 33 reads thus:

> "Instruments of restraint, such as handcuffs, chains, irons and strait-jackets shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:
>
> a) as a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;
>
> b) on medical grounds by direction of the medical officer;
>
> c) by order of the Director, if other methods of control fall, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the Director shall at once consult the medical officer and report to the higher administrative authority."

In 1984, the UN General Assembly, having regard to Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, both of which provided that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and having regard also to the Declaration on the Protection of All Persons from being subjected to Torture and other Cruel Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 09.12.1975, adopted the convention against torture and other cruel inhuman or degrading treatment or punishment.

All these conventions and the others, suggest the presence of provisions to safeguard the basic human rights. It is well known that the right to liberty is recognized as a fundamental human right. Accordingly, it is to be noted that the rights of the persons, who are deprived of their liberty, also should be safeguarded as the deprivation of liberty does not remove the right for the petitioner for being subjected to torture and cruel, inhuman and degrading treatment.

Several Rules were made under the Prisons Ordinance for the well being of the Prisoners. Considering the Rules contained in the Prisons Ordinance and the Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress, it is evident that all Prison Officials are bound, not only to perform such duties for the purpose of preserving discipline and enforcing diligence, cleanliness, order and conformity to the Rules of the Prison, but also to treat the prisoners with kindness and humanity.

It is not disputed that Anthony Fernando was an inmate of the Welikada Prison at the time of material to this application. He was incarcerated on a charge of contempt of Court. Does this mean that such a person should not enjoy the constitutional guarantee of personal liberty? I do not think so, since the constitutional guarantee of personal liberty should be enjoyed by all persons on an equal basis. In fact the Supreme Court of Sri Lanka in **Senthilnayagam v Seneviratne** ([1981] 2 Sri L.R. 187) had clearly stated that 'even persons, whose records are not particularly meritorious' should irrespective of such records enjoy the constitutional guarantee of personal liberty.

In **Amal Sudath Silva v Kodituwakku** ([1987] 2 Sri L.R. 119) it was stated that even 'notorious' or 'hard core' criminals should not be subjected to torture, inhuman or degrading treatment or punishment. Atukorala, J. was of the view that,

> "Every person in this country, he be a criminal or not, is entitled to this right to the fullest content of its guarantee ..... Nothing shocks the conscience of a man so much as the cowardly act of a delinquent Police Officer who subjects a helpless suspect in his charge to depraved and barbarous methods of treatment within the confines of the very premises in which he is held in custody ..... **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"** (emphasis added).

Since the decision in **Amal Sudath Silva** *(supra)*, where this Court held that the petitioner's fundamental rights guaranteed in terms of Article 11 of the Constitution had been violated, several cases had followed the dictum that the position or the petitioner's standing in the society should not be taken into consideration in deciding whether there has been a violation of his fundamental rights (**Dissanayake v Superintendent, Mahara Prisons** [1991] 2 Sri L.R. 247, **Premalal de Silva v Inspector Rodrigo** [1991] 2 Sri L.R. 307, **Pellawattage (A.A.L.) for Piyasena v O.I.C., Wadduwa** S.C. (Application) No. 433/93 – S.C. Minutes of 31.08.1994, **Rani Fernando v O.I.C. Seeduwa** S.C. (Application) No. 700/2002 – S.C. Minutes of 26.07.2004).

On a consideration of all the facts and circumstances of this matter referred to above, I hold that due to the cruel, inhuman and degrading treatment meted out to Anthony Fernando, his fundamental rights guaranteed in terms of Article 11 of the Constitution were infringed while he was in the custody of the officials of Welikada Prison.

The question that has to be gone into next is whether the 1st to 4th respondents, who are Prison Officials and/or the State would be liable for the violation of Anthony Fernando's fundamental rights guaranteed in terms of Article 11 of the Constitution.

As stated earlier, Anthony Fernando had complained of the violations of his fundamental rights after he was taken to Welikada Prison on 06.02.2003. At all times material to this application, it is not disputed that Anthony Fernando was under the custody of the Prison Officials. Even at the time, Anthony Fernando had received treatment at the National Hospital, Prison Guards had been present. Although certain allegations were leveled against the 1st and 2nd respondents regarding the assault, since there is no evidence against them personally, I cast no liability on them, but hold that the State is responsible, for the infringement of Anthony Fernando's fundamental rights guaranteed in terms of Article 11 of the Constitution. As stated in **Kanapathipillai Machchavallvan v Officer-in-Charge, Army Camp Plantain Point, Trincomalee** (S.C. (Application) 90/2003 – S.C. Minutes of 22.09.2004), it is to be borne in mind that respect for the rights of individuals is the true bastion of democracy and State has to take steps to address the infringement caused by its officers to the prisoner.

I accordingly award Anthony Fernando a sum of rupees One Hundred and Fifty Thousand (Rs. 150,000/-) as compensation and costs. This amount to be paid by the State within three (3) months from today.

JUDGE OF THE SUPREME COURT

JAGATH BALAPATABENDI, J.
I agree,

JUDGE OF THE SUPREME COURT

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

S.C. FR Application No. 128/2003

In the matter of an application under Article 126 of the Constitution.

Suranjith R.K. Hewamanne,
Attorney-at-Law,
530/7, Havelock Road,
Colombo 06.

Petitioner

Anthony Michael Emmanuel Fernando,
187/70A, Jayasamagi Mawatha,
Hospital Road,
Dehiwala

Presently of
13442 – 79 Avenue,
Surrey V3W 2Y8 B C
Canada.

Substituted – Petitioner

Vs.

1. Gayan Chrishantha,
   Jail Guard,

2. W.A. Priyashantha,
   Jail Guard,

   both of Welikada Prison,
   Colombo 8.

