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Rathnayake Tharanga Lakmali v. Niroshan Abeykoon: Sri Lankan Supreme Court Recognises Custodial Death as a Violation of Right To Life

Raj Krishna* and Kumar Mukul Choudhary**

Abstract

Police brutality is a point of concern for the entire world. Post the George Floyd incidence, questions have been raised all over the world on the extent of force which can be used by the law enforcement agencies for maintaining law and order. Similar questions were also raised before the Supreme Court of Sri Lanka in the case of Rathnayake Tharanga Lakmali v. Niroshan Abeykoon wherein the Court held that custodial death violates right to life of an individual and therefore, is prohibited by law.

In the light of the above facts, the authors in this case comment have analysed the judgement of the Sri Lanka Supreme Court. The authors have also discussed about the impact this judgment will have on the Sri Lankan constitutional and human rights jurisprudence. Furthermore, the authors in this case comment have also discussed about the significance of this ruling for the Indian legal system.

Introduction

"The rule of law doesn't mean the police are in charge,
but that we all answer to the same laws"

- Edward Snowden

Custodial torture is a major disgrace for a society governed by rule of law. The most pertinent question before any adjudicating authority dealing with the issue of police brutality is that, to what extent deference may be provided to law enforcement agencies in matters of use of force for implementation of law. Furthermore, whether rule of law should be implemented

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by courts in formal sense or substantive sense while determining these questions? Should authorities be given free hand or should they be held accountable for their acts just like a common man? There are many such questions which pop up when we discuss about the use of force by police authorities.

The U.S Supreme Court has answered these questions by way of qualified immunity. Initially the Court held that *"[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he had probable cause, and being mulcted in damages if he does."*[1] As a result police officials were provided with immunity from civil suits for their actions. But for grant of such immunity mental intent of the police officers has to be seen which should not be malicious. However after sometime this requirement was also diluted. Furthermore to protect the officials the courts applied the test of reasonableness instead of trials to see whether the action of the official would reasonably violate law or any constitutional principle.[2] As a result cases of police brutality increased in United States.

Recently, similar questions were raised before the Sri Lankan Supreme Court[3] i.e. to what extent deference may be provided to law enforcers in their act of use of force upon general public. The Supreme Court of Sri Lanka in the landmark judgment has held that "*extra-judicial killing of a detainee in police custody violates the fundamental right to life of an individual, despite the fact that there is no explicit right to life mentioned in the Sri Lankan Constitution.*[4]*"* Furthermore, the standard of evidence required to make police accountable must not be too burdensome. This would make contention of victim too hard to prove and would give a free hand to the law enforcement authorities.[5]

Facts of the Case

This Fundamental Right application was filed by the wife of the deceased Rathnayake Tharanga Lakmali, on behalf of her husband Ranamukage Ajith Prasanna who died in a Police Custody on September 18, 2010. The petitioner in her application contended before the Supreme Court that her husband was wrongly arrested and detained. After arrest, her husband was subjected to torture, cruel inhuman treatment and was eventually killed by

1 *Pierson v. Ray*, 386 U.S. 547 (1967).

2 *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

3 *Rathnayake Tharanga Lakmali v. Niroshan Abeykoon*, 2019 SCCOnLine SLSC 14 (Supreme Court of Sri Lanka).

4 *Id.* at 14.

5 *Id.* at 12.

the police officials in the custody. As a result, several police officers from the Embilipitiya Police Station were made respondents in this case.[6]

However, the respondents argued that the arrest of the deceased was a lawful arrest and the deceased was not subjected to any torture, cruel, inhuman or degrading treatment. Furthermore, the Respondents claimed that the death of the petitioner's husband was merely accidental and thus justified by law.[7]

Critical Analysis of the Judgment

On the basis of arguments of both the parties and the post mortem report, the three-judge bench of the Supreme Court held that the respondents and the State have infringed the Fundamental Rights of Ranamukage Ajith Prasanna guaranteed to him under Articles 11[8] (which says *"No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*) and 13(1)[9] (which says *"No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."*) of the Constitution. The Court in its judgement further observed that, the Sri Lankan legal system provides for investigation, inquiry, trial, and punishment by proper authorities. As per Article 13(4) of the Constitution, *"no person shall be punished with death or imprisonment except by order of a competent court.[10]"* Though the Constitution of Sri Lanka does not explicitly recognize right to life. However, it has been held that Article 11 (freedom from torture) read with Article 13(4) (freedom from arbitrary punishment) recognizes, by necessary implication, right to life under Sri Lankan Constitution.

This judgment of the Sri Lankan Supreme Court has been hailed as a landmark judgment for holding constitutional values and essential principles of victim justice. It should also be appreciated for being given in a nation which holds such a grim record in the field of protection of human rights.[11]

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6 *Id*. at 4-5.

7 *Id*. at 9.

8 Article 11 "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The Constitution of Sri Lanka 1978.

9 Article 13(1) "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest." The Constitution of Sri Lanka 1978.

10 Article 13(4) "No person shall be punished with death or imprisonment except by order of a competent court." The Constitution of Sri Lanka 1978.

