Documents regarding the judgment of the High Court of Negombo in case No. 259/2003 – regarding the torture of Lalith Rajapakse

THE ASIAN HUMAN RIGHTS COMMISSION - HONG KONG

Documents regarding the judgment of the High Court of Negombo in case No. 259/2003 – regarding the torture of Lalith Rajapakse

Asian Human Rights Commission (AHRC)

Asian Human Rights Commission

ISBN 978-962-8314-38-6

AHRC-PUB-015-2008

Published by

Asian Human Rights Commission (AHRC)
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October 2008

Printed by

Clear-Cut Publishing and Printing Co.
A1, 20/F, Fortune Factory Building
40 Lee Chung Street, Chai Wan, Hong Kong

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Introduction

The case of the torture of Lalith Rajapakse took a new turn when the High Court judge of Negombo decided on the 9th October 2008 to acquit the accused on the basis that the case against the accused had not been proved beyond reasonable doubt as required by law. Was the judgement correct?

The documents attached here show that the judgement contains some grave errors on the face of record.

We reproduce here the judgement and an analysis of that judgement in detail for the benefit of all those who are aware of this case and who, over a period of six years have supported the struggle of this torture victim to seek justice.

The documents are self explanatory and the basic issues that arise from this judgement can be found in these documents.

MOON Jeong Ho
Programme Officer
Asian Human Rights Commission
October 21, 2008

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SRI LANKA: An acquittal not based on evidence – HC Negombo case of Lalith Rajapakse

FOR IMMEDIATE RELEASE
AHRC-STM-265-2008
October 15, 2008

A Statement by the Asian Human Rights Commission

The Negombo High Court last week acquitted the accused in a torture case where a Sub Inspector of Police was charged with an offense under the CAT Act (Act No. 22 of 1994) punishable with seven years of rigorous imprisonment. As the basis of acquittal the court stated in the written judgement, "If the suspect was assaulted on the soles of his feet, particularly if he was assaulted for about thirty minutes, there should be severe injuries on the soles of the feet. But the according to the medical report there is no mention of any injuries to the soles of the feet. For the suspect to have been struck on the soles of the feet for thirty minutes without any signs of injury is truly wondrous."

In contrast to this finding by the High Court judge the medical report of the Assistant Judicial Medical Officer (AJMO) Dr. Kumudu Kumari Jooza, stated the feet as injuries no's 9 & 10.

8. Contusion 2 inches x 2 inches on the sole of the left foot;
9. Contusion 2 inches x 1 inch on the sole of the right foot; and….

The AJMO gave detailed evidence on injuries No's 8 & 9 and explained in detail the nature of these injuries and stated categorically that these injuries could not have happened in any other way except by way of assault.

"**Q.** You came to a conclusion on the basis of injury no. 10 and injuries no's 8 & 9?
A. It can be said that this is due to an assault. Injuries no's 8 & 9 which are injuries to the soles of the feet cannot happen in any other way.
Q. Why is that?
A. Having injuries on the soles of the feet like injuries no's 8 & 9 specially, can happen due to assault on the soles of the feet. It can happen also if a person falls from a height to the ground. If it is not like that there is no way for there to be injuries on the soles of the feet.
Q. If a person falls from a height injuries like this can happen?
A. Yes. If you fall from a height there would be bone fractures and accompanying injuries.
Q. Did you observe a fracture of the bones?
A. No.
Q. After examining this patient what is the conclusion you came to?
A. That the injuries are due to an assault.
Q. To come to that conclusion, injuries no's 8 & 9 contributed a lot?
A. Yes."

(From a certified copy of the proceedings).

Therefore the wonder is, not as to how there could be no injuries on the feet despite of a claim of the assault on the soles of the feet, but how the High Court judge failed to read the medical report and see injuries no's 8 & 9 and the AJMO's evidence on this injury. This conclusion of the High Court judge is even more shocking because in the latter part of her judgement she quotes from the medical report all the ten injuries recorded by the AJMO. This included injuries no'

s 8 & 9. Thus the finding of the High Court judge about injuries no's 8 & 9 are in contradiction with the facts recorded in the same judgement.

The State Counsel in this case was Anupama De Silva, Attorney-at-Law. In her lengthy submission she emphasized in very great detail, the content of the medical report and the evidence of the AJMO, as well as two other doctors about these injuries. There is no way for the High Court judge not to be aware of these injuries and the evidence of the doctors, since these submissions were made orally in her presence. If due to the time lapse, she had forgotten this evidence and the submission, she had the written record of the case where the medical report, the doctor's evidence and the oral submission of the State Counsel was recorded. How did she then miss this evidence which is so vital to the offense of torture which was the crime being prosecuted before this judge?

In the submissions by the lawyer for the aggrieved party the medical report was also fully quoted and commented upon. Therefore, reading the lengthy submission made on behalf of the aggrieved party consisting of an analysis of all aspects of the case, including injuries no's 8 & 9, the High Court judge could not have stated that these injuries had not been found in the medical report.

The Defense Counsel, who made his oral submission taking several days of postponements over a period of three to four months, stated to court that there was no record in the medical report about the injuries to the soles of the feet of the torture victim. Did the High Court judge allow herself to be mislead by the submission of the defense counsel whose oral submission falsified the evidence that was before court through statements and documents?

Had the High Court judge come to the only conclusion that she could have come to on the basis of the evidence, that the claim of the torture victim about the assault on his feet was collaborated and confirmed by the medical report and the evidence of the AJMO, there would have been no option for her but to convict the accused.

Thus, it was the result of her finding that no injuries to the soles of the feet of the torture victim, despite of his claims that he was assaulted, lead to the acquittal.

This amounts to a blatant error on the face of record. It has also caused a grave miscarriage of justice to a victim who suffered extremely serious injuries including a brain injury which kept him unconscious for 16 days in hospital. The judgement comes after a trial that lasted six years. Even the UN Human Rights Committee concluded that this particularly trial had been too long and constituted undue delay. The committee held that there was a violation of the victim's fundamental rights under article 2 (3) of the ICCPR (Communication No, 1250/2004). Thus, the torture victim has made every effort to get justice. He also stayed away from his home village in a faraway place for over five years in order to avoid being a victim of threats by the perpetrators of this case. However, due to a blatant mistake regarding the facts, made by the High Court judge he has been deprived of justice.

This is not the only area where the High Court judge has misrepresented the facts in the case. Injury no 10 is a cerebral contusion. Two doctors including a specialist who treated the torture victim during the 16 days when he was semi conscious, stated very clearly that the cerebral contusion caused edema to the brain. According to the evidence of the doctors, this could have occurred either due to a severe assault to the head or due to a viral infection. The doctors very clearly and consistently stated that whether it was due to an assault needs to be considered in the light of the circumstances under which this has happened.

The circumstances of the injury were described by the torture victim in his evidence to court.

"**Q.** What was done after that?
A. I was taken out, books were placed on my head and the books were struck.
Q. How many books were kept?

A. About three books were put on my head and hit. They tied my hands.
Q. How were these books kept?
A. They were simply kept on my head.
Q. How many people hit?
A. Those two persons (the accused police officer and another).
Q. Was hit on the books?
A. Yes.
Q. Then what happened to you?
A. My head became disorientated."

Thus, even on the grave injury of the brain, injury no. 10, the High Court judge completely mislead herself and came to the wrong conclusion because the facts that were placed before her in the trial and were available on the written record were ignored.

What is involved in this case is not merely a wrong judgement but in the very least a case of clear incompetence. In Sri Lanka a High Court is the highest court of first instance regarding criminal trials. High Court judges are expected to have the required qualifications, competence and are expected to act without negligence. All judges are also expected to be fair and impartial.

We urge everyone to write to the Attorney General of Sri Lanka and request him to appeal in this case. He was the prosecutor and the state counsel who prosecuted did an excellent job in this case. It is a now a legal and a moral obligation to appeal in this case and give justice another chance. The AG also has the legal power to appeal from this judgement. The contact details of the Attorney General are as follows:

Mr. Priyasath Dep - Acting Attorney General
Attorney General's Department
Colombo 12
SRI LANKA
Fax: +94 11 2 436 421

The letter written by the AHRC to the Attorney General is attached.

Dear Mr. Dep,

Re: Request for Appeal against the judgement of the High Court judge of Negombo bearing case No. 259/2003, relating to the torture of Sundara Arrachige Lalith Rajapakse

We are writing to request you to appeal from the judgement made by the High Court judge of Negombo on 9th October 2008 acquitting the accused in this case under the CAT Act, Act No 22 of 1994. We are making this request because our perusal of the judgement clearly indicates that the judgement is wrong on the very face of record. In the attached draft appeal we have stated in detail the major grounds on which this judgement needs to be considered as wrong in law and fact.

In fact, it is a very strange judgment because the finding of the judge regarding material facts is contrary to what is in the proceedings. Just to give you one example of the many that are set out in the appeal the learned High Court judge came to the conclusion that the virtual complainant's claim that he was beaten on the soles of his feet cannot be believed because there is nothing to indicate any injuries to his feet in the medical report which was marked P1. In fact, the injuries No. 8 & 9 in the medical report are injuries to the soles of the feet of the virtual complainant and they are:

8. Contusion 2 inches x 2 inches on the sole of the left foot;
9. Contusion 2 inches x 1 inch on the sole of the right foot; and...

The AJMO Dr. Kumudu Kumari Jooza, gave detailed evidence on injuries No's 8 & 9 and explained in detail the nature of these injuries and stated categorically that these injuries could not have happened in any other way except by way of assault. (Kindly see the details of evidence in the draft appeal).

It is a very strange case where the learned judge has not read the

evidence recorded in the proceedings and the documents before coming to a finding that there was no injury to the soles of the victim' s feet.

If the judge came to a finding that there was injury on the soles of the feet of the victim that alone would have sufficed to convict the accused. The conviction was avoided by holding that the evidence of the injury to the soles of the feet of the victim was, in fact, false evidence. This was probably based on the learned High Court judge basing herself on the oral submission of the defense counsel without checking the veracity of the factual information by comparing it with what was, in fact the evidence recorded in the case.

Regarding injury No. 10 which is a brain injury which kept the virtual complainant unconscious for 16 days, which according to the virtual complainant was due to the accused placing books on his head and then beating them with a pole. According to the learned High Court judge the brain injury was probably due to a viral infection and not a result of assault on the head. In fact, the learned High Court judge omits the evidence given on the assault to the head in this manner from the judgement. It is completely contrary to the evidence of three doctors including a specialist who gave evidence on this matter.

There are numerous other errors of fact and law in this judgement which are not on the basis of evidence recorded in the case and which are very contrary to the conclusions that could have been arrived at if these facts were properly narrated in her judgement.

Clearly not at least being accurate on the recording of facts on the basis of the existing record is not mere error of law but in the very least, it implies incompetence. A judge is expected to maintain basic professional standards and the judgement fails in that regard.

The complainant in this case who suffered serious injuries thereafter spent six years pursuing this case despite of extremely serious threats. Out of that six years he spent over five years away from his village in

Kandana, living in Kandy to avoid the pressures which were trying to silence him.

If the case was lost due to a problem of evidence or prosecution that is not a matter that anyone is entitled to complain of. However, when a case is lost on the basis of blatant incompetence and the causing of errors on record by the judge people have a right to request you as the prosecutor to use your right of appeal.

Anupama De Silva, the State Counsel, who prosecuted this case extremely intelligently and bravely knows the details of this case. The aggrieved party also made a long submission consisting of 92 pages (a copy of which is sent herewith) which dealt with all aspects of the case. Had the learned judge read the submissions of the Sate Counsel and that of the aggrieved party instead of relying entirely on the falsified submission of the defense counsel she would not have made the blatant errors that are found in this judgement.

We urge you to consult the state counsel and file an appeal as this is the least that can be done in order to justify your role in prosecuting this case and also to recognise the effort of the complainant and the dangers he has faced, thereby giving justice another chance.

We hope that you will do what is professionally appropriate in terms of the office of the Attorney General under the present circumstances.

Thank you

Yours sincerely,
MOON Jeong Ho
Asian Human Rights Commission

Attached: A copy of the judgement of the High Court judge
The draft appeal of the aggrieved party, and
A copy of the written submission of the aggrieved party.

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The abject failure of the CAT Act - Kishali Pinto Jayawardene - Focus on Rights - The Sunday Times, October 19, 2008

It is now very clear that the Convention Against Torture and other Inhuman and Degrading Punishment Act No 22 of 1994 (the CAT Act) has signally failed in its intent to bring about an improved deterrent regime in regard to practices of torture in Sri Lanka.