3. The Superintendent,
   Welikada Prison,
   Colombo 8.

4. Commissioner General of Prison
   Prison Headquarters,
   Colombo 08.

5. The Secretary,
Ministry of Interior,
Baladaksha Mawatha,
Colombo 3.

6. Hon. The Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

BEFORE : Dr. Bandaranayake, J.
Amaratunga, J.
Balapatabendi, J.

COUNSEL : Desmond Fernando, P.C., with K.S. Ratnavel,
Sandamal Rajapakse and Priyalal Sirisena for the Petitioner.

W. Prematillake for 1st and 2nd Respondents

Harshika de Silva, State Counsel, for 3rd to 6th Respondents

ARGUED ON : 03.07.2007

DECIDED ON : 14.05.2008

GAMINI AMARATUNGA J.

I have had the advantage of reading in draft the judgment proposed by Hon. Justice, Dr. Bandaranayake. With utmost respect, I regret to place on record my inability to agree with the conclusion reached by Her Ladyship. My separate judgment is as follows.

This fundamental rights application had been filed by Mr. Suranjith Hewamanne, attorney-at-law on behalf of one A.M.E. Fernando, (hereinafter referred to as Mr. Fernando) who was at that time (13.3.2003) receiving indoor treatment in Ward 75 of the National Hospital of Sri Lanka, (NHSL). At the time the application was filed, Mr. Fernando was serving the sentence of one year's rigorous imprisonment imposed on him by the Supreme Court on 6.2.2003 for contempt of Court committed '*in facie curiae*' on that date.

It is common ground that after the Supreme Court sentenced Mr. Fernando, he was admitted to the Welikada Prison on the day. In the evening Mr. Fernando developed a serious asthmatic condition and was admitted to the prison hospital from where he was transferred to the NHSL on the same day. He received treatment in Ward 41 of the NHSL till 10.2.2003, on which date he was discharged from NHSL and transferred back to the prison hospital. He was again re-admitted to the NHSL on 16.2.2003 and remained there till 19.3.2003. This application had been filed by the attorney-at-law in his own name on 13.3.2003 while Mr. Fernando was still in the NHSL after his second admission. The petition refers to the manner in which Mr. Fernando was treated in Ward 44 of the NHSL and also contains an allegation of assault on him by two prison guards when he was being transported from the NHSL to the prison hospital on 10.2.2003. The petitioner has sought relief against the alleged violations of Mr.

Fernando's fundamental rights guaranteed under Articles 11, 12(1) and 14(e) of the Constitution.

Before granting leave to proceed, this Court, on 28.3.2003, has directed the hospital authorities to forward medical records relating to Mr. Fernando's stay in the NHSL and the two Bed Head Tickets relating to Mr. Fernando's two stays in the NHSL have been forwarded to this Court on 21.4.2003. On 28.4.2003, this Court has granted leave to proceed for the alleged violation of Mr. Fernando's fundamental right guaranteed by Article 11 of the Constitution which reads as follows.

> "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

When granting leave to proceed this Court has directed the respondents to file their objections within four weeks from 28.4.2003 and counter affidavits to be filed within two weeks thereafter. The hearing has been fixed for 9.6.2003. When the application came up for hearing on 9.6.2003, it was found that the respondents have not filed their objections to the petitioner's application. The Court has therefore granted further time to the respondents to file their objections.

It does not appear that the reason for the failure of the respondents to file their objections has come to the attention of this Court on 9.6.2003. Rule 45(3) of the Supreme Court Rules of 1990 relating to fundamental rights applications enacts that upon leave to proceed being granted, the petitioner shall, within two working days, tender to the Registry of this Court, such number of notices in the prescribed form to be served on the respondents, together with stamped, addressed envelopes containing the petition, affidavits and annexures. Once the notices are tendered, the Registrar shall cause such notices to be served on the respondents by registered post.

The petitioner, has tendered the stamped, addressed envelopes to the Registry only on 29.5.2003, that is after the expiry of the period of four weeks granted to the respondents to file their objections. However the petitioner has not submitted the notices in the prescribed form to be sent to the respondents and as such the Registrar was unable to dispatch those stamped, addressed envelopes to the respondents and those envelopes are to be found in the record up to date. It does not appear that on 9.6.2003, this Court has noticed the failure of the petitioner to comply with the mandatory rules relating to the service of notices on the respondents. Up to date the 3rd – 5th respondents have not filed their objections and the reason is obvious. However although the 1st and the 2nd respondents too have not been served with notices, they have filed their objections. However it must be noted that at the hearing, the learned State Counsel has marked her appearance for the 3rd to 5th respondents although no proxy has been filed by the Attorney General on their behalf.

The petition contains the following main allegations relating to the alleged torture, cruel, inhuman and degrading treatment.

1. When Mr. Fernando was admitted to Ward 44 of the NHSL for bronchial asthma he was not given a bed and that he was made to lie on the floor of the ward. As a result he developed a chill which made his asthmatic condition worse.

2. Mr. Fernando's leg was chained. He was permitted to move only for answering calls of nature. Two prison guards stood guard.

3. On 10.2.2003 Mr. Fernando experienced severe pain all over his body, but was not given medical treatment. His condition was so critical that his father who visited him brought a priest to give him the final sacrament.

4. On 10.2.2003 when Mr. Fernando was being taken from the NHSL to the prison hospital, he was assaulted by two prison guards inside the prison bus.