11 U.N High Commission for Human Rights, '*Report of OHCHR Investigation On Sri Lanka*' 16 September 2015, A/HRC/30/CRP.2.

In this judgement another contention raised by the respondents was that the victim was an aggressive criminal having relation with underworld and doing contract killings. Therefore, deference should be provided to police in matter of extensive use of force. To prove this point, they also relied upon *Jeganathan v. Attorney General,*[12] wherein the Supreme Court held that *"The petitioners' allegations against the 4th and 5th respondents if proved will carry with them serious consequences for these respondents. Furthermore, the allegations are of a very serious nature. They must therefore be strictly proved. This degree of cogency is seriously lacking in these proceedings which must fail.*[13]" This implies that to support the proposition that allegations of torture and extra-judicial killing which are of a very serious nature must be strictly proved.[14] But in the present judgement, Court did not accept the above-mentioned proposition. The Court further held that, even though victim was barbaric criminal causing severe law and order problems. But on the day of encounter, police took him out with minimal security.[15] They have even not entered the record of such investigation in their record book.[16] Furthermore, by way of post-mortem report it came to the knowledge of the court that severe injuries have been caused to the victim in the police custody. The court held all of these evidences are sufficient proof of improper working of police.[17] The Supreme Court further held that merely because prisoner is a hardcore criminal, it does not power the authorities to commit gruesome acts upon the prisoner and take his life and liberty away without proper application of the law. This could be gathered from following words of the court- *"Our legal system provides for investigation, inquiry, trial and punishment by proper authorities which is the base of democracy and the Rule of Law. As per Article 13 (4) of the Constitution, no person shall be punished with death or imprisonment except by order of a competent court. Hence, even a convicted criminal has a right not to be arbitrarily deprived of his life except in accordance with procedure established by law.*[18]" By these words courts not only recognised the right of the prisoners but it also incorporated principles of rule of law in substantive sense i.e. substantive version of the rule of law described by Tamanaha as the "social welfare" concept, which "imposes on the government an affirmative duty to help make life better for people, to enhance their existence, including effectuating a measure of distributive justice.[19]" The Supreme Court of

12 *Jeganathan v. Attorney General*, (1982) 1 Sri LR 294 (Sri Lanka).

13 *Supra* note 3.

14 *Ibid.*

15 *Id.* at 10.

16 *Id.* at 9.

17 *Id.* at 14.

18 *Id.* at 12.

19 BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 1644 (Kindle ed. 2004).

Sri Lanka vide this judgment imposed the duty upon the government and the executive to look after the rights and interest of the prisoners to protect their basic fundamental rights.

However, there are certain grounds on which this judgment can be questioned. Some of the grounds are as follows: -

Restrictive Constitutional Interpretation

On page 13 of the judgment, the court has recognized that Constitution is a living document and should be interpreted liberally.

> *"The Fundamental Rights Chapter in our Constitution does not expressly refer to a right to life. However, the Constitution, as a living document, should not be construed in a narrow and pedantic sense. I am of the view that constitutional interpretation should be informed by the values embodied in it.*[20]*"*

However, at the time of ratio, the court has emphasized upon its earlier judgment[21] in which the Court has recognized life as a mere existence and distinct from dignified existence. Thus, it can be said that right to life has not been recognized by the Court in its absolute sense which in turn puts rights of weaker section of public in jeopardy.

Evasive Approach of the Court

The Supreme Court took nearly 10 years to deliver this verdict, whereas the Sri Lankan Constitution under Article 126(5)[22] (which says *"The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference.")* provides that petitions related to fundamental right should be disposed of within two months of filling.

However, the Sri Lankan Supreme Court in another case[23] has held that this regulation is not mandatory. This creates a negative impact upon the ambitions of general public to stand against wrongs committed by state. It brings uncertainty in their mind with regards to time and resource required to protect their rights.

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20 *Supra* note 3.

21 *Sriyani Silva v. Iddamalgoda*, *Officer-in-Charge, Police Station Paiyagala and Others* (2003), 2 Sri LR 6 (Sri Lanka).

22 The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference.

23 *Visuvanagam v. Liyanage,* [1983] 1 Sri LR (Sri Lanka).

Non Determination of Duty

The Sri Lankan Supreme Court in its judgement observed that fundamental rights have been violated under the constitution. But still it did not order the investigation of killing. Furthermore, it also doesn't determine that whether the killing was intentional or not. The court in its judgement also failed to understand that monetary compensation may be sufficient for victim, but not for the public in general. The court in this matter should have decided that what amounts to ex-judicial killing or torture along with what liability can be imposed upon accused if such acts were committed. If the same would have been done then the judgment of the court would have created a deterrent impact upon the authorities which may have retracted such horrendous acts in future.

Significance of this Ruling for the Indian Legal System

This judgment of the Sri Lankan Supreme Court is even important for the Indian Legal System. In India, police encounters, custodial deaths and brutalities are common phenomenon and courts often find themselves incapable of dealing with such issues. The Supreme Court of India in *D.K Basu*[24] judgement has laid down guidelines pertaining to arrest which has also been incorporated into the provisions of Cr.P.C and Evidence Act. But, still the approach of police officials towards torture and brutalities has not been transformed in any sense. According to latest report of N.C.R.B, since 2005 to 2017 more than 1300 people either died or disappeared from police custody[25].