As repeatedly pointed out in this column previously, Sri Lanka's High Courts have handed down only three convictions during the fourteen years of the CAT Act's existence. In contrast to this, three acquittals have been entered into while a number of trials are pending. The reason as to why we focus on this vexed issue yet again is that on 9th October 2008, the Negombo High Court delivered the fourth acquittal in terms of the Act in the case of Lalith Rajapaksa. As in the case of the acquittal of Gerald Perera, (again by the Negombo High Court), the acquittal in the case of Lalith Rajapaksa was judicially justified on the basis that the evidence was not sufficient to prove the guilt of the accused beyond all reasonable doubt.

The Rajapaksa Case

Rajapaksa's complaint was that he had been arbitrarily arrested by several police officers, beaten and dragged into a jeep. During his detention, he was subjected to torture for the purposes of obtaining a confession which caused serious injuries. A medical report issued by the National Hospital stated that the "most likely diagnosis alleged to assault due to traumatic encephalitis." He filed a fundamental rights application in the Supreme Court which is still pending. Meanwhile,

the Attorney General indicted a sub-inspector of police implicated in the torture, in terms of the CAT Act. The relevant acquittal handed down by the High Court early this month was in respect of this case.

While it is not the intention in this column to elaborate on the legal grounds of appeal which is a matter within the ambit of the legal process, some egregious discrepancies appear to be evident on a bare reading of the trial documents and the decision itself. For instance, rigorous scrutiny of the decision indicates that though the High Court had come to a conclusion that the medical record did not bear out the allegation by the accused that he had been mercilessly assaulted on the soles of his feet, this is refuted by the fact that injury numbers 8 and 9 on the medical report attests to injuries that were, in fact, explained by the Assistant Medical Judicial Officer in court as having been caused by assault with a blunt instrument.

Judicial assessment of the evidence

Further, the judicial assessment of the evidence seems problematic when evaluated against the evidence in particular, relating to the clear testimony that the victim was fit and healthy before being arrested by the police officers, that he sustained grievous injuries while inside and indeed, the evidence of the accused himself that the victim was taken in a virtually unconscious state to the hospital from the police station, that he had used minimum force in hitting the victim with a pole purportedly in order to prevent the victim from assaulting another policeman and inaccuracies that demonstrated the lack of credibility in the evidence of the accused.

No direct eye witness to torture

Generally, it must be said that examination of judgments relating to acquittals handed down by the High Court under the CAT Act indicate certain problematic features in the legal process. The acquittal of the torturers of Gerald Perera, a worker at the Colombo dockyard (who was tortured to the point of renal failure by officers attached to the Wattala Police Station with, as judicially held by

the Supreme Court, the 'consent and acquiscence' of the officer in charge) is a case in point. A major reason for this acquittal was the lack of direct evidence testifying to the acts of torture being committed by the particular police officers who are indicted, even though the Court accepted the fact that Gerald Perera was a hale and healthy man when brought into the police station but had suffered multiple injuries when taken out of the station. (see Republic of Sri Lanka vs Suresh Gunasena and Others, HC Case No 326/2003, Negombo High Court, HC Minutes 02.04.2008).

However, it is inherent in the very act of torture that it will not be committed on a public thoroughfare and with onlookers nearbye. Rather, torture is commited in secret and in hidden places. In the circumstances, a judicial insistence on direct eye witness evidence of torture practices is clearly problematic and defeats the very intent and objective of the CAT Act.

Judicial understanding of the CAT Act

Problems with a lack of clear judicial understanding of the objective and purpose of the CAT Act also emerge from analysis of the relevant judicial decisions; Thus, in one acquittal, the High Court judge concludes as follows; "Even though it appears that when considering the number of injuries, the accused has used some force beyond that which was necesarry, that does not prove the charge against the accused in the case."(see Republic of Sri Lanka vs Havahandi Garwin Premalal Silva Case No. 444/2005 (HC), High Court of Kalutara, High Court Minutes, 19.10.2006. This decision is being appealed against to the Court of Appeal).

Another useless law

The CAT Act was brought to the country's statute books in 1994 with ambitious hopes of proving to be an effective legal deterrent to torture practices being perpetrated by custodial officers. However, copuled with the long delays in pending trials, lack of prosecutorial will to bring about convictions and manifest judicial reluctance to

convict, it is evident that the legislation itself has lost almost all if not most of its force. Unfortunately, it has now been relegated to yet another useless law in Sri Lanka.

4

A copy of the original Medical Report of the torture victim

4 copy

P6

Health 1135
(F*S., T. & E.) 04/76

අධිකරණ - වෛද්‍ය වාර්තාව

சட்ட வைத்திய அறிக்கை

MEDICO - LEGAL REPORT

(Diagramatic Form 1135 A may be used to illustrate injuries and inserted into this report when necessary)

Serial No. ....

Medico-Legal Form No. 407/02

Magistrate's Court ....

Date of Issue. 20.04.2002

Case No. ....

Police Station Hospital police post

Date of Trial ....

A. IDENTIFICATION

Full Name Lalith Rajapaksha", (From BHT)

Age 24 years (From BHT)

Female/ Male Male

Address ....

Place of examination Ward No: 49, NHSL

Date 28.04.2002

Time 10.00a.m.

Date of admission to hospital 20.04.2002

Time ....

Date of Discharge ....

Bed Head Ticket No. S/554609

B. SHORT HISTORY GIVEN BY PATIENT

From the Bed Head Ticket.

Patient had been transferred on 20.04.2002 from Teaching Hospital Colombo North in semicouscious state with history of police assault on 19.04.2002.

compatible – ගැලපෙන

(2)

C. INJURIES

අංකය No.	තුවාලයේ ස්වභාවය, ප්‍රමාණය, හැඩය, පිහිටි සහ ස්ථානය Nature, size, shape, disposition and site of injury
	Patent unconscious.
	Average build with fairly good nutritional states.
	Injuries :-
1).	Healing scab abrasion 2"x1" on the right scapular region.
2).	Healing scab abrasion 1"x1" on the back of the right elbow.
3).	Healing scab abrasion 2"x1,1/2" on the front of the right chest.
4).	Contusion 2"x3" on the back of the left hand.
5).	Contusion 2"x3" on the front of the left forearm.
6).	Contusion 1"x1,1/2" on the medial side of the left hand.
7).	Contusion 1"x2" on the lateral side of the left hand.
8).	Contusion 2"x2" on the sole of the left foot.
9).	Contusion 2"x1" on the sole of the right foot.
10).	? Cerebral contusion following assault is the most likely diagnosis, but it is difficult to the differenciate from Encephalitis. Most likely diagnosis is alelged to assault due to Traumatic Encephalitis.

පරීක්ෂණ (එක්ස්රේ ආදිය)
SPECIAL INVESTIGATIONS (X-RAY ETC.)

D. OPINION

1. නිරෝගී නොවන තුවාල (අංක) Non-grievous injuries (Nos.) (1) to (9)

2. නිරෝගී තුවාල (අංක) Grievous injuries (Nos.)	දණ්ඩ නීති සංග්‍රහයේ 311 වගන්තිය යටතේ අදාළ කොටස 311 ஆம் பிரிவுத் தண்டச் சட்டப் பகுதி Limb under section 311 of Penal Code	විස්තරාත්මක පරිහරණ සටහනක් නම් விளக்கக் குறிப்புகள் இருந்தால் Explanatory remarks, if any
(10)	(a)	Any injury, which endangers life.

(3)

4. තුවාල සිදුවී ඇති අයුරු
காயங்கள் ஏற்பட்ட முறை—
Injuries caused by—

(a) Blunt Weapon—Nos. .... (1) - (10)

(b) Sharp cutting instrument .... None

Cut—Nos. .... None

Stab—Nos. .... None

(c) Firearms—Nos. .... None

(d) Burns—Nos. .... None

(e) Bite marks—Nos. .... None

Further Notices.—(Consider self-inflictions, caused by friendly hand suggestive of fall and whether injuries are compatible with history given by injured.)

---

5. Patient smelling of liquor .... No

Under influence of liquor .... No

Name of Medical Officer and Qualifications .... Dr.(Mrs) K.K.Joozar

MBBS (S.L.)

Designation .... Asst.J.M.O.Colombo

Station .... Office of the J.M.C.Colombo

Date of despatch of Report 12/06/2012

DR Mrs K. K. JOOZA'
MBBS (SRI LANKA) Reg No
Asst Judicial Medical Off
COLOMBO.

True COPY

W. R... SANJEEWA, LL.B (Cel)
Attorney-at-Law

5

An English translation of the original Sinhala judgment

In the Provincial High Court of the Negombo

Democratic -ocialistic Republic of Sri Lanka

Complainant

vs.

1. Warnakulasuriya Mahavaduge
Rohan Prasanga Peiris
Accused

Negombo High Court No
H.C. 259/2003
Before Ms. J.H.T.U.M.P. Tennakoon High Court Judge - Negombo
E.A.P. Kusumalatha Stenographer.
Case No H.C. 259/2003
Date 09.10.2008

Judgment

The Honorable Attorney General has presented the following indictment against the Accused Waranakulasuriya Mahawaduge Rohan Prasanga Peris

Indictment

During the time period between 18.April 2002 and 19 April 2002, in Kadana within the jurisdiction of this court you along with other

persons unknown to the prosecution, tortured Sundara Arachchige Lalith Rajapaksha who had been taken into police custody regarding a theft with the intention of obtaining some information regarding the said act or to frighten him and thereby you have committed an offence under Section 32 of the Penal Code read with and punishable under Section 2(1) of the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994.

Section 12 (2) of this Act is the interpretation section. Section 2(1) is as follows

> "Any person who tortures any other person shall be guilty of an offence under this Act.

Cruel treatment has been defined in the interpretation sections as follows. "torture" with its grammatical variations and cognate expressions means any act which causes severe pain, whether physical or mental, to any other person,

(a) being one of the following acts causing a person severe physical or mental pain
    (i) obtaining from a person or a third person, any information or confession
    (ii) punishing a person for any act which he has committed, or is suspected of having committed
    (iii) intimidating or coercing some person or some third person

(b) intimidating or coercing such other person or a third person; or done for any reason based on discrimination, and being in every case, an act which is done by, or at the instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity.

When considering the above charge against the Accused Suspect, the first things to be considered is if according to the definition clause the Accused is a Public officer. Section 12 defines a "Public Officer"

and states that an public officer is as an employee whose salary is paid by the Republic. This fact has been proved by the evidence of the Plaintiff. In this case it has been factually established that the Accused Suspect has been serving as a reserve police inspector at the Kadana Police Station during the time of this incident. Accordingly it is not necessary to further establish that the Accused Suspect was a public officer.

It is stated that the person subject to physical and mental harassment was the first witness of the Prosecution a person named Sundara Arachchige Lalith Rajapaksha. This person has given evidence before court. In this evidence he mentions the fact that this unfortunate incident happened on 18 April 2004 [should have been 18 April 2002]. Evidence has been given that on the 18 April 2004 [should have been 18 April 2004] the person named Lalith Rajapaksha worked at the Badagamuwa timber work shop and since the next day he had to go with a person named Nimal, he spent that night at Nimals house. Further evidence was given that previously too he had spent the night at Nimals house in this manner. Evidence has been given that on the next day at about 2.00 a.m. some one had called stating "Police have come open the door", and Nimal's wife had opened the door. He has given evidence that on that occasion there were 4 police officers dressed in uniform. The officers had a torch. Nimal has given evidence that inside his house there was a lighted lamp. Lalith Rajapaksha has given evidence that when they asked Nimal's wife if Lalith Rajapaksha was there mentioning his name, he came forward asking "why". It was said that in that instance he was assaulted. Evidence was given that when questioned "why are you hitting" the answer given was that because he had stolen. Giving further evidence he said that two persons assaulted him, and evidence was given that in the first instance he was kicked. Evidence was given that the kick had struck his forehead. Evidence was given that a handle of the axe without its blade which was in the verandah of Nimal's house was used to assault him on his back. Evidence was given that after assaulting 3, 4 times in this manner, his hands were tied in front and he was taken to the road and put into the jeep that was parked there. Evidence was given that after that they went in

search of another person named Lalith to his house and got to know that the said person was not in the house from his parents. Evidence has been given that after that Lalith Rajapaksha was taken to the Kadana Police Station and put into the cell, by that time it was early morning of the 19th. It is stated that when he was put into the cell there were another 4 or 5 persons. It was said in the evidence that on the 19th Lalith Rajapaksa's friends came to obtain bail but the police refused bail.