Mr. Hewamanne has filed an affidavit in support of the allegations made in the petition. Subsequently he has filed an affidavit from Rev. Father Stephen, Hospital Chaplain. The two Bed Head Tickets (BHT) are also available to this Court. The Assistant Judicial Medical Officer (AJMO), Colombo has forwarded his report on the examination of Mr. Fernando. Before the application was taken up for hearing Mr. Hewamanne has passed away in June 2006. It appears that by that time, Mr. Fernando, having served his period of imprisonment has taken up residence in Canada. In July 2006, Mr. Fernando has submitted a motion seeking to get himself substituted in place of Mr. Hewamane and this Court has allowed his application and substituted him as the petitioner. Thereafter, Mr. Fernando has filed his affidavit signed in Canada in September 2006.

Now I turn my attention to the affidavit of Mr. Hewamanne. In his affidavit Mr. Hewamanne has not stated that he has seen how Mr. Fernando had been kept and treated in the NHSL during Mr. Fernando's first admission. He has not stated that he has received instructions from Mr. Fernando or from any other person with regard to the facts deposed to in his affidavit. He has not stated that he was an eye witness to the alleged assault on Mr. Fernando by the prison guards on 10.2.2003. He has not stated that he deposed to the facts set out in his affidavit of his own knowledge and/or observations or on the instructions received by him. In view of the observations I have made above, it is necessary to consider whether Mr. Hewamanne's affidavit is a proper affidavit, prepared in accordance with the law, and if it is not so, whether this Court can attach any weight to the averments of facts set out therein.

It is a basic principle in the law of evidence in Sri Lanka that hearsay evidence is not admissible (subject to the exceptions specified in the Evidence Ordinance) to establish the truth of any assertion tendered as evidence. Section 181 of the Civil Procedure Code, which gives expression to this fundamental principle, reads as follows.

> "Affidavits shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to, except on interlocutory applications in which statement of his belief may be admitted provided that reasonable grounds for such belief be set forth in the affidavit".

Thus the rule is that the affidavit must contain statements of such facts which the declarant is able to testify to, of his own knowledge and observation. Our courts have consistently followed this basic rule. See Samarakoon vs. Ponniah (1931) 32 NLR 257; Simeon Fernando vs. Goonasekara (1946) 47 NLR 512; Kanagasabai vs Kirupamoorthy (1959) 62 NLR 54. In Damayanthi Abeywardene vs. Hemalatha Abeywardene (1993) 1 SLR 272, S.N. Silva J. (as he then was) confirmed this position in the following terms.

> "the rule in section 181 which confines an affidavit to a statement of such facts as the declarant is able of his own knowledge and observation to testify to is intended to restrict the contents of affidavits to direct evidence as prescribed in section 60 of the Evidence Ordinance. By necessary implication it excludes hearsay from such affidavits. The only exception is that in interlocutory applications a statement of what is believed as to the relevant facts may be included. This exception is subject to a proviso that reasonable grounds for such belief should also be set froth in the affidavit."

It is thus clear that in terms of section 181, an affidavit can contain only direct evidence as explained in section 60 of the Evidence Ordinance. A statement of belief can be included in an interlocutory application but a fundamental rights application is not an in interlocutory application. In the absence of any averment in Mr. Hewamanne's affidavit that he has direct knowledge of the statements of facts set out in the affidavit or that such facts have been given to him by Mr. Fernando or by any specific person or persons on his behalf, the affidavit of Mr. Hewammane has no evidentiary clause to support the statements of facts set out in the petition.

Mr. Hewamanne has sought to cure this defect by his counter affidavit where he has stated that "I further state that I myself and later my juniors had to get instructions from Anthony Michael Emmanuel Fernando on or about 16th February 2003 as the said Anthony Michael Emmanuel Fernando was too ill to give full instructions on the very first visit on 13th February 2003".

Even the above averment in the counter affidavit is not sufficient to cure the defect of the original affidavit as Mr. Hewamanne has failed to separately specify the instructions received by him and his juniors and to attach the affidavits of his juniors setting out the instructions received by them.

The only method that was available to furnish proper evidence to support the averments in the petition was the filing of an affidavit by Mr. Fernando himself. This has been done in 2006. Mr. Fernando's affidavit, dated 6.9.2006, signed in the City of Surrey, British Columbia, Canada, before a Commissioner for Oaths has been forwarded to this Court. This affidavit contains the following rubber stamp impression below the Commissioner's signature.

> "No legal advice given. Attested to only. Not drawn or read by Shahnaz Rahim Tula, Notary Public."

The affidavit of Mr. Fernando signed in British Columbia, Canada on 6.9.2006 is a virtual reproduction of Mr. Hewamanne's affidavit dated 13.3.2003, with the substitution of the letter 'I' in places where Mr. Hewamanne has used the word "he" of "Fernando".

Every deponent who affirms or swears to an affidavit has an obligation to speak the truth, and it must appear from the contents of the affidavit that the deponent was aware of his obligation to speak the truth. See Section 10 of the Oaths and Affirmations Ordinance. Cap 17 CLE, Sooriya Enterprises (International) LTD v Michael White and Company Ltd. (2002) 3 SLR 371 at 373.

A deponent's obligation to speak the truth is a requirement necessary to ensure the testimonial trustworthiness of the matters or the facts deposed to in the affidavit. It must appear from the affidavit that before the deponent took the oath or made the affirmation and signed the affidavit, he had given his mind to the correctness and the accuracy of the facts and the matters deposed to in the affidavit.

An examination of Mr. Fernando's affidavit shows that he has signed the affidavit without paying any attention to the correctness of the facts and the matters stated therein and without any regard to his obligation to speak the truth. I shall demonstrate this by comparing two averments contained in Mr. Hewamanne's affidavit with two corresponding averments in Mr. Fernando's affidavit.