There are provisions in Cr.P.C., which provides for enquiry by judicial magistrate in case of custodial death. But only in 20% of the above-mentioned cases these enquiries were ordered.[26] This undoubtedly shows lethargic approach of courts and authorities to act against custodial death or torture. The main reasons behind custodial deaths are ancient investigative approach of police and too much burden of work upon officers.[27] This results into confession by way of torture and brutality. Although, Supreme Court always condemned this manner of confession. But lacklustre approach of lower courts in dealing with enquiries does provide police officers deference for their actions. This approach of lower courts has on many occasions restricted authorities from taking action against culprit

24 *D.K. Basu v. State of West Bengal,* (1997) 1 S.C.C. 416.

25 *Excerpts from the W.P. (Crl.) No. 354/2019*, LIVE LAW (June 10, 2020, 10:00 AM) https://www.livelaw.in/pdf_upload/pdf_upload-369455.pdf.

26 *Ibid*.

27 *Bound by Brotherhood*, HUMAN RIGHTS WATCH (June 12, 2020, 10:05 AM), https://www.hrw.org/report/2016/12/19/bound-brotherhood/indias-failure-end-killings-police-custody.

officers because deference provided to them by lower courts.[28] These tactics of judiciary and authorities has further undermined the right of weak and vulnerable.

Furthermore it is also an accepted view in the Indian Legal System that police encounters are necessary. The Supreme Court of India while dealing with the legitimacy of encounters has pointed out in *Public Union for Civil Liberties v. Union of India*[29] that *"if the version of the police with respect to the incident in question were true there could have been no question of any interference by Court. Nobody can say that the police should wait till they are shot at. It is for the force on the spot to decide when to act, how to act and where to act. It is not for the Court to say how the criminals should be fought.*[30]*"*

Even Section 46 of the Code of Criminal Procedure permits police encounters in India. The acceptance of validity of encounters in our legal system is based upon a misleading fact. The fact is that the State and the accused are on the same footing and the authorities do not have any other option than encounters.[31] This assumption can be rejected with the help of present judgment of the Sri Lankan Supreme Court. It is because in this case the court deviated from the strict proof and recognized the unequal footing of the petitioner and the respondent in the given case.[32]

The Indian courts should also follow their Sri Lankan counterparts in cases involving police brutality instead of saying that they cannot do much.[33] The Indian Courts should accept that police hold sheer power of state sovereignty from which the citizens require thoughtful protection, who are no way close to police power.

Furthermore, Parliament has a responsibility to protect vulnerable people from the access of the law enforcement agencies. Hence it is expected from the legislature that they will bring legislation to limit the extensive use of force by police officials. For this purpose, they can rely upon recommendations of 273rd report of Law Commission.[34] Furthermore,

28 *Ibid*.

29 *Public Union for Civil Liberties v. Union of India*, A.I.R. 1997 S.C. 1203.

30 *Ibid*.

31 The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974 (India).

32 *Ibid*.

33 Utkarsh Anand, *Courts Can't Do Much: SC Adds 'Peace' Caveat to Hear Pleas Against Police Crackdown on Jamia, AMU Students Tomorrow*, NEWS 18 (June 9, 2020, 11:00 AM), https://www.news18.com/news/india/courts-cant-do-much-its-law-and-order-problem-sc-refuses-to-hear-plea-on-violence-in-jamia-2425595.html.

34 Law Commission of India, *Implementation Of United Nations Convention Against Torture And Other Cruel, Inhuman And Degrading Treatment Or Punishment Through Legislation*, Report No. 273 (Oct. 2017).

the law commission has also annexed a draft prevention of torture bill[35] which could help legislature in forming a new law. Therefore, it could be anticipated and wished that parliament possibly will bring a law in future to prevent torture in this vibrant democracy in order to protect the rights of most vulnerable in the society.

CONCLUSION

This judgment of the Sri Lankan Supreme Court may not be of much significance for the Western democracies. However, in a country like Sri Lanka which has history of torture and war crimes,[36] recognition of constitutional principles and rule of law is a great achievement.

This judgment further brings a new hope that Sri Lanka will now ensure rights to its prisoners and vulnerable. Even though this judgment can be criticized on various grounds but it deserves an appreciation because this judgment has recognized the rights of the prisoners and other constitutional principles. The Court vide this judgment has tried to remind the authorities that even a convicted criminal has a right not to be arbitrarily deprived of his/ her life except in accordance with procedure established by law.

At last the authors will like to conclude by saying that the judges while deciding the case of police brutality should remember the lines of Justice White [U.S. Supreme Court Judge] from the case of *Wolff v. McDonnell* wherein he observed that, *"A prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons."* [37]

35 *Ibid*.

36 *Supra* note 11.

37 *Wolff v. McDonnell*, 418 US 539.