According to the evidence of this witness on the next day one by one those that were in the cell were taken away. Evidence was given that when they were taken in that manner they would have been assaulted and that he heard them shouting don't assault. However the witness had not seen any of this. Afterwards on one occasion in the same way Lalith Rajapaksha was taken out of the cell. Giving evidence on this he said that there was another room and that they were taken in this manner to that room. Distinct evidence regarding this room has been given. Evidence was given that there were poles in the room and two tables. There is evidence that Lalith Rajapaksha was taken into that room and his hands and legs were tied and a pole passed through them and kept between the table. It is stated that after that two persons from either side hit his soles with two poles. While he was assaulted in this manner he was questioned if he had stolen. Evidence has been given that in this manner he was assaulted for a considerable a time, after which he was untied and put into the cell and ordered to jump up. Evidence was given that since he was assaulted on his soles, he was unable to keep his feet on the floor and jump and as such he kept on falling while jumping.

Further evidence was given regarding this assault and it was stated that he was taken out of the cell and taken outside and three books were kept on his head and assaulted, and at that time his hands were tied. Giving evidence with regard to this assault he has said that his 'head went like mad'. Evidence was given that afterwards Lalith Rajapaksha was hung from his two fingers and assaulted all over his back of his body while questioning him with regard to the theft.

Evidence was given that he lost consciousness and when he gained consciousness he was in the National Hospital and that he regained consciousness after about 16 days. The witness has accepted that he has given a statement to the Criminal Investigation Department with regard to this assault. He has taken part in an identification parade after he got well and left the hospital. Further evidence was given that the Respondent was one of the four officers who came to take him into custody and was one of the two officers who had assaulted him at the police station and at Nimal's house. Evidence was given that it was this Respondent that had tied his hands and assaulted him and kept the books on his head and assaulted and that he was not wearing uniform at that time. Further as stated at the end of his evidence in chief he was brought to the police station on the 19th at about 2.00 in the morning.

Further evidence was given that he did not commit any theft and that he did not know where this theft took place.

1. **What has to be inquired first by me are whether as stated in his preliminary evidence the Complainant in this case Lalith Rajapaksha was subject to the assault of the Accused? Is there sufficient evidence educed by the Prosecution to prove this fact beyond reasonable doubt?**

As revealed from the evidence of Lalith Rajapaksha, he had first been subject to this Accused's assault at Nimal's house where he was taken into custody. Evidence has been given that at the time of this assault Nimal and his wife were in that house. Lalith Rajapaksha has clearly given evidence under oath to court that he was kicked saying "You have stolen" and after that a he was hit on his back with a handle of a axe without its blade which was kept in the verandah. However Nimal or his wife has not given evidence to corroborate this evidence. An officer from the Criminal Investigation Department who had conducted the investigations has given evidence in court. From his evidence it has been revealed that a statement has been recorded from Nimal. In fact if the assault took place in Nimal's house the 2 independent witnesses who would know best about this fact is Nimal

and his wife. However they have not been called as witnesses. In this regard the defense has argued that Nimal and his wife were not called as witnesses because if there were called it would have been detrimental to the prosecution. With regard to this the defense has also submitted these facts in their submission. Having so submitted, I have focused my attention to Section 114 (f) Evidence Ordinance. This section is as follows.

Sec 114 (f)

If evidence which is not produced, but if produced it could be detrimental to the person that prevents it.

In that case has the prosecution not called this evidence because it was detrimental evidence to the prosecution. Before saying anything with regard to that I focus attention on the medical report forwarded with regard to Lalith Rajapaksha.

The doctor in this Judicial Medical Officers Report has observed 10 injuries. Out of this 10 injuries not even one is stated to be on this witnesses fore head or on his back. If Lalith Rajapaksha was assaulted on his back with a handle of the axe without a blade, at least he should have had a contusion on the back. If he was kicked on his fore head, the fore head also should have a contusion or at least an abrasion injury. Since there is evidence that these officers were wearing their uniforms it is clear that they were wearing shoes. If that was so it is clear that there should have been at least a abrasion injury on his fore head. However there is no evidence that there was any such injury.

With regard to this Nimal or Nimal's wife from whose house Lalith Rajapaksha was taken into custody has not given evidence. If they gave evidence with regard to this assault it would have been eye witness evidence. However such evidence has not been led before me. Accordingly the factor that is apparent is that the evidence given by Lalith Rajapaksha that two police officers assault him at Nimal's house is not corroborated.

After the person named Lalith Rajapaksha had recovered and was in prison on 17.05.2002 he was produced before the additional Magistrate Wattala. There he made a request and gave a statement regarding the torture and inhuman assault by the police. In that statement he has said that the police had caught him while he was at home and that in that instance there was no one else in the house. Thereafter he was assaulted while being taken. In that instance the witness has made no statement with regard to being kicked. However he has said that he was assaulted with the handle of an axe after the blade was removed. In this court the witness gave evidence that in the verandah there was an axe from which the blade had been removed and that he was assaulted with it. Further by that statements he has given evidence that he was assaulted on his head, shoulders, and cheeks. However when giving evidence in this court he has stated that he was assaulted only on his fore head and on his back. Therefore a doubt arises if the evidence given in this court is true.

II Was Lalith Rajapaksha assaulted by the said Accused in the police station?

According to the evidence in chief given by Lalith Rajapaksha he was taken twice out of the cell and assaulted. It was stated that in the first instance he was taken to a room where there were poles and two tables, his hands and legs were tied and a pole passed through them and raised and kept on a table, after that his soles were hit with two poles by two persons from either side. With this regard Lalith Rajapaksha has stated in his cross examination that out of the persons in the cell he was the third to be taken out. However with regard to this Lalith Rajapaksha in his statement to the Criminal Investigation Department has stated that he was the fifth to be taken out of those in the cell. This contradiction has been produced marked as "V.4. A". With regard to his further evidence was given that his two hands and two legs were tied and he was hung by a pole which was on top of the table, and afterwards he was assaulted with poles for about an half an hour. He has said that he was assaulted with poles on his soles. In this manner if the accused [this should have been the complainant] was assaulted on his soles specially for half an hour his soles should

have been seriously injured. However according to the medical report there is no mention of any injury on the soles. This is a surprising fact.

Another fact told by Lalith Rajapaksha in his evidence is that thereafter he was again brought and put into the cell and was ordered to jump up It was stated that in this instance he continuously fell while jumping.

Giving further evidence he has stated that he was assaulted again on the following day That is on the second day. Evidence was given that in that instance he was assaulted on his back and he was tied to a pillar and books were kept on his head and assaulted. However in this person's statement to the Criminal Information Department there is nothing stated with regard to an assault on the second day .....In that statement there is no such thing said. This has been marked as a deficiency by the Accused. The witness in his evidence in chief stated that he was hung by his two fingers on a roof beam, nothing of this is mentioned in the statement made to the Criminal Information Department or in the statement made at the Magistrates Court.

To corroborate Lalith's evidence the Plaintiffs called Manjula who gave evidence in court that at the time Lalith was taken into custody he was in the jeep. Evidence was given that Lalith was not assaulted in the jeep but he was brought with his hands and legs tied. However Lalith when giving evidence in court has not given evidence that after he was taken into custody he was taken to the jeep with his hands and legs tied. This fact was for the first time revealed in the evidence of Manjula. In further evidence he has stated that about half an hour after Lalith was put into the cell he was taken out and he heard the sound of him being assaulted. Evidence was given that he was again brought back put into the cell, and he was sprawled lifelessly in the cell. To the question that how he knew that Lalith Rajapaksha was assaulted he has answered that when he left the cell he went well and when he came back his soles were blue and he was in a situation where he could not walk. Evidence has been given that he came back

limping and fell down as if lifeless. Further evidence has been given that he talked to him and applied sidharlepa (balm). The problem that comes up here is how the cell where suspects were kept in the Kadana Police station got sidharlepa. This witness further stated in evidence that Lalith Rajapaksha slept in the same place till morning, and even when food was brought and he was called his head fell down lifelessly. Evidence was given that it was not possible to feed him since the food flowed out from the side of the mouth. Evidence was given that on the next day morning he was taken to the hospital. However when this witness was further questioned he gave evidence that he did not see Lalith being assaulted, and that at no time did he hear Lalith shouting. Giving further evidence he stated that he had seen no injury on Lalith Rajapaksha's body. However he gave evidence that his lower abdomen, face and body were bluish and showed contusions. Evidence was given that he went walking and came back limping and in that instance he had no strength even to talk.

Here the factor that the Court must look into is if the evidence that Manjula is giving is in fact true. Inspector of Police Fernando who took the person named Srinath Manjual into custody has given evidence in court.

In his evidence it was revealed that he had taken the person named Srinath Manjula into custody at about 5.30 p.m. on 21 April 2004. At that time Police Inspector Fernando had been on duty at the Kapuwatte temporary check point along the Colombo Road and when examining the vehicles he took suspects into custody. At that time one of the suspects taken into custody was stated to be the person named Srinath Manjula. Evidence was given that on that day when he assumed duty at 2.45 at the road block as usual he signed the day book, these notes have been marked and produced as “F” and the witnesses signature as “F.1”. The Prosecution’s notes with regard to the taking into custody is recorded on 21.4.2002 in page 247, paragraph 161 of the Grave Crimes book. This note is marked as “G” and the witnesses signature is marked as “G.1”.

The Accused giving evidence has stated that the relevant notes had been made regarding the raid on 19.04.2002 in the MOIB Book. Evidence has been given that the note regarding leaving is recorded on page 176 paragraph 156 of that book. The time is stated to have been 22.00 hours. This note has been marked as "A" and the signature of the Accused as "A.1". The person named Lalith Rajapaksha has been taken into custody on that day. The time Lalith Rajapaksha was taken into custody has been recorded as 2.20 hours on 20 April 2002. There is evidence given that when they returned to the police station it was 3.30 hours, accordingly notes were made in the MOIB book. Evidence has been given that on the same book where the leaving was noted the return was also noted and all that happened at the raid. The time 3.30 in the morning, has been marked as "B" on page 176 paragraph 156, of the MOIB Book relating to 20 April 2002. The witnesses signature has been marked as "B.1" in the document marked "B". On that day at 4.00 a.m. the person named Lalith Rajapaksha has been handed over to the Reserve Police. It is stated that on 20 April 2002 at 8.30 hours Lalith Rajapaksha was taken to hospital. The signature on that has been recognized to be that of Reserve Police Constable 8915 Kumaradasa. This note has been marked as "C" and the signature as "C1". When considering this documentary evidence a fact that becomes clear is that when Inspector of Police Fernando took Srinath Manjula into custody at about 5.30 hours on 21 April 2002, and handed him over to the reserve, the person named Lalith Rajapaksha was in hospital. In that case the evidence given by Srinath Manjula that Lalith Rajapaksha and Srinath Manjula were in the police cell on the same night cannot be accepted. Accordingly the evidence given with regard to the assault of Lalith Rajapaksha, the bathing of Lalith Rajapaksha, and that Srinath Manjula also went with him to the hospital, cannot be accepted. Further the fact that Srinath Manjula was in the jeep when Lalith was taken into custody and taken to the jeep cannot be accepted as true facts. Accordingly it is my conclusion that Manjula's evidence is not true evidence.

When was Lalith Rajapaksha taken into custody? At what place and what time was he taken into custody?

Lalith Rajapaksha has given evidence in this court that on 18 April 2002 he worked in the timber work shop and since he had to go the next day with Nimal for a job he stayed the night over at Nimal's. Evidence has been given that on the 19th at about 2.00, four officers dressed in uniform had arrived and calling his name had assaulted him and taken into custody. In the fundamental rights application filed on behalf of Lalith Rajapaksha (marked as "V.1" by the Accused) it is stated that on 18thApril 2002 when he was sleeping the police officers had pulled him by his hair and thrown him on the ground, assaulted his head with a shoe, and taken out of the house. However in the High Court evidence there is no evidence that he was pulled by his head in the house and that he was assaulted by a shoe on the head. He has clearly stated that his name was called and he came forward inquiring why. Accordingly there is contradictions evidence in the affidavit marked "V.1" where facts were sworn under oath and the sworn evidence given in this court. On 17 May 2002, Lalith Rajapaksha has made a statement before the Magistrate in the Wattala Magistrates Court. In that statement he has stated that at about 8.00 in the evening while he was in his house, the police took him into custody from his house, this contradictory evidence has been marked as "V.2. a" Accordingly the fact that becomes clear is that contradictory evidence has been given with regard to the taking of the person called Lailth Rajapaksha into custody, the time and place of taking into custody. Sub Inspector of Police Narasinghe Arachchi of the Criminal Information Department has been called to give evidence on behalf of the prosecution. Evidence has been given according to the MOIB book in relation to 20 April 2002 page 176 and paragraph 156. Evidence has been led that Lalith was imprisoned at 2.20 hours and at 8.30 hours he was taken to hospital. When examining these documentary evidence the next factor that becomes clear is that the person named Lalith Rajapaksha was taken into custody on 20 April 2002 early in the morning, and on the same day at 8.30 hours he was warded in hospital. Another fact that becomes clear then is that the evidence given by Lalith Rajapaksha in his evidence in chief that he was taken into custody at dawn on the 19th cannot be accepted.