Paragraph 12 of Mr. Hewamanne's affidavit dated 13.3.2003, filed when Mr. Fernando was in the NHSL is as follows.

> "I state that thereafter Anthony Michael Emmanuel Fernando was examined by a doctor and was given a bed without a mattress. Thereafter on 16th February 2003 he was transferred to the Colombo National Hospital for further treatment, as he was considered to be too seriously ill to be kept at the prison hospital. He have (sick) been under treatment in the Colombo National Hospital first in Ward No. 72 and thereafter in Ward No. 75. He remains there under treatment to date." (emphasis in mine)

Parargraph 13 of Mr. Fernando's affidavit, signed in Surrey, British Columbia, Canada on 6.9.2006 (three and a half years after Mr. Hewamanne's affidavit) is as follows.

> "I state that thereafter I was examined by a doctor and was given a bed without a mattress. Thereafter on 16.2.2003 I was transferred to the Colombo National Hospital for further treatment, as I was considered to be too seriously ill to be kept at the prison hospital. I have been under treatment in the Colombo National Hospital first in Ward No. 72 and thereafter in Ward No. 75. I remain there under treatment to date." (emphasis is mine)

In the affidavit signed in 2006 in Canada, Mr. Fernando states that he remains under treatment in Ward No. 75 of the Colombo National Hospital to date!

Paragraph 22 of Mr. Hewamanne's affidavit is as follows,

> "I state that Anthony Michael Emmanuel Fernando has suffered immense physical agony consequent to the said assault. He is not in a position to move as he was assaulted on the spine and he vomits blood frequently. He loses consciousness and feels dehydrated. He has difficulty in the intake of food and experiences pain all over his body especially the stomach region as a result of being kicked on the stomach. I state that in addition Anthony Michael Emmanuel Fernando has suffered mental agony as a result of the inhuman treatment meted out to him."

Paragraph 23 of Mr. Fernando's affidavit, filed three and a half years after Mr. Hewamanne's affidavit, is as follows;

> "I state that I have suffered immense physical agony consequent to the said assault. I am not in a position to move as I was assaulted on the spine and I vomit blood frequently. I lose consciousness and feel dehydrated. I have difficulty in the intake of food and experience pain all over my body especially the stomach region as a result of being kicked on the stomach. I state that in addition I have suffered mental agony as a result of the inhuman treatment meted out to me."

Does this mean that even more than three years later Mr. Fernando has the same physical condition and bodily feelings described in Mr. Hewamanne's affidavit? A comparison of Mr. Fernando's affidavit with the affidavit of Mr. Hewamanne filed three years ago, clearly indicates that it is a reproduction of Mr. Hewamanne's affidavit and Mr. Fernando has blindly signed his affidavit without any regard to the truth and accuracy of its contents.

The defects in the affidavits of Mr. Hewamanne and Mr. Fernando are not mere technicalities. Those defects arise from the deponents' failure to observe and adhere to the statutory provisions and the rules applicable to affidavits. The object of the statutory provisions and the rules applicable to affidavits is to ensure the evidentiary value of the facts and the matters stated in the affidavit. Fundamental rights applications are decided on the evidence placed before this Court by way of affidavits. There is no occasion to lead oral evidence or to cross examine the deponents to test their accuracy and veracity. In those circumstances, it is imperative that there must be proper affidavits before this Court to enable it to decide of the existence or the non existence of the facts in issue and the relevant facts. Documents (purporting to be affidavits) which have not been prepared in accordance with the statutory provisions and the rules applicable to affidavits, cannot take the place of affidavits contemplated by the law of this country. The purported affidavits of Mr. Hewamanne and Mr. Fernando do not have the characteristics of valid affidavits recognized by law as formal and solemn documents containing legal evidence on which a Court of Law can act. I therefore cannot rely on the facts deposed to in those purported affidavits.

Rev. Father Stephan's affidavit states that he first saw Mr. Fernando in Ward 72 of the NHSL in the latter part of February 2003. This is the period of Mr. Fernando's second admission to NHSL. Therefore this affidavit is not relevant in considering the averments in the petition relating to Mr. Fernando's first admission to the NHSL. The averments in the petition relating to this period can be examined in the light of the entries made by the medical staff in BHT No. 338479.

It is stated in the petition that that on 6.2.2003 Mr. Fernando was taken to the National Hospital Colombo and was admitted to the Intensive Care Unit and that he was transferred to Ward 44 on 8.2.2003. The impression created by this averment is that when Mr. Fernando was admitted to the NHSL on 6.2.2003 his condition was so bad necessitating treatment in the Intensive Care Unit for two days before he was transferred to Ward No. 44. However the BHT does not support this position. According to the BHT, on 6.2.2003, Mr. Fernando had been admitted at 6.10 p.m to the Emergency Treatment Unit (ETU) and not to the Intensive Care Unit (ICU). An entry in page 3 of the BHT states that "patient brought to the ward at 6.53 p.m. on 6.2.2003." Thus 43 minutes after his admission he had been sent to ward 44. The diagnosis at the time of admission was bronchial asthma. An entry in page 3 of the BHT says "Plan-Re-transfer patient to prison hospital. Cont M. as for B. Asthma." This entry shows that Mr. Fernando's condition was not so bad as averred in the petition.

There is no indication in the BHT whether Mr. Fernando was given a bed in Ward 44. In the petition it is stated that Mr. Fernando was made to lie on the floor and as a result he developed a chill which made his asthmatic condition worse. However the BHT does not indicate that his condition became worse at any time after his admission to the NHSL.

The petition states that on 10.2.2003 Mr. Fernando experienced sever pain all over his body but was not given medical attention. His condition was so critical that his father who visited him brought a priest to give him final sacrament given only to persons who are about to die. In assessing the weight to be attached to this statement, it is pertinent to examine BHT entries relating to 8th, 9th and 10th February, 2003. In page 10 of BHT the entry dated 8.2.2003 reads "BP 120/80. Mc. cont same. Fit for transfer. Plan written on 1st page". There is a diagram of his lungs and opposite of it the word "clear" is written. On 9.2.2003 the entry is "No complaints. Continue same." On 10.2.2003 the entry is "C/o nil. Cont same". The above entries show that on 8.2.2003 Mr. Fernando was fit for re transfer and that there were no complaints by him on the 9th and 10th February.

In considering the alleged critical condition on 10.2.2003 it is also pertinent to examine the objections filled by the 1st and 2nd respondents. They in their affidavits have stated that on 10.2.2003 when Mr. Fernando was discharged from hospital and was to be taken to the Welikada Prison, he screamed aloud pleading not to send him to the prison. Thereafter he was again referred to the doctors of the ward who after examining him confirmed that he was fit to be sent back to the prison. This position is confirmed by hospital attendant Upali in his affidavit marked R1. This version and the absence of any entry in the BHT showing that on 10.2.2003 Mr. Fernando's condition became bad indicate that the position taken up in the petition relating to Mr. Fernando's condition on 10.2.2003 cannot be the correct position of Mr. Fernando's health on that day. The foregoing examination of the details of Mr. Fernando's illness from 6.2.2003 (as set out in the petition) shows that the averments in the petition are exaggerated versions of his illness. The entries in the BHT indicate that Mr. Fernando had been properly treated in the NHSL and page 13 of the BHT indicates that the drugs prescribed by doctors had been properly and punctually administered to him.

The other allegation is with regard to the failure to give a bed to Mr. Fernando when he was in Ward 44. There is no allegation that although beds were available no bed was given to him. Patients lying on mats or bed sheets spread on the cement floors of the verandahs of hospital wards is sometimes not an uncommon scene in hospitals in Sri Lanka. This happens when due to the exigency of the circumstances the number of patients admitted to a hospital ward exceed the number of beds available in the ward. Therefore the failure to give a bed to Mr. Fernando cannot per se amount to cruet inhuman or degrading treatment meted out to him.

The other allegation is that Mr. Fernando was kept chained whilst he was in Ward 44. Section 89(1) of the Prisons Ordinance enacts that,

> "A prisoner may, when confined in an insecure place or whenever he is outside prison walls be put in handcuffs solely as a measure of precaution against violence, disturbance, mutinous conduct, escape or rescue....."

Thus there is legal provision which permits a prisoner to be put on restraints when he is outside prison walls. It is not a comfortable thing to be in shackles. However, it is not stated in the petition that the chain put on Mr. Fernando was unduly painful or tight. The petition itself says that he was allowed to move to answer calls of nature. In those circumstances, the mere fact that Mr. Fernando was kept on schackles cannot be treated as cruel, inhuman or

degrading treatment or punishment. In Rev. Father Stephen's affidavit, there is an averment relating to the manner in which Mr. Fernando had been kept schackled during his second stay in NHSL. I shall deal with that averment when I deal with the second period of his stay in the NHSL.

The next matter to be considered is the alleged assault on Mr. Fernando by the prison guards. This is the main fact in issue in this case. The allegation of assault has surfaced only after Mr. Fernando was admitted to the NHSL on 16.2.2003. Before dealing with the complaint of assault it is pertinent to consider the reason for Mr. Fernando's second admission to the NHSL on 16.2.2003. With regard to that matter the averment in the petition is that on 16th February 2003, Mr. Fernando was transferred to the Colombo National Hospital for further treatment as he was considered to be too seriously ill to be kept at the prison hospital. According to the admission sheet of BHT No. S/574816 relating to Mr. Fernando's second admission to NHSL, the reason for his admission was the history of a fall and a complaint of back ache with numbness of both lower limbs. Mr. Fernando remained in the NHSL from 16.2.2003. A history recorded in pages 27 and 28 of the BHT is as follows.

> "Was in prison from 10.2.2003 up to 16.2.2003. Since he did not pass urine properly and did not open bowel he was not eating properly. He complained the problem to prison medical officers and then he was transferred to NHSL accident service. On 16.2.2003 at 8.20 p.m. On admission he had back ache and numbness of both L/L."

This entry shows that Mr. Fernando's condition was not so serious as alleged. The true reason for Mr. Fernando's second admission to the NHSL is set out in the history given by Mr. Fernando to the AJMO on 25.2.2003. The relevant part in the AJMO's report is as follows.

> "Since he had a fear that some one would harm his life, he requested from his parents and the priest who visited there to see him to take some action to admit him to the National Hospital Colombo, again. Finally he was again brought to the National Hospital Colombo for hospitalization on 16.2.2003."

This history very clearly reveals that Mr. Fernando had been admitted to the NHSL on 16.2.2003 because of his reluctance to stay in the prison hospital. At this point again it is relevant to refer to the version given by the 1st and the 2nd respondents and the hospital attendant Upali, that on 10.2.2003, when Mr. Fernando was discharged from the NHSL he started to scream pleading not to take him back to the prison. The history recorded in page 28 of the BHT quoted above shows that whilst being kept at the prison hospital from 10.2.2003 to 16.2.2003 Mr. Fernando had not taken his meals properly and as a result there was no proper passing of urine or bowel movements. From what I have stated above, it is clear to me that Mr. Fernando had deliberately created a situation which had compelled the prison authorities to admit him to the NHSL on 16.2.2003.