Sub Inspector of Police Narasinghe Arachchi has been called to give evidence on behalf of the prosecution. He is the police officer attached to the Criminal Information Department investigating this incident. In his investigation it was revealed that the person called Lalith Rajapaksha who had been taken into custody by Sub Inspector Peiris was detained in the cell of the Kandana Police at 2.20 hours on 20 April 2002. Accordingly the fact that is established is that Lalith Rajapaksha has been taken into custody in the early morning of 20th April 2002. Giving further evidence in court Sub Inspector of Police Narasinghe Arachchi stated that he recorded the statements of those prisoners in the cell on that day, and from that it was revealed that Lalith Rajapaksha was in the cell on the night of 18 and on the night of 19 he was assaulted. However from these prisoners only the person named Srinath Manjula was called to given evidence to corroborate these facts. Other witnesses have not given evidence in court. It must be stated that due to the contradictions in Srinath Manjula's evidence and the lack of dependability of his evidence, this cannot be taken as a corroborative evidence.

Evidence has been given in court by Elaris a witness called by the prosecution who stated in evidence that on the night of 19th April Lailth stayed at the house of the person called Nimal at Batagama Road in Kapuwatte. From this too it is established that Lalith was taken into custody not on 19 April but on 20 April. If that is so it is established that Lalith was not subject to any assault whatsoever on the night of 19 April.

On 27.09.2002 Srinath Manjula has made a statement to the police. In this statement what is recorded is that on the day after the Sinhala New Year in 2002 Manjula and his elder brother were taken into custody under suspicion. Lalith Rajapaksha was brought to the police station 4 days after that around 11.00 to 12.00 in the night. This contradiction is marked as “V.7.d”. The documentary evidence establishes that when Lalith Rajapaksha was brought to the police station and handed over it was a time early in the morning. Accordingly it is difficult to accept the evidence given by Manjula in court.

There is evidence that a Fundamental Rights petition has been filed in the Supreme Court on behalf of the person of Lalith Rajapaksha. This F.R Case No SCFR 267/02 has been filed by a lawyer on behalf of Lalith Rajapaksha. In that affidavit it is stated that on 18 April 2002 at about 10.00 p.m. several police officers attached to the Kadana police came and one of the police officers assaulted him on his fore head with a shoe and took him into custody. In that instance Respondents named as 02 and 03, the accused of this case and another police officer was there. As stated by Lalith Rajapaksha in evidence in this court, he was taken into custody not at 10.00 p.m. of 18 April 2002. Accordingly the facts stated in the affidavit "V.3" is contrary to the evidence. The facts are stated in the same manner in the "V.4" affidavit which is connected to the "V.3" petition. Questions were asked from Lalith Rajapaksha on the time in the petition filed in the Supreme Court "V.3" and the affidavit. He states with certainty that he was taken into custody at 2.00 in the morning. He has further stated in that affidavit that while he was sleeping a group of police officers pulled him by his hair and threw him on the floor and assaulted him on his head with a shoe and took him out of the house. However Lalith Rajapaksha has not accepted any thing like that when giving evidence in this court. He has repeatedly stated in court that as a result of his name being called he came to the front asking why. Accordingly it has been established that Lalith Rajapaksha was taken into custody from Nimal' s house on 20.04.2002 at 2.20 hours.

Was Lalith Rajapaksha admitted to hospital as a result of the injuries sustained in the assault or due to any other health condition?

The Assistant Judicial Medical Officer Colombo Mrs. Joozar has been called as witness by the Plaintiff. This lady medical doctor' s medical knowledge, specialist qualifications and expertise was not disputed by the Accused. It has been marked as admission under Section 420 of the Criminal Procedure Code. Evidence has been given that the person named Lalith Rajapaksha was examined by the witness on 28 April 2002 in ward No. 49 of the National Hospital.

Evidence was given that this patient was a person transferred from the Ragama Hospital to the National Hospital. It has been accepted that the bed ticket relevant to this patient is S 554609. According to it the patient was admitted to hospital on 20 April 2002. The lady doctor has not been able to acquire any information with regard to the patient or his case history. The reason she has set out is that the patient was senseless. Lalith Rajapaksha's Judicial Medical Report has been produced marked as "P.1". A fact that becomes clear from this Medical Report is that even the patient's name and brief medical history has been obtained from the bed ticket. From this lady doctors evidence it is revealed that 9 external injuries were observed. These injuries are as follows.

1. Healing scab abrasion 2 inches x 3 inches on the right scapular region;
2. Healing scab abrasion 1 inch x 1 inch on the back of the right elbow;
3. Healing scab abrasion 2 inches x 1 1/2 inches on the front of the right chest;
4. Contusion 2 inches x 3 inches on the back of the left hand;
5. Contusion 2 inches x 3 inches on the front of the left forearm;
6. Contusion 1 inch x 1 1/2 inches on the medical side of the left hand;
7. Contusion 1 inch x 2 inches on the lateral side of the left hand;
8. Contusion 2 inches x 2 inches on the sole of the left foot;
9. Contusion 2 inches x 1 inch on the sole of the right foot ; and,

In addition to these there is evidence of a contusion in the brain. Evidence was given that this was revealed by a C.T. scan examination. However the lady doctor has not observed any injury. The C.T. Scan examination has been done not by this doctor. This health condition has been described as "encephalitis". The witness giving evidence with regard to this said that encephalitis is caused by a germ entering the brain and he was senseless because of this.

When this witness was cross examined, questions with regard to the condition of encephalitis was asked from her. She has given evidence

that this condition of encephalitis could come about in two ways. She has given evidence that the condition of encephalitis can come about because of a germ entering the brain and rarely it can come about by being assaulted. She has given evidence that out of the injuries observed in the patient, injuries no 1 – 9 are not serious injuries, the contusion condition observed on the brain by the CT scan is serious. Before this witness examined the patient Dr. Siva Kumaran had examined the patient.

Dr. Siva Kumaran has given evidence in court. Lalith Rajapaksha had received treatment under the supervision of Dr. Sivakumaran at the National Hospital Colombo. The Hospital card on the admission to hospital has been produced marked as "Y". At first Lalith Rajapaksha was admitted to ward No 72 of the National Hospital. But after it was concluded that the patient does not need to undergo surgery he was transferred to Ward No 55. After that he was transferred to Ward No 49. Ward No 49 comes under the supervision of Dr. Sivakumaran. Lalith Rajapaksha was admitted to ward No 49 on 01st May. Evidence has been given that by that time he was senseless. Evidence has been given that on the day the patient was admitted to the National hospital it had been observed that he has been semi conscious. This evidence has been given in respect of his bed ticket. Dr. Sivakumaran giving evidence to court stated that though he could talk, when he was questioned as to what happened he could not tell anything even though he attempted to do so. Dr. Sivakumaran had treated Lalith Rajapaksha for 10 or 11 days. In that time it was revealed that there was some weakness in his nerves. Giving further evidence this witness stated that the person named Lalith Rajapaksha had fever and he was semi conscious and that he was not aware of anything. Evidence was given that there was no awareness of earlier incidents. In further evidence he revealed that the patient was observed with a condition of the brain being swollen. The witness had diagnosed the patient with signs of encephalitis that is a tightening in the neck, falling asleep, not being fully conscious or unconscious, epilepsy and fits. Evidence has been given that in such a patient the fingers fall downwards or are raised. Evidence was given that this reveals that the patient's brain has in some way been

affected . The C.T. Scan examination had shown that there was no necessity for brain surgery. However it observed the swelling on the brain. Further evidence was given by this witness who stated that this condition of encephalitis could come about as a result of an assault. Evidence was given that the same symptoms of the illness can be seen by an assault on the head or by a virus entering. In that case the court will have to decide on evidence whether this person named Lalith Rajapaksha got this medical affliction encephalitis or whether he got this symptoms as a result of an assault.

When Dr. Siva Kumara was giving evidence in court the following questions were asked from him. Can a person with a medical history of an assault on a head and police assault be said to be suffering rumetic encephalitis condition in his braim.

The Doctor stated that with regard to that the medical history must be examined. The medical history has been marked as "Y.2". According to the medical history "Y.2" and the Judicial Medical Record prepared by Dr. Mrs Juser and marked as "P.1", it is stated in the following manner in the small section called the medical history given by the patient. The patient was transferred from the Colombo North Teaching Hospital on 20 April 2002 to the National Hospital. It is stated that at that time the patient was semi conscious and it was in connection to a police assault of 19 April 2002. However this has been taken from the bed ticket.

The problem that arises here is that only on this short medical history can it be accepted that the patient was assaulted by the police. We know the evidential value of the short history given by the patient is only as secondary evidence. This is because the patient himself has on an occasion told of his medical history to the doctor. Here the patient has not told anything with regard to his medical history to Dr. Mrs. Juser. Evidence has been provided by the medical report itself that he was semi conscious at that time. In the same manner it has been reveled from the evidence given in court by Mrs. Juser and the evidence of Dr. Sivakumaran who examined the patient in ward 49 of the National Hospital on 01 May, that by 1st May the Patient

was not in a position to state something and was in a semi conscious state. Dr. Sivakumaran's evidence further revealed that even by 12 May 2002, Lalith Rajapaksha was a patient who had difficulty in talking. There is evidence that he was stuttering. This patient who was not in his senses was referred for physio therapy on 9th May 2002 to enable him to walk. Accordingly the fact that becomes clear is that according to the medical history given in "P.1", it is not possible for Court to conclude that this health condition was brought about by the police assault.

Further questioning Dr. Sivakumaran it has been asked as follows.

Q. By keeping three books on his head and assaulting in some manner, can a sickness be caused to the brain as a result of an assault on the head?

A. This instance the sickness caused to the brain is very serious. Huge changes have taken place. It is difficult to give a decision. It can be done only by a specialist Neurologist.

Considering this situation the court hoped to get the help of specialist Neuro Surgeon of the Colombo National Hospital Dr. Sunil Perera but did not succeed.

When Dr. Sivakumaran was being cross examined, questions regarding the medical history was raised. He had stated that the medical history was obtained from a relative of the patient. Lalith Rajapaksha was first admitted to the Ragama Teaching Hospital. When this doctor was asked his opinion regarding the illness, he had stated that this illness can happen on an occasion when the head is severely assaulted. In such an instance there would be a loss of consciousness as a result of continuously assaulting the head this illness can happen. However in this case this condition that is, if this medical condition happened as a result of an assault, has to be decided by court after considering other independent evidence produced.

Srinath Manjula is the witness called by Lalith Rajapaksha to corroborate the evidence given by him in court regarding the assault on him. The evidence given by him in court cannot be accepted as correct and true. Based on these facts my conclusion is that it has not been proved beyond reasonably doubt that Lalith Rajapaksha who was taken into custody was treated in a cruel and inhumanly manner by the accused.

The prosecution has called a person called Elaris who is the grandfather of Lalith Rajapaksha's to give evidence. This witness had seen Lalith Rajapaksha being taken to be admitted to hospital. Regarding that instance he states that Lalith Rajapaksha was lying unconscious on the floor and when he was spoken to he did not respond. Evidence was given that he was taken by two police officers who put their hands under his arms and carried him, his neck was bent to the front. My conclusion is that the reason for this condition is encephalitis.

What is the onus of proving a criminal case

Every criminal case has to be proved beyond reasonable doubt by the prosecution. This is clearly stated in the case of Queen vs. Geekiyanage Don Jayaratna. Until a criminal case is proved beyond a reasonable doubt the Accused is considered a completely innocent person. This is the golden theory that runs through the whole of the criminal law in Sri Lanka. In the case of Don Gunaratne proof beyond reasonable doubt has been discussed at length. If a doubt arises in the mind of a reasonable and prudent (intelligent) man then the benefit of that doubt should always be given to the accused. When examining the evidence presented in this case when comparing and contrasting the evidence presented in this case it is clear that evidence is contradictory to each other and the aforesaid benefit of the doubt arising from the said contradictory evidence should be given to the Accused. In the evidence given by Lalith Rajapaksha in court the evidence adduced is in a manner that the credibility of his evidence breaks down. There has been a Fundamental Rights application 267/02 in the Supreme Court filed on his behalf. The

accused has been asked whether he advised any lawyer to file this Fundamental Rights case. He has stated "no". Thereafter he had been questioned again in the following manner.

Q. Now think well and answer. After you went to Kandy did you give any instructions to a lawyer to institute an action at the human rights.