Mr. Fernando was a known asthmatic patient. He had also complained of a back ache. During his second stay in the NHSL he had been examined by the Consultant Orthopaedic Surgeon, Consultant Neuro Surgeon, Consultant Neurologist, Consultant Psychiatrist and Consultant Forensic Psychiatrist. They have not found any serious illness or a physical abnormality of Mr. Fernando. Ultra sound scan of the abdomen excluded intra abdominal injuries, X-rays of the lumbo sacral spine revealed no fractures of the bones. MRI scan revealed no significant abnormalities in the spinal cord or nerve root compressions or traumatic injury of the lumber

spine to cause any neurological problems. It was the Consultant Psychiatrist who diagnosed Mr. Fernando's illness as "depressive illness". He had prescribed antidepressant drugs for it. Consultant Forensic Psychiatrist had expressed the opinion that in addition to the drugs, Mr. Fernando needed more freedom in the ward to help his mental state.

The History of a Fall/Assault

The complaint of the assault is that Mr. Fernando was assaulted by the prison guards inside the prison bus when he was being taken to the Welikada Prison from the NHSL. Jailor Nanayakara in his affidavit, marked R2, has stated that on 10.2.2003, when the prison guards brought Mr. Fernando from the hospital and handed over to him, Mr. Fernando never complained to him of any assault, abuse or harassment by the prison guards or by any other person.

When Mr. Fernando was admitted to NHSL on 16.2.2003, the history given by him to the admitting doctor was a history of a fall. Page 3 of the BHT also contains the history given by the patient to the admitting doctor. The entry reads as follows:

> "Transferred from prison hospital. H/o fall six days back. C/o back ache. Numbness of both lower limbs. O/E in pain."

Twenty minutes after Mr. Fernando's admission to NHSL, he had been examined by the House Officer of Ward 72. The entry made by that doctor is as follows.

> "Pt. he had a fall and struck his back on to a bed on 10.2.2003. PMH – slipped disc."

The letters 'Pt' indicates that the patient had given the above history to the doctor. An entry in page 27 reveals that Mr. Fernando had a previous history of slipped lumber disc. An entry in page 7 of the BHT made on 18.2.2003 at 7.00 a.m. reads,

> "H/O fall on the 10th medical ward – also? assaulted"

Another detailed entry in page 27 of the BHT states as follows.

> "H/O fallen down accidentally in Ward 44 when he was getting treatment for BA in NHSL and hit his back on a chair. Back ache since then. He could not walk since then, while he was transferring to prison hospital assaulted by an unknown person his shoes, backache aggravated".

There is an entry at the bottom of page 1 of the BHT made by the Senior House Officer at 10.45 p.m. on 17.2.2003. It is addressed to the police post/NHSL. It reads "Please be informed that this pt c/o? assault history. Please inform J.M.O."

From the entries in the BHT quoted above it is clear that at the time of admission to the hospital on 16.2.2003, Mr. Fernando had not complained to the admitting doctor that his back ache was due to an assault on him. Instead he had given a history of a fall. Mr. Fernando had never complained to the House Officer of Ward 72, who examined him at 7.35 p.m. on the same day, about an assault on him. Instead he had given a specific history of a fall on

10.2.2003. Later, according to an entry in the BHT I have quoted above, he had again given a specific history of a fall with details of the date and the place. According to that history, he had a fall on 10.2.2003 in Ward 44 of the NHSL whilst he was receiving treatment for bronchial asthma. From the time Mr. Fernando was taken to the Welikada Prison from the NHSL on 10.2.2003, he was in prison up to the time of his admission to the NHSL again on 16.2.2003. Thus the time of his second admission to the NHSL was the 1st opportunity that was available to Mr. Fernando to complain to any one other than the prison authorities about the alleged assault. However, he had not made any such complaint. Instead he had given a specific history of a fall. His failure to complain of an assault to anyone who has no connection with the prison in the very first opportunity that was available to him after 10.2.2003 and his conduct in giving a specific history of a fall are highly relevant in assessing the weight to be attached to the story of the alleged assault.

The 1st and the 2nd respondents in their affidavits have denied the allegation of assault. Their version is supported by the hospital attendant Upali and the driver of the prison bus, Kumarasiri.

The AJMO who had examined Mr. Fernando had submitted his report dated 25.4.2003 to this Court. The report indicates that he had examined Mr. Fernando at Ward 75 on 25.2.2003 following a Court order received by him on 25.2.2003. This Court has not made an order to the JMO, at any time prior to 25.2.2003 to examine and report on Mr. Fernando's condition. This Court's order to call for a medical report has been made only on 28.3.2003 when the Court considered the application for the purpose of granting leave to proceed. Therefore the Court order referred to by the AJMO was not an order issued by this Court. Perhaps it was an order issued by the Magistrates Court before which there was a complaint at that time about the alleged assault. Be that as it may, the AJMO's report is relevant in considering the main fact in issue to be decided by this Court.

According to the AJMO's report, on general examination of Mr. Fernando on 25.2.2007 at 2.15 p.m. the AJMO had found that he was conscious and rational. Mr. Fernando was lying flat on the bed. There was an indwelling catheter draining his urine. He did not appear to be in pain. Sad facial expression was evident. The past medical history as set out in the AJMO's report is as follows;

> "He is a known asthmatic patient for 3-4 years, which will be precipitated with stress. He developed a backache in 1996 and was treated by Consultant Neurologist Dr. Jagath Wijesekara. Diagnosis Cards were not available. He has had no major psychiatric illness in the past."

I quote below, the history given by Mr. Fernando, as reproduced in the report of the AJMO.

> "While he was being transferred from Ward 44 of National Hospital, Colombo to the Prison Hospital, Borella on tenth February 2003, in between 2.00 pm and 4.00 pm he had been assaulted by two prison guards inside the prison vehicle. One prison guard in casual dress slapped upon both cheeks about four or five times, while he was resisting to get into the vehicle by tightly holding the vehicle. The prison guard in white shirt and karchy trousers kicked him and hit him with bear (sic) hand on his back, saying "Dehiwala neda? Negitapiya! Negitapiya!! (Is it Dehiwala?

> Gent up! Get up!), while he was lying flat on the floorboard of the vehicle. He was not assaulted while he was in the prison hospital."

Having obtained the history from the patient, the AJMO had examined the patient and had noted the following physical injury.

> "Contusion, 7 x 6 cm size, resolving (faded blackish brown) was situated in lower back, in the midline, corresponding to the fourth and fifth lumber vertebrae. The area was tender on palpation. When I reviewed him on 6.2.2003, the contusion was completely resolved."

At this point, I wish to refer to an entry made in the BHT on 18.2.2007 (page 25) one week before the AJMO examined Mr. Fernando. There is a rough diagram of a human body where there is a mark described as a contusion 5 x 3 cm in size. This contusion is at the same place of the body described by the AJMO as the place where he found the contusion. How this contusion which was 5 x 3 cm in size on 18.2.2003 became larger in size to 7 x 6 cm on 05.2.2003 (one week later) is a question. The AJMO's report does not have any reference to the contusion marked and described in the BHT.

The story of a fall, given by Mr. Fernando to the hospital authorities looms larger in the entries made in the BHT. Any person who peruses the BHT cannot fail to notice it. The details given in the AJMO's report consisting of three pages very clearly indicate that the AJMO has perused the BHT. In the AJMO's report there is no reference at all to the history of a fall recorded in the BHT.

The conclusion and the opinion expressed by the AJMO with regard to the contusion he had seen in the body of Mr. Fernando is as follows:

> "The patient said that the injury described under No. 2.1.1; was caused by kicking upon the back. Contusion could be caused by a blunt force as mentioned by the patient.

Blunt force mentioned by Mr. Fernando is a kick on his back. If a human body comes into violent contact with an object like a bed or a chair as a result of a fall, it may also result in causing a contusion depending on the force with which the body hits such an object. In the history given to the doctors, Mr. Fernando had stated that he had a fall and struck his back on a bed. On another occasion he had said that he had a fall and struck his back on a chair and since then he had a back ache. Those statements are highly material for the purpose of ascertaining the cause of the contusion.

At the time of his examination of Mr. Fernando, the AJMO should have questioned him about the history of a fall recorded in the BHT. Upon such questioning, if Mr. Fernando had admitted that his back struck some hard object (such as a bed or a chair) when he had a fall previous to the alleged assault on him, then the AJMO would have had the opportunity to examine the place of Mr. Fernando's body which had come into contact with that hard object. If it was a place other than the place where the AJMO has found the contusion on Mr. Fernando's body, then the inevitable inference deducible from such fact would be that the probable cause for the contusion was the assault. On the other hand if the place where the hard object struck Mr. Fernando's body was the same place where the AJMO found the

contusion, then the AJMO's task would have been to consider whether the probable cause for the contusion was the assault or the fall or both such assault and the fall.

The story of a fall, recorded in several places of the BHT, stares at the face of anyone who peruses the BHT. I do not think that that story can escape the attention of a forensic expert, who is expected to examine a patient who had complained of an assault, and to report to Court, the nature of the injuries, if any, he had found on the body of such patient and his expert opinion as to the probable cause for such injuries. Courts, more often than not, expect an opinion from forensic experts on the question whether his opinion as to the probable cause for such injury is compatible with the history available to him as to the cause for such injuries. History available to a forensic expert as to the cause of the injuries found on a patient, is not confined to the history given by the patient. Other material, such as entries in a BHT, which have a bearing, either as material supporting the history given by the patient, or as material which are in conflict or at least, are inconsistent in some way with the history given by the patient, constitute the history, a forensic expert is expected to take into account in expressing his expert opinion as to the probable cause for the injuries. The failure of a forensic expert to turn his attention to all material available or accessible to him with regard to the probable cause for the injuries of the patient constitutes a failure to consider all relevant material before reaching a conclusion submitted to a Court as "expert opinion."

In view of the apparent failure of the AJMO to take relevant material into consideration in giving his "expert opinion" with regard to the probable cause for the inquiry of Mr. Fernando, the AJMO's opinion is inconclusive as to the probable cause for that injury.

Even if the AJMO's opinion is conclusive with regard to the cause of the injury found on Mr. Fernando's body – namely the alleged assault by the prison guards – in order to come to a finding against the 1st and the 2nd respondent prison guards, this Court must have before it evidence to show that the 1st and the 2nd respondents had assaulted Mr. Fernando. Such evidence must come from the victim or at least from any other person who had witnessed the alleged assault. In this case I have already ruled that there is no evidentiary value in the purported affidavits of Mr. Hewamanne and Mr. Fernando. There are no other eye witnesses to the alleged assault. The only account available to this Court with regard to the alleged assault is the history given by Mr. Fernando to the AJMO. In the absence of a valid affidavit from Mr. Fernando, setting out an account of the alleged assault, the history given by Mr. Fernando to the doctor is hearsay. The history given to a doctor is not direct evidence contemplated by section 60 of the Evidence Ordinance and the value of such evidence, if any, is only as corroborative evidence under section 157 of the Evidence Ordinance. Although the history given to a doctor is not substantive evidence, such history may amount to a previous inconsistent statement (relating to the same fact) relevant to impeach the credit of a witness. My detailed references to the history of a fall given by Mr. Fernando to the doctors of the NHSL have been made in accordance with the provisions of section 155(c) of the Evidence Ordinance to demonstrate the unreliability of the story of the assault given by him.