A. No.

The Defense has marked as "V.1" an affidavit said to be signed by this witness. In that affidavit an Attorney-at-law named Nirmala David has signed as a Commissioner of Oaths. In the jurat section of the said affidavit the said lady Commissioner for Oaths has attested the swearing and signing. However Lalith Rajapaksha has clearly stated that there was no such lady lawyer at the time the document "V.1" was signed. On further questioning he has stated in evidence that he signed documents and there were two lawyers present but no lady lawyer was present. Accordingly it is not possible to convict the Accused Suspect accepting the evidence given by Lalith Rajapaksha as his evidence has not been corroborated by other independent evidence and the indictments against the Accused have not been proved beyond reasonable doubts. Accordingly it is very clear fact that there is insufficient evidence adduced before this court to prove the case of the prosecution. Further accordingly it is established that the prosecution case is not proved beyond reasonable doubts.

Taking the said facts into consideration, I find the Accused Suspect not guilty of the indictment raised against him and acquit and discharge the Accused Suspect.

Signed by

(J.M.T.M.P.U. Thennakoon)

High Court Judge

Negombo

09.10.2008.

6

Grounds on which this judgement can be appealed from

1. The facts relating to charges

The accused respondent, Warakulsuriya Mahawaduge Roshan Prasanga Peiris, was charged before the Negombo High Court for committing an offense under section 2 (1) of the Convention against torture and other cruel and inhuman act, Act No. 22 of 1994 by torturing the virtual complainant appellant on or about 18th -19th April 2002 for the purpose of obtaining some information regarding an act he was supposed to have done or for the purpose of intimidating him.

2. The Trial

2.a The trial in the case started on xxxdatexxx and ended on xxxdatexxx and the judgement was delivered on the 9th October, 2008 where the learned High Court judge acquitted the accused.

2.b The following witnesses gave evidence on behalf of the prosecution: the virtual complainant, Sundara Arrachige Lalith Rajapakse; Ranaweka Arrachige Alarus Alwis; Sub Inspector Sagara Nilantha Karasinghe Arrachi from the Criminal Investigation Division; Kasipillai Srinath Manula; Kumudu Kumari Jooza, Assistant Judicial Medical Officer; Negamuni Herbet Mendes Abey Gunawardene, OIC Police Station Kandana; Dr. Bandula Chandranath Wijesiriwardene; Dr. Subharatnam Shivakumaran and Widiandan Amuda, a translator of the High Court.

2.c The Learned Judge of the High Court called for the defense to lead its evidence: The following witnesses gave evidence for the defense: Warakulsuriya Mahawaduge Roshan Prasanga Peiris; Waranakulasuriya Hector Chaminder Fernando.

2.d Subsequent to the leading of evidence by the defense oral submissions were made to court by the counsels for the prosecution and for the defense and the aggrieved party. Written submissions were also made by the aggrieved party.

2.e The Learned High Court Judge made her judgement on 9.10.2008 and acquitted the accused/respondent on the basis that the prosecution had not proved the case beyond reasonable doubt.

3. The Grounds on which revision of the High Court judgement is sought

3.1 **The learned High Court Judge erred in fact and in law by stating that although the virtual complainant states that he had been assaulted on the soles of his feet for a considerable time, there is nothing in the medical record to record that there were any injuries to the soles of his feet.** In the medical report the injury numbers 8 and 9 are as follows: "8. Contusion 2 inches x 2 inches on the sole of the left foot. 9. Contusion 2 inches x 1 inch on the sole of the right foot." The Assistant Medical Judicial Officer (AJMO) gave evidence in court and explained these two injuries at length and state that these injuries could only have been caused by assault with a blunt instrument.

The relevant portion of the judgement is as follows:

,එසේ පොලුවලින් පහර දුන්නේ යටිපතුල්වලට පමණක්

බවද කියා තිබේ. මේ ආකාරයට චුදිට යටිපතුල්වලට පහර දුන්නේ නම් විශේෂයෙන්ම පැය බාගයක පමණ වේලාවක් පහර දුන්නේ නම් යටිපතුල් දැඩි ලෙස තුමාලවලට ලක්විය යුතුය. එහෙත් වෛද්‍ය වාර්තාවට අනුව යටිපතුල්වල කිසිදු තුවාලයක් තිබුන බවට සඳහන් වන්නේ නැත. එය පුදුම උපදවන කරුණක්ය.,

The translation of this is as follows:

"If the suspect was assaulted on the soles of his feet, particularly if he was assaulted for about thirty minutes, there should be severe injuries on the soles of the feet. But the according to the medical report there is no mention of any injuries to the soles of the feet. For the suspect to have been struck on the soles of the feet for thirty minutes without any signs of injury is truly wondrous."

The evidence of the AJMO regarding the injuries number 8 and 9 are as follows:

,8 වැනි තුවාලය අඟල් 2 ං අඟල් 2 ප්‍රමාණයේ වම් යටිපතුලේ යටි පතුලේ. 9 වැනි තුවාලය තැලීම් තුමාලයක් අඟල් 2 ං අඟල් 1 ප්‍රමාණයේ අකුණු කකුලේ යටි පැත්තේ.,
ඣඣඣඣඣඣඣඣගග
ප්‍ර. ඔබ නිගමනයටකට පැමිණියා 10 වැනි තුවාලය සහ 8,9 තුවාල සම්බන්ධයෙන්.
උ. මේක සාමාන්‍යයෙන් පහරදීමකින් කියා කියන්න පුළුවනි. 8,9 තුවාල යටි පතුල් පැලීම සාමාන්‍යයෙන් වෙන විධියකින් වන්න හැකියාවක් නැහැ.
ප්‍ර. ඇයි ඒ?
උ. යටි පතුල තුවාල වෙන එක, 8,9 ඒ තුවාල විශේෂයෙන් පහර දීමකින් යටිපතුලට තුවාලයක් වෙන්න පුළුවනි. උඩකින් පහලට වැටුනොත් වෙන්න පුළුවනි. එහෙම නැත්නම් සාමාන්‍යයෙන් යටි පතුල තුවාල වෙන්න විධියක් නැහැ.
ප්‍ර. උඩකින් පහලට වැටුනොත් පමණයි මේ වගේ යටි පතුල් තුවාල වෙන්නේ?

උ. එහෙමයි. උඩකින් වැටුනොත් අස්ථි බිඳීමක් සමඟ තුවාල වෙනවා.
ප්‍ර. අස්ථි බිඳීමක් ඔබ නිරීක්ෂණය කලාද?
උ. නැහැ.
ප්‍ර. මේ රෝගියා පරීක්ෂා කිරිමක් කලාට පස්සේ ඔබ ගත් නිගමනය මොකද්ද?
උ. පහර දීමක් සමඟ ආපු තුවාල කියා.
ප්‍ර. ඒ නිගමනයට පැමිණීමට 8,9 තුවාල ගොඩාක් උපකාර වුණා.
උ. එහෙමයි.

The translation of the above transcript is as follows:

"Q. You came to a conclusion on the basis of injury no. 10 and injuries no's 8 & 9?
A. It can be said that this is due to an assault. Injuries no' s 8 & 9 which are injuries to the soles of the feet cannot happen in any other way.
Q. Why is that?
A. Having injuries on the soles of the feet like injuries no's 8 & 9 specially, can happen due to assault on the soles of the feet. It can happen also if a person falls from a height to the ground. If it is not like that there is no way for there to be injuries on the soles of the feet.
Q. If a person falls from a height injuries like this can happen?
A. Yes. If you fall from a height there would be bone fractures and accompanying injuries.
Q. Did you observe a fracture of the bones?
A. No.
Q. After examining this patient what is the conclusion you came to?
A. That the injuries are due to an assault.
Q. To come to that conclusion, injuries no's 8 & 9 contributed a lot?
A. Yes."

3.2 **The learned High Court Judge erred in law in assessing the injury number 10, which was "Cerebral contusion" by not recording the evidence of the virtual complainant, who stated to court in evidence that some books were placed on his head and the books that were on top of his head were beaten down on him with a blunt instrument.** The evidence of the virtual complainant about the beating on the books on his head was as follows:

,ප්‍ර. ඊට පස්සෙ මොනවද කලේ?
උ. ඊටපස්සෙ මාව එළියට අරන් ඔලුවට පොත් තියා ගැහුවා.
ප්‍ර. පොත් කීයක් විතර තිබ්බාද?
උ. පොත් 03 ක් විතර ඔලුව උඩ තියා මට ගැසුවා. ඒඅ ය මගේ අත් දෙක බැන්දා.
ප්‍ර. පොත් කොහොමද තිබුනේ?
උ. පොත් නිකම් ඔලුව උඩ තිබුණා.
ප්‍ර. කී දෙනෙක් ගැසුවාද?
උ. ඒ දෙන්නාම තමයි.
ප්‍ර. පොත් වලට ගැසුවේ?
උ. ඔව්.
ප්‍ර. එතකොට තමාට මොකද වුණේ?
උ. මගේ ඔලුව නිකන් විකාර වෙලා ගියා.,

The translation of this transcript is as follows:

"Q. What was done after that?
A. I was taken out, books were placed on my head and the books were struck.
Q. How many books were kept?
About three books were put on my head and hit. They tied my hands.
Q. How were these books kept?
A. They were simply kept on my head.
Q. How many people hit?
A. Those two persons (the accused police officer and another).

Q. Was hit on the books?
A. Yes.
Q. Then what happened to you?
A. My head became disorientated."

3.3 **The learned High Court Judge erred in law and fact by stating that the virtual complainant did not state in evidence he was brought to the jeep after his hands and feet were tied. In fact, the evidence on record clearly showed that he had made that statement, stating that after being hit three or four times his hands were tied in front with a rope and that he was taken away.**

The portion of the judgement is as follows:

,එහෙත් ලලිත් අධිකරණයේ සාක්ෂි දෙද්දී අත් අඩංගුවට ගැනීමෙන් පසුව ඔහු ජීප් රථයට රැගෙන ආවේ අතපය ගැට ගසා බවට සාක්ෂි දී නැත. එම කරුණ පළමු වරට එලිදරව් වී තිබෙන්නේ මංජුලගේ සාක්ෂියෙන්ය. ,
ඔයැ චදරඑසදබ සබ එයැ ැඩසාැබජැ සී් දෙකකදඉථ
,ප්‍ර. ඊට පස්සෙ කොච්චර වෙලාවක් ගැහුවද?
උ. පාරවල් තුන හතරක් ගහලා ලනුවක් අරගෙන මගේ අත් දෙක බැන්දා.
ප්‍ර. ඒ කොයි පැත්තට තියලද අත් දෙක බැන්දේ?
උ. ඉස්සරහට තියලා.
ප්‍ර. ඊට පස්සෙ?
උ. මාව පාරට අරගෙන ගියා.,

3.4 **The learned High Court Judge erred in fact and law when answering the question which she has posed to herself as to whether Lalith Rajapaksha was beaten by the accused inside the police station without taking into consideration any of the following facts which came out clearly in the evidence:**

3.4.1 The accused very clearly and repeatedly in his evidence that at the time when the virtual

complainant was brought to the police station, he was in a healthy condition and he had no injuries to be seen.

3.4.2 That the accused clearly and repeatedly stated that no note was made in the police records when the virtual complainant was handed over to the police reserve when he was brought to the police station after the arrest.

3.4.3 The accused in his evidence clearly stated that the virtual complainant was taken to the hospital from the police station in an unconscious state by him.

3.4.4 The medical report marks 1-10 injuries. These injuries would have occurred while the virtual complainant was inside the police station.

3.4.5 The virtual complainant has given details of assault on the soles of the feet, on the head on top of books and other parts of the body done inside the police station.

3.4.6 Under the above stated circumstances the learned High Court Judge should have assessed all the facts stated above in answering the questions which she has posed to herself as to whether Lalith Rajapaksha was beaten by the accused inside the police station.

3.5(a) **The learned High Court Judge erred in law and fact in assessing the credibility of the witness Kasipillai Srinath Manjula by merely comparing it to the version of events given by police officer Sagara Nilatha Karasinghe Arachi without assessing the credibility of the said Sagara Nilantha Karasinghe Arachi. The learned High Court Judge without any assessment of**

this defence witness, who is also a police officer, accepted his evidence as true and decided that the evidence of Kasipillai Srinath Manjula was not true because his evidence was different to this police officer's evidence.

(b) The learned High Court Judge rejected the collaboration of evidence of the virtual complainant and the witness Kasipillai Srinath Manjula because the evidence of the police officer Sagara Nilantha Karasinghe Arachi was different to the evidence given by witness Kasipillai Srinath Manjula.

(c) The Learned High Court judge did not take into consideration that Kasipillai Srinath Manjula was not cross examined when he gave evidence that he was arrested by SI Sagara Nilantha Karasinghe Arachi on the 21.4.2002. If the defense believed that this police SI arrested Kasipillai Srinath Manjula on the 21st then it was the duty of the defense to confront him with this information and question him.