In view of what I have stated above, my conclusions with regard to the story of the alleged assault are as follows.

(A) There is no legal evidence before this Court with regard to the alleged assault.

(B) On the otherhand there is legally admissible evidence before this Court, tendered by way of the affidavits of the 1st and 2nd respondents, that there was no such assault as alleged in the

petition. This version finds support from the affidavit of Upali, a hospital attendant, marked R1.

(C) The failure of Mr. Fernando to complain of the alleged assault to Jailor Nanayakkara on 10.2.2003 and his failure to complain to the admitting doctor of the NHSL on 16.2.2003 and to the House Officer of Ward 72 on the same date, constitute significant omissions a court has to take into consideration in assessing the weight to be attached to the story of the alleged assault.

(D) The history of a fall, given by Mr. Fernando, also could be the probable cause for the contusion found on Mr. Fernando's body.

In view of the conclusions set out above, I hold that the petitioner has failed to prove the allegation of assault to the satisfaction of this Court on a balance of probabilities.

It is necessary to consider three other matters which arise from the affidavit filed by Rev. Father Stephen, Hospital Chaplain. The priest in his affidavit has stated that when he saw Mr. Fernando in Ward 75 of the NHSL, the latter was without any clothes and was covered only with a hospital bed sheet. According to the report of the AJMO, at the time of his examination of Mr. Fernando there was an indwelling catheter draining Mr. Fernando's urine. An entry in page 39 of the BHT made on 5.3.2003 indicates that a catheter was fixed as Mr. Fernando complained of passing urine without his knowledge. The same note states that Mr. Fernando's prison suit obstructs nursing care and that he should be given normal clothes.

There is no complaint by Mr. Fernando that he was kept naked covered only with a bed sheet as a part of any humiliating treatment extended to him by the hospital authorities. It is possible that Mr. Fernando was kept naked covered only with a bed sheet due to reasons connected with nursing care. I therefore cannot conclude that this was degrading treatment meted out to him.

Rev. Father Stephen in his affidavit has stated that when he found that Mr. Fernando was without any clothes he had inquired from him whether he needed any clothes and that Mr. Fernando answered his question in the affirmative. The priest has stated that he provided the necessary clothes to Mr. Fernando but on a later occasion when he visited Mr. Fernando he found that the latter was without any clothes again. The priest has stated that when he inquired from Mr. Fernando as to what had happened to the clothes given to him, Mr. Fernando had told him that the prison guards stripped him (Mr. Fernando) and took away the clothes when he expressed his reluctance to attend an identification parade to identify the prison guards who assaulted him.

In the petition in this Court there is no reference at all to this allegation against the prison guards. When Mr. Fernando took steps in 2006 to file his affidavit in this Court, he had the opportunity, if he was so inclined, to narrate details about this allegation in his affidavit. There is no such complaint made to this Court by Mr. Fernando and in the absence of any complaint by Mr. Fernando, the version given by Rev. Father Stephen about the alleged act of the prison guards with regard to Mr. Fernando's clothes is hearsay, and as such, I cannot act on that version.

The third matter arising from the affidavit of Rev. Father Stephen is the alleged pain caused to Mr. Fernando as a result of the chain put around his leg. The priest's account of the manner in

which Mr. Fernando was kept schackled to the bed relates to the period of Mr. Fernando's second stay in the NHSL. In the petition, there is an averment that when Mr. Fernando was receiving treatment in Ward No. 44 of the NHSL, he was kept schackled. However in that averment, there is no allegation that the chain put around Mr. Fernando's leg was unduly tight to cause bodily pain. As I have already indicated, there is provision in the Prisons Ordinance to keep a prisoner schackled when he is outside prison walls.

Mr. Fernando has not complained to this Court that the manner in which he was kept schackled during his second stay in the NHSL was unduly harsh or painful. In the absence of a complaint from the person who was kept schackled (and who had the opportunity to make his complaint to this Court even at a later stage) this Court cannot hold that the manner in which he was kept schackled was cruel and inhuman.

Section 89(1) of the Prisons Ordinance which permits to keep a prisoner schackled when he is outside the prison walls, specifically states that a prisoner may be put on schackles as a measure of precaution against violence.

The notes of the nurses, written in page 21 of the BHT, indicate that Mr. Fernando had displayed signs of violent behaviour during his second stay in the NSHL. The relevant notes of the nurses are as follows:

> "13.3.03. 5.15 pm. Pt. restless. Pt tried to suicide himself. He hit his head himself. Inform Dr. on call."
>
> "2.30/14.03.03. Pt. Shouted loudly scolded to the prison guard. Again at 5.15 – shouted loudly scolded to the prison guard. Informed the doctor in c."

When a prisoner becomes unruly whilst he is outside the prison, there is justification to keep him schackled as a measure of precaution. Since prison authorities are authorized by law to keep a prisoner schackled when he is outside the prison walls, the mere fact that Mr. Fernando was kept schackled cannot be treated as inhuman and cruel treatment. As already indicated Mr. Fernando has not complained about any pain caused to him as a result of the chain put around his leg. Therefore I am unable to act on the sentiments expressed by the onlookers.

Having taken into consideration all relevant material which I am entitled to consider in accordance with the law, I am of the view that the petitioner has failed to establish, on a balance probabilities, that the respondents had violated his fundamental right guaranteed by Article 11 of the Constitution. Accordingly this application is dismissed without costs.

JUDGE OF THE SUPREME COURT

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