(d) There was no proof that the Srinath Manjula referred to by this witness and Kasipillai Srinath Manjula who gave evidence before the court were one and the same person.

3.6 **The learned High Court Judge erred in law and fact by recording part of the evidence given by the virtual complainant regarding signing of the affidavit for the Fundamental Rights Application before lawyer Nirmalla David, by initially stating that he did not remember signing the petition before her but correcting himself later by stating that he remembered that he signed the petition before the lawyer Nirmalla David.**

First Part-Regarding the Nirmala David Jurat of the Affidavit filled in the Supreme Court.

ප්‍ර. එත කොට ඉස්සෙල්ලා මම ඇහැව්වාම නිර්මලා ඩේවිඩ් නෝනා සිටියේ නැහැ කියා කිව්වා?
උ. එහෙම කිව්වා. ඊට පස්සෙ ගෙදර ගිහින් කල්පනා කරන කොට මට මතක් වුණා තවත් නිතිඥ නෝනා කෙනෙක් සිටියා කියා.
ප්‍ර. අද කියන සාක්ෂිය ඒකයි?
උ. ඔව්.
ප්‍ර. තවත් කියන්න දේවල් තියෙනවාද? එදා දුන්න උත්තරවලට පස්සේ, මතක් වෙච්ච ඒවා, තිබෙනවාද?
උ. ඔව්.
ප්‍ර. එයා මීට පෙර දැකලා තිබෙනවාද?
උ. ඔව්.
ප්‍ර. මම සිංහලෙන් ඇහැව්වාම, තමා කිව්වා ඔය දිවුරුම් ප්‍රකාශය අත්සන් කරන කොට ඔය නෝනා සිටියේ නැහැ කිව්වා?
උ. ඔව්.
ප්‍ර. එදා දිනෙන් පස්සේ ගෙදර ගිහින් කල්පනා කරන කොට මේ නෝනාත් එතන සිටියා කියා මතක් වුණා?
උ. ඔව්.
ප්‍ර. පසුගිය දින හරස් ප්‍රශ්නවලට දුන්න සාක්ෂියට වඩා දැන් මතක් වෙච්ච දේවල් තිබෙනවා නම් ඒවා මතක් කරල කියන්න?
උ. දවස් 15 ක් සිහිය නැතිව සිටියා. ඒ අනුව මට හුඟාක් කල්පනාව නැහැ. මට ඒකෙන් කල්පනාව නැහැ.
ප්‍ර. තමාට කල්පනාව නැහැ කියන්නේ, තමාට අමතක වෙනවා නේද?
උ. කල්පනාව නැහැ.

3.7 (a) **The learned High Court Judge erred in law and fact in taking portions of the evidence of the accused, ignoring the major part of his evidence in which he repeatedly stated that he used minimum force by hitting the virtual**

complainant with a pole in order to prevent the virtual complainant harming a brother officer who accompanied him for the arrest. The learned High Court Judge has completely left out the major part of the evidence of the accused and selected from here and there a few references made by the accused without judging the veracity and credibility of the evidence of the accused.

(b) The learned High Court Judge ignored a long series of admissions made by the accused in his evidence by stating that on many of the relevant facts no entries were made in the relevant books at the police station about the matters on which he gave evidence. The matters on which no entries were made included the time and details about the information received about the virtual complainant before going to arrest him, about the visit to the house of Nimal in order to arrest the virtual complainant, regarding non-used of an official vehicle but going in a private vehicle hired on the road, the whole incident narrated in evidence about waylaying in order to arrest the virtual complainant about the struggle the accused spoke of between the virtual complainant and a brother officer, the alleged attempt by the virtual complainant to use a knife and the alleged subduing of the virtual complainant by the accused beating him with a pole. The learned judge also failed to take into considerations that there were no productions of any knife or a pole that the accused said that he used on this occasion. There were numerous more omissions and contradictions in the evidence of the accused which the learned High Court Judge did not assess before accepting some pieces of his evidence as true.

(c) The learned High Court Judge also did not assess

the fact that the evidence given by the accused to the effect that he took rest after handing over the virtual complainant to the reserve police was proven wrong by the documents produced by the OIC of the Kandana police station, who showed that according to the information recorded, the accused was on duty on the entire night of the 19th and that there was no record at all of his taking any rest.

(d) The learned High Court Judge failed to assess the credibility of the statements purported to be given by the accused to the reserve police though nobody from the reserve police gave evidence before the court.

3.8 **The learned High Court Judge failed to act judiciously in not making distinctions between what are material facts relevant to the case and what are not material facts in assessing the facts given by the virtual complainant and two other witnesses of the prosecution, … Elaris Alvis and Kasipillai Srinath Manjula.**

3.9 **The learned High Court Judge failed to act judiciously by merely narrating the submissions made by the defence council without comparing the matters of evidence with the notes recorded in the case records and thus without taking efforts to ensure that what is recorded as facts in her judgement are in conformity with what was recorded as evidence in the case record. In the earlier paragraph examples of the differences between what is recorded in the case record and what is narrated in the judgement has been demonstrated.**

3.10 **The learned High Court Judge erred in law and in fact and failed to act judiciously by omitting from the judgement the evidence given by the inquiring officer**

regarding Nimal and his wife and drawing an adverse conclusion to the prosecution on the basis on the basis that these two persons were not called as witnesses to give evidence in the case. The evidence of the virtual complainant was that at the time of his arrest it was the wife and children of Nimal who were at the house of his friend. The evidence of the inquiring officer was the Nimal's wife has left to work abroad and that after initially giving a statement Nimal also has left the house and his whereabouts were unknown. The learned High Court Judge has omitted this part of the evidence of the inquiring officer in assessing the importance of Nimal and his wife not being called as witnesses.

3.11 **The Learned High Court Judge failed to consider the totality of the evidence lead by the prosecution in this case and failed even to sum up the totality of the evidence that the prosecution lead in this case the summary of which is as follow:**

The evidence of the virtual complainant/appellant Lalith Rajapakse

3.11.1 The virtual complainant/appellant in his evidence stated the following salient facts: he worked in a timber yard at the time of the incident and he stayed the night of the18.4.2002 at the house of a friend called Nimal. On that night a group of policemen arrived at the house. He heard them enquiring about his name and they entered the place where he was sleeping and started beating him. When he asked why he was being beaten he was told that, you have done some robberies. The officers assaulted him by hand and the wooden axe handle. Then he hands were tied and he was taken to a police jeep which was kept on the

road. On the way the police officers stopped at another house of a person known as Lalith who was not at home. He was then taken to the Kandana Police Station. He further said that several friends came to release him on the following day but he was not released. Later during the day two police officers came and took the other person who was staying in the cell outside, and later he heard him shouting don't hit me. After that the person was brought back to the cell. He said that there was a room close to the cell and he was taken there. His hand and feet were tied; he said that, "My feet and hands were tied to each other and a pole was inserted between and left on the table. After that two officers stayed on each side with poles he was assaulted on this soles of his feet. He was asked if he had done robberies. He said he was beaten for a long time. Then he was taken out of that room and brought near a cell. He was then asked to jump and it was very painful to do so. Then he was taken out of the cell again and some books were placed on his head and struck with a pole. Due to the assault he became disoriented and later fell unconscious. He regained consciousness only in the hospital and he learned that ht had been in that state for sixteen days. He identified the accused as one of the group who arrested him, who assaulted him during the arrest and who brought him to the Police Station. He also stated that the accused was one of the officers who assaulted in inside the room on his feet with a wooden police. He also identified the accused as the one who had placed the books on his head then struck the books with a pole. He also stated that later at the Magistrate's Court he also identified

the accused as the person who arrested and assaulted him. In the cross examination he restated what he had stated in the evidence in chief. He further described how he was assaulted at the time of arrest and further at the police station inside where he was assaulted for a long time on his feet. He started that after this incidence when he was released from remand he had gone to Kandy. Given the reasons for going he said the police trouble and that due to these troubles he could not stay in the village which was why he went to Kandy and he stayed there. He also stated that the police filed two cases of robbery against him and that he was acquitted from both of the cases. He once again identified the accused as the person who was standing in the accused box as being the one who assaulted him. When questioned about the hitting on the soles of his feet and how long he was hit like that, he answered that it was for a long time. On any of the material points to a charge under section 2 (1) of the CAT Act 22 of 1994 the defense failed to extract any material contradiction in his evidence.

Medical evidence

3.11.2 The medical evidence in this case consisted of the medical report marked in evidence as xxxx… and the evidence of three medical officers.

(a) This medical report noted injuries number 1-10 which are as follows:

1. Healing scab abrasion 2 inches x 3 inches on the right scapular region;
2. Healing scab abrasion 1 inch x 1 inch on

the back of the right elbow;

3. Healing scab abrasion 2 inches x 1 1/2 inches on the front of the right chest;
4. Contusion 2 inches x 3 inches on the back of the left hand;
5. Contusion 2 inches x 3 inches on the front of the left forearm;
6. Contusion 1 inch x 1 1/2 inches on the medical side of the left hand;
7. Contusion 1 inch x 2 inches on the lateral side of the left hand;
8. Contusion 2 inches x 2 inches on the sole of the left foot;
9. Contusion 2 inches x 1 inch on the sole of the right foot ; and,
10. Cerebral contusion.

The last injury is described in the report as 'grievous', that is, sufficient to cause death.

The evidence of the Assistant Judicial Medical Officer (AJMO)

(b) The Assistant Judicial Medical Officer (AJMO) Dr. Kumudu Kumari Jooza gave evidence on the medical report. Her expertise and her qualifications as a Judicial Medial Officer was agreed upon the prosecution and the defense and this agreement was recorded under section 420 of the Criminal Procedure Code as requested by the prosecution. The AJMO has examined the virtual complainant on 28/04/2002 as the virtual complainant was not in a conscious state it was not possible to question him and record the history of the injuries. The Bed Head Ticket mentioned that he was sent from the Ragama Teaching Hospital on 20/04/2002 regarding a police assault. The patient had 9 external injuries and one internal injury. She had examined the nine external

injuries and she gave details about each of the injuries. She gave evidence on injury number 10 on the basis of the scan reports which were attached to the Bed Head Ticket. She mentioned that she came to the conclusion that the injuries number 8 and 9 which are injuries on the soles of the feet can happen only through an assault. She explained why she believed that the injuries 8 and 9 can happen only through assault and excluded the possibility of this happening by a fall. She said that her conclusion was that all the injuries were due to assault and that injuries number 8 and 9 were extremely helpful in coming to that conclusion. She stated that her conclusion was that the medical condition called encephalitis was a result of assault. The AJMO explained that a medical condition similar to encephalitis can arise due to swelling of the brain due to assault. Encephalitis can also happen due to a viral infection, however her conclusion in this instance was that taken with other injuries, injury number 10 was also a result of assault. On cross-examination she stated that she has examined 25-30 patients who had complained of police assault. She explained that as the injury on the brain was an encephalitis condition, it could happen due to virus infection or bacterial infection or due to assault. There were no symptoms to demonstrate that he suffered from the illness called encephalitis. She further stated that injury number one was on the back. Answering further questions she said regarding injuries four and five that when a person is assaulted, normally it is the arms that are used to defend themselves. Injury number seven was also an injury in the back. The defense was unable to obtain any contradiction from the evidence given in examining the chief.

The evidence of Dr. Bandula Chandranath Wijesiriwardana

(c) Dr. Bandula Chandranath Wijesiriwardana in his evidence stated that on 20/04/2002 he worked in

Colombo North (Ragama) Teaching Hospital as in charge of wards number 13 and 16. He recognized he documents which were used to transfer patient Lalith from Colombo North (Ragama) Teaching Hospital to Colombo National Hospital. He mentioned that in the transfer document the patient's condition had been mentioned as due to police assault. It would not have been possible to get that information from the patient as he was in an unconscious condition and it may have been obtained from someone who came with the patient. The patient was sent from Ragama hospital to Colombo because the former did not have a scanning facility then. He said that the patient was a drowsy condition and there was no treatment given by the Ragama hospital and under those conditions it was the practice to transfer such patients to the Colombo National Hospital.

The evidence of Dr. Sabakarathnam Shivakumaran

(d) Specialized consultant Dr. Sabakarathnam Shivakumaran gave evidence and said that on 20/04/2002 he worked at wards 47/49 and his position was as the specialized medical consultant. Patient Lalith was admitted to his ward at 2:38 p.m. of 20/04/2002 regarding an assault. He was admitted regarding a head injury. The patient was under his care. He marked a document as Y and stated that the name and address given on the cover was SI Peiris at Kandana Police Station. When the patient was admitted, it was decided that he did not need surgery and the same night he was admitted to the ward. He was admitted to ward number 55 because the mention of the police assault and it is the usual practice to admit such patients into this ward. He was kept in the ward from the 10th of April to the 30th. On the first of May he was transferred to ward number 43. He was in charge of ward 43. From the time the patient was admitted to his ward he was in a semi-conscious situation. That observation

was made at ward number 72. The record stated that he reacted to extreme pain. The implication was that he was not completely unconscious. When there was an attempt to talk to him he tried to say something but he could not. It was appeared that there was a weakening of his nerves. From the document it appears that at the time the police handed over Lalith to the hospital he was in a semi-conscious state. When the patient was admitted to the witnesses ward he had fever and he was in a semi-conscious state. As a result it was not possible to know the previous history of the incident. From the state of the patient it appears that cerebral edema, meaning swelling in the brain. Besides fever, semi-consciousness, swelling of the brain he also had EEP condition. This was explained by the doctor as follows: "if the hand collides with an object it gets swollen and gives pain. In the same way if a germ enters the swelling and pain takes place. In this situation we say the hand is swollen …"

Second part- this part regarding the hand got swollen.

ප්‍ර. මේ පුද්ගලයාට මේ වනවිට උණ සහ අර්ධ සිහි තත්ත්වයකුත්, මොළම ඉදිමීමක් තිබුනාට අමතරව ඊ.ඊ.ජී. එල්සපලයිටිස් තත්වයක් තිබුණා යනුවෙන් පෙනී යනවා?
උ. එහෙමයි.
ප්‍ර. මොකද්ද ඒ ඊ.ඊ.ජී. එන්සපලයිටිස් යන්නෙන් අදහස් වන්නේ?
උ. යමක් අතක ගැටුනොත් එතන ඉදිමිලා වේදනාව ඇති වෙනවා. ඒ වාගේම විෂබීජයක් ඇති වුනොත් එවිට ද ඉදිමීම හා වේදනාව ඇති වෙනවා. ඒ අවස්ථාවේදී කියන්නේ අත ඉදිමිලා කියලා. ආසාදිත තත්ත්වයක්.
ප්‍ර. ඔබ අතට සමාන වන තත්ත්වයක් තමයි වයි කියන ලේඛනයේ සඳහන් වෙන්නේ සෙරිබ්‍රල් ඉඩීමා කියලා?
උ. එහෙමයි. මොලය ස්කෑන් කල අවස්ථාවේදී ඔහුගේ මොලය ඉදිමිලා තිබුනා. සෙරිබ්‍රල් ඉඩීමා කියන්නේ ඒකයි.

A similar situation as what happens to the hand was there when his brain was scanned. Then there was a swelling of the brain, called cerebral edema. Encephalitis is a situation of infection of the brain. The witness said he worked with the view to save the life of the patient. During this time the big toes of both of his feet were raised up, which implies that he has a swelling in the brain. One Sudath Gunasekara did an EEG examination. According to that the swelling as a result of bruising. "Q. If there was an assault on the head and if there was bruising EEG shows it in the same way? A. If there was an assault on the head or encephalitis. Both are shown in the same way. This doctor has conducted examinations. This EEG scan the swelling of the brain can happen to someone either encephalitis can take place or both can happen." He explained that the situation of a person who has been assaulted on the head, having traumatic encephalitis and the situation of a patient having encephalitis is the same. "Q. What are the situations in which the brain can be infected? A. The encephalitis normally is a result of infection due to virus. After an assault it is possible to go unconscious. It may be a semi-conscious state, drowsy state or convulsive fit. "Q. This is what you are saying, that when there is an assault on the head or entering of a virus symptoms of illness are the same? A. The symptoms of illness can be the same." The witness further answered, "If there was no assault we could have concluded that it is encephalitis." He further answered "Q. If there was no history of assault it would have been possible to state with 100% certainty that this was encephalitis? A. That situation can be easily identified but it is possible to be wrong also." Further answering he said "Q. According to this if as person had a history of assault and police assault, you could say that the situation of the brain created by assault on the head as traumatic encephalitis, which was what Lalith Rajapaksha had? A. According to the EEG report in both of these situations the same state can take place. This means that that the

history of the illness has to be examined. It was because of that the doctor has said that as this is a situation that is common to both states that the history of illness must be examined and external examinations must be done. Q. According to that, as against the viral encephalitis state if a person has an encephalitis state due to assault, it is on the basis of the history of illness that it is possible to express an opinion? A. When there is the possibility of these two situations it is possible to give an opinion on the basis of the history of illness more than through external examination. For example if a person comes with swelling in the hand it is not possible to say whether it is due to an assault or due to an infection. On some occasions it is possible to say that easily. On some occasions it is difficult. But if somebody says it is due to an assault, then it is possible to give an opinion with certainty. After assault there can be an infection. In that situation he can get fever." The witness further said that the patient was in his ward for twelve days and was altogether in the hospital for three weeks. As he was getting better he was transferred to Punaruthanaya. In cross examination this witness stated the same positions. The defense was unable to get any contradictions. In re-examination this witness further stated "my opinion is that this situation can happen if somebody is assaulted on the head severely. We all know when the head has been hit very hard a person faints. That can be for a short time. After an assault a person may be without consciousness. For that situation it must be a severe assault. From such a severe assault, a situation like this can happen." He further explained that in judging this condition, the history of the illness is essential." This witness further stated on the 19th of May if this person was in a normal condition and on the 20th he suddenly became unconscious, if he became unconscious within a half and hour or one hour, if there was evidence that his head has been assaulted with something it can be satisfied that the condition of his illness was due to that. If he was

hit severely this situation can happen immediately. If it was to happen by way of a viral, it would take about 24 hours (roughly) for him to come to a state of semi-consciousness. It would take several hours to become a semi-conscious situation."

The evidence of Ranawana Arachige Elaris Alvis and Kasipillai Srinath Manjula

3.11.3 Evidence of Ranawana Arachige Elaris Alvis and Kasipillai Srinath Manjula of Ranawana Arachige Elaris Alvis was 77 years old and was the grandfather of the virtual complainant. He learned about the arrest of Lalith on the 19th of April, night, from a friend of his and went to visit the grandson at the police station on the 20th morning. When he finally went near the police cell he saw two persons in the cell and asked where is Lalith. He was shown his grandson who lay on the floor and when he talked to him he did not reply. Thinking that the boy was dead he started shouting, saying that you have killed my son. Then some police officers came and said that his grandson had had a fit. He replied saying he climbs seventy five eight feet tall trees and he'd never had a fit. The officers raised the body of Lalith and it was apparent that he was unconscious. The witness left the police station and went to the house of a politician and got him to call the police and ask what happened. Then the police informed that he had been taken to the hospital. The witness went to the hospital and saw Lalith in an unconscious state in the hospital. There was a police officer and he shouted at the police saying that they have killed his son. He came back home and informed the family that the boy

has been killed and they can go and see him. Many days later he went to Colombo hospital to see the grandson and he became conscious only about 15 days later and he saw that the grandson had been fixed with a catheter. Sometime later he went to the Magistrate's Court and got bail for his grandson. At the cross-examination the defense was unable to extract any contradiction on the story he had said above.

3.11.4 Evidence of Ranawana Arachige Elaris Alvis and Kasipillai Srinath Manjula of Ranawana Arachige Elaris Alvis was 77 years old and was the grandfather of the virtual complainant. He learned about the arrest of Lalith on the 19th of April, night, from a friend of his and went to visit the grandson at the police station on the 20th morning. When he finally went near the police cell he saw two persons in the cell and asked where is Lalith. He was shown his grandson who lay on the floor and when he talked to him he did not reply. Thinking that the boy was dead he started shouting, saying that you have killed my son. Then some police officers came and said that his grandson had had a fit. He replied saying he climbs seventy five eight feet tall trees and he'd never had a fit. The officers raised the body of Lalith and it was apparent that he was unconscious. The witness left the police station and went to the house of a politician and got him to call the police and ask what happened. Then the police informed that he had been taken to the hospital. The witness went to the hospital and saw Lalith in an unconscious state in the hospital. There was a police officer and he shouted at the police saying

that they have killed his son. He came back home and informed the family that the boy has been killed and they can go and see him. Many days later he went to Colombo hospital to see the grandson and he became conscious only about 15 days later and he saw that the grandson had been fixed with a catheter. Sometime later he went to the Magistrate's Court and got bail for his grandson. At the cross-examination the defense was unable to extract any contradiction on the story he had said above.

The evidence of Sagara Nilantha Karasingha Arachi

3.11.5 Evidence of Sagara Nilantha Karasingha Arachi, an officer involved with the investigation, Herbert Mendis Abegunawardana, OIC of police station Kandana and Waidyanadan Amuda, translator of the High Court, to present the report of the identification parade.

(a) The investigating officer Sagara Nishantha Karasingha Arachi said that he conducted inquiries under the direction of the OIC police inspector Chanaka Silva. He examined the documents relating to the case at Kandana police station. He found the name of Lalith Rajapaksha in the list. The note was made on 22/04/2002 at 0200 hours In that note it is said that the date of putting the virtual complainant in the cell was on the 20th at 0400 hours and time of taken to hospital as 0830 hours that same day. He said that according to the note SI Peiris has arrested the virtual complainant at 2.20 am of the 20th but however it was revealed in the investigation that the virtual complainant was kept in the police cell before that time. He said that the investigation revealed that he virtual complainant was arrested on the 18th. Answering

questions from the prosecution the witness stated as follows:

"Q. Did the investigation reveal when Lalith Rajapaksha was taken to the police station?
A. It was revealed that he was kept at the police station on the night of the 18th at the police cell.
Q. What was revealed about the 19th?
A. the witnesses stated that there was an assault on the 19th." That day the virtual complainant had been handed to Parajasingham and had been bathed. In the inquiries about this, statements from SI Peris and police constable 311205 Wijerathne was recorded and they were arrested. SI Peris is the accused in this case. He said that a statement was recorded from one Nimal in the course of inquiry but his person is no longer at that address and his wife has left the country for foreign employment. In answering cross examination this witness stated that he has recorded statements from Lalith his grandfather Alvis who has said that on the 18th morning Lalith had gone to work cutting trees. In the inquiries he found that it was recorded the virtual complainant was arrested for some robberies and that the virtual complainant tried to stab Wijerathne and that at that stage minimum force had been used, according to the notes. This witness stated that a person called Nimal gave a statement and thereafter it was not possible to find him. He also recorded the statement from the doctor. Answering questions for reexamination it said that though there was a note that minimum force had been used at the time of arrest, there were no notes in the police entries that have been caused to the virtual complainant. The information available stated that he was examined and that there were no external injuries. Accordingly inquiries revealed that the virtual complainant was taken into custody without any external injury. Later the virtual complainant was taken to hospital and there were some notes stating that he was taken due to a fit. The

information has also revealed that SI Peiris has taken a revolver when he went to arrest the virtual complainant.

The evidence of Herbert Mendis Abegunawardana, OIC Kandana

(b) The officer in charge of the Kandana police, Herbert Mendis Abegunawardana, gave evidence regarding books maintained at the Kandana police station regarding official duties relevant to 18/04/2002 and he has brought to court the relevant books. The accused worked at the Kandana police station during that time. He had been on duty 12/04/2002 to 28/04/2002. He has reported to work on 17/04/2002 at 4:45 a.m. and ended the work at 21:15 pm on that day. On 18/04/2002 the accused had reported to work. There's a note at 8:20 pm that he is going out for the night on duty. The time he returned back had not been recorded. It is stated that he has gone to control traffic on the Negambo road. It has not been recorded that on the 19th he has taken any rest. It is correct to state according to the book maintained at the police station that on the 19th he was at the police station. On 6:36 a.m. he has reported to work on the 20th. That information book does not record that he took any rest. If there was any rest taken, it should have been recorded in that book. It is therefore correct to say from the morning of the 18th to the morning of the 20th this officer has worked at the police station. On the 19th he has continuously worked on duty. He has been on duty from the 18th morning. In answering questions in cross-examination he reaffirmed what he has stated in the examination chief. He stated that according to the documents, no other special incident has been recorded in this book. Only the report of persons to duty has been recorded. There is no record about taking the person to hospital or regarding any other information. The witness identified that the SI Peiris mentioned in the information book was the accused.

The evidence of Waidyanadan Amuda regarding the identification parade

(c) Waidyanadan Amuda, translator of the High Court, produced the report of the identification parade held at Wattala Magistrate Court on 28/02/2003 on the case bearing number B/2450. This report was accepted by the defense and the State Council for the prosecution moved to mark it as admission under section 420 of the Criminal Procedure Code and it was marked as P2. The witness who participated in the identification parade was Lalith Rajapakshe.

3.12 The Learned High Court judge failed to consider the totality of the evidence given by the defense and in particular left out large chunks of evidence which related to the use of minimum force that the accused/respondent lead in court relating to the use of minimum force on the Appellant.

The evidence of the accused Warakulsuriya Mahawaduge Roshan Prasanga Peiris

3.12.1 For the defence the accused Warakulsuriya Mahawaduge Roshan Prasanga Peiris stated that he was attached to the Kandana Police Station at the time of the incident. The Officer-in-Charge of the station was Nalin Atthanayake and the Officer-in-Charge of the Crime Division was S.I. Fernando. The accused stated that he did the arrest of the virtual complainant. When going for such arrest he had to fill in forms regarding the weapons and the officers with whom he was going. After he returned he had to make notes about the persons who are arrested and any materials taken into custody. He said that once suspects are handed over to the police

reserve and the suspects are kept in a police cell. If a person is taken out notes are written about it. He said that on 19.4.2002 he received information that the virtual complainant who was wanted for a house robbery involving gold items was at a house at Batagama. The incident of robbery happened before that and there was a B report in the Magistrate's Court about. He noted the information and get the permission of the Officer-in-Charge in writing and left for the arrest. He was the chief officer and he went with PC Wijeratna. He had made notes about it. He said that he had gone for the arrest in a three-wheeler. He said that he used a private vehicle because he thought that going in an official vehicle was an obstacle to carrying out his duty. The place he went to was two kilometers from the station and could be reached within 10-15 minutes. They hid themselves near a road with PC Wijeratna who was in civilian clothes to waylay the virtual complainant.

3.12.2 The accused further said that there was a person coming and we thought that must be the suspect. When Wijeratna and myself went behind him he understood that we were coming and he tried to run. And Wijeratna grabbed him. Then the virtual complainant struggled with Wijeratna and he took from his waist a knife. Then Wijeratna fell. The accused said that he picked up a pole and hit the virtual complainant several times and he hit his back and the hand. He did that to save his brother officer. He took the knife to his custody and stopped a three-wheeler and went with the virtual complainant and Wijeratna to the police station. He first said that he returned to the

station at 2:20 a.m. and then said it was a 3:30 a.m. He handed over the virtual complainant to the police reserve at 4:a.m. of 20.4.2002. He produced a document signed by Kumaradasa of the reserve police.

3.12.3 The accused then said he learned that the suspect had a fit and had fallen inside the police station. He informed the Officer-in-Charge about it and on instructions of the OIC he took virtual complainant to the hospital with some other officers. When he left he made notes.

3.12.4 He further said that after handing over the suspect to the reserve he saw the suspect only when he was unconscious in the police cell. He further said that cases were filed against the virtual complainant at the Magistrate's Court.

3.12.5 The accused also said that he heard the evidence of the virtual complainant in the court saying that the accused assaulted the virtual complainant inside the police station and that he denies having assaulted the virtual complainant inside the station.

3.12.6 He said that he was arrested about this incident and that he made a statement to the police about that incident.

3.12.7 In cross examination the accused stated that regarding any instructions given by the OIC he was not aware that such instructions should be in writing. When it was suggested to him that if the OIC makes an order it should be in writing, he said, it is not like that, the accused wrote it. The accused refused to accept that

according to police regulations the OIC had to make a note about the orders he gives on such occasions. When asked whether the orders are written in the Grave Crimes Book he replied it may be there in that book. When asked to look at the book and reply he said that it was not there in the grave crimes book and that the Grave crimes book was not before the court. The accused stated that the MOIA book is the information book for small crimes and that the notes he has purported to have made had been in that book. He said that he wrote it in the small crimes book because that was the book that was available. When questioned about making records in the proper book, that is the grave crimes book, he said that the Officer-in-Charge reads both books. However, the accused admitted that there is a specified procedure in the police that notes must be made systematically and that it is not possible to act arbitrarily. When asked why before proceeding to the arrest no note was made in the grave crimes book he said there is no the police have not been told to do it that way. When asked if he had reasonable grounds for not recording the notes in the book, he said he did not have such reasonable excuse.

3.12.8 When asked what time he received the information which lead to the arrest he said about 6:00 but admitted that had had not made any notes about it. He said that he is telling the time by memory even though about 5 years have passed after the incident. He admitted he had not made any notes about receipt of the information and that he has also not made any

notes about going to the house of Nimal.

3.12.9 Asked as to why he has not recorded that he did not go in an official vehicle but in a three-wheeler his reply was there was no vehicle available and that he took a three-wheeler. He also admitted that even on return he had not recorded that he went and returned in a private vehicles.

3.12.10 When questioned why he did not make any note about the informer and the information received because there was no informer he rejected the suggestion.

3.12.11 When questioned by the prosecution that there was no written evidence in the notes about the arrest or he admitted that there were no notes written about it.

3.12.12 When asked if there was any eyewitness to the alleged robberies he answered no. He said there was only circumstantial evidence. When asked why on such circumstantial evidence why he hid on the road to arrest someone he said that he arrested on information. When asked whether there was information as to the wanted person as being Lalith Rajapakse the accused admitted there was not such note.

3.12.13 He admitted that at the time of the arrest he did not know that the person arrested was Lalith Rajapakse.

3.12.14 When asked what happened to the two cases filed against the virtual complainant the accused said he did not know. He said that regarding

these cases there was no evidence. When the prosecution suggested that since there was no evidence the virtual complainant was arrested in order to find some information he admitted the suggestion and that said that he was arrested on suspicion. When questioned further that he was arrested for the purpose of looking for information the accused admitted that in order to find information by questioning the suspect was taken into custody. The accused admitted that the virtual complainant was acquitted on both cases filed at the Watala Magistrate's Court. Regarding the allegation of trying to stab PC Wijeratna the accused said the case was filed about it did not bear any fruit.

3.12.15 The accused was questioned as to why no question was put to the virtual complainant about struggling with PC Wijeratna when the virtual complainant gave evidence accused admitted that no questions were put about the matter when the virtual complainant was cross examined. The accused said I have informed about the struggling to the lawyers.

3.12.16 He said that he put a note on return to the situation that the virtual complainant had no injuries. And he further said that he did not see any injuries. When asked if a person has put up resistance like trying to stab an officer it should be reported to the Officer-in-Charge, the accused answered that all officers are representative of the OIC and therefore he handed over the suspect to the reserve. He said that he had no books by which to say who the officers who were in the reserve police that night and that the accused has not listed notes.

3.12.17 The accused admitted that on the night of the day of the arrest he was at the police station. He did not have any books to indicate who was at the reserve. He also admitted that he took the virtual complainant to the hospital the next day. He admitted that his name had been mentioned as the guardian in the form at the hospital.

3.12.18 The accused admitted that although there was a note in the police books that the accused had a fit there was nothing to indicate that the accused was informed about it. There was also nothing to indicate the manner in which the virtual complainant was found fallen inside the police cell. The accused admitted that all that is in the notes is that about taking custody and leaving.

3.12.19 The accused also admitted that at the time the virtual complainant was handed over to the reserve there was no note as to the condition of the virtual complainant. The accused admitted that the note that is made should be able to indicate what is stated very clearly to anybody who looks at it. He admitted that according to the information there is no sufficient evidence to explain what happened during the time between the arrest and the time of taking the virtual complainant to the hospital. There is also no information in the notes about the condition of health of the virtual complainant at the time of the assault or thereafter. What is said about the fit the accused admitted was what he knows but not anything about what is recorded in the notes. The prosecution suggested that such information is not there because he was really aware of the actual physical condition of the

accused but did not want that to be revealed. The accused denied the suggestion. When asked about notes about leaving for the arrest, going in a private vehicle and doing a successful being not there in the notes, the accused answered it is not necessary to put these things in the notes.

3.12.20 The accused stated that it would take about 15 minutes to return from the place of arrest to the state that he admitted that it took one hour and fifteen minutes.

3.12.21 He admitted that P2 is the identification parade and the virtual complainant identified him during the parade.

3.12.22 He admitted that there was neither direct nor circumstantial evidence regarding the two cases for which the virtual complainant was made the accused at the Magistrate's Court. The accused also state that no material production relating to the thefts were found from the virtual complainant. He admitted that the virtual complainant was taken for questioning without any of these things. When asked why the virtual complainant was released the accused answered that he did not know.

3.12.23 The prosecution suggested that the two cases were filed in the Magistrate's Court after the virtual complainant was admitted to the hospital in order to create an excuse for the arrest. The accused replied to this by saying B reports had been filed before the incident.

3.12.24 When asked how an action was filed about the virtual complainant trying to obstruct a

state officer in the conduct of his lawful duties without getting permission from the Attorney General the accused answered that I don't know about it. He admitted that he knew that to file a case of such obstruction it was necessary to obtain the permission of the Attorney General. The prosecution suggested that the case was filed in order to cover up the actual incident relating to arrest and assault. The accused rejected the suggestions.

3.12.25 The accused admitted that no statement was recorded on any of the charges including obstruction to a state officer at any time from the virtual complainant. The accused also admitted that he has not produced any material production during this case regarding the obstruction to duty and that virtual complainant was not questioned by way of cross examination when he gave evidence in court about this matter of obstruction to duty. The accused also admitted that at the time of arrest the virtual complainant had no property in his hand and there was note about any property being taken in the notes.

3.12.26 The accused also admitted that the information had not given the physical description and dress of the virtual complainant.

3.12.27 The accused stated that he did not remember the manner in which the virtual complainant was caught by Wijeratna. When asked why he used a pole to subdue the virtual complainant and not the revolver which he had the accused answered the revolver had a plastic butt.

3.12.28 The accused stated that the virtual complainant was very strong and very healthy at the time of the arrest. He said he beat the virtual complainant very hard with the pole on the back and took charge of the knife. He further said that when the virtual complainant was brought to the police station there was nothing to show that he was not well. He explained that the virtual complainant walked to the police station from the place of arrest putting his feet firmly on the ground and walking very well. The accused said that they walked up to Giriwulla junction by foot and then took a three-wheeler.

3.12.29 The accused rejected the suggestion that he did the arrest on the 18th April. The accused also rejected that he assaulted the virtual complainant while keeping books on his head.

3.12.30 When questioned about the accused evidence that the virtual complainant may have had the occasion to know him before the identification parade the accused admitted that no questions were asked about this in the evidence of the virtual complainant when he gave evidence in court.

3.12.31 The accused admitted that when he handed over the virtual complainant to the reserve no note was written about the use of minimum force. The accused stated that he orally informed the reserve officer about the use of minimum force but did not write it down. He admitted that there was nothing to substantiate that he made such oral statement. He rejected the suggestion by the prosecution about his informing orally was false. When it was suggested that regarding

the use of minimum force on any occasion sufficient description must be made the accused rejected it.

3.12.32 The accused admitted that there was no note to substantiate that he took a rest after handing over the virtual complainant to the reserve police. He rejected the suggestion that he did not take any rest and that he assaulted virtual complainant.

3.12.33 The accused rejected the suggestion that he assaulted the virtual complainant on the soles of the feet. In re-examination he stated that he did not put notes about the vehicle he used for the arrest because it was not an official vehicle.

The evidence of Waranakulasuriya Hector Chaminder Fernando

3.12.34 This witness said that he was a Sub Inspector of Police who was seconded for service at the Kandana police on April 2002. He said that on the 21st morning he was working in a road block and arrested Srinath Manula at around 2:45 a.m. on that day. He said he was arrested for theft. He said that he did not bring the book he used to the court. When questioned in cross examination as to how long Srinath Manjula was in his custody he said that it was only for half an hour. The entire period for which he had association with him was for half an hour.

7

Letter to the Acting Attorney General

October 17, 2008

Mr. Priyasath Dep - Acting Attorney General
Attorney General's Department
Colombo 12
SRI LANKA
Fax: +94 11 2 436 421

Dear Mr. Dep,

Re: Request for Appeal against the judgement of the High Court judge of Negombo bearing case No. 259/2003, relating to the torture of Sundara Arrachige Lalith Rajapakse

We are writing to request you to appeal from the judgement made by the High Court judge of Negombo on 9th October 2008 acquitting the accused in this case under the CAT Act, Act No 22 of 1994. We are making this request because our perusal of the judgement clearly indicates that the judgement is wrong on the very face of record. In the attached draft appeal we have stated in detail the major grounds on which this judgement needs to be considered as wrong in law and fact.

In fact, it is a very strange judgment because the finding of the judge regarding material facts is contrary to what is in the proceedings. Just to give you one example of the many that are set out in the appeal the learned High Court judge came to the conclusion that the virtual complainant's claim that he was beaten on the soles of his feet cannot

be believed because there is nothing to indicate any injuries to his feet in the medical report which was marked P1. In fact, the injuries No. 8 & 9 in the medical report are injuries to the soles of the feet of the virtual complainant and they are:

8. Contusion 2 inches x 2 inches on the sole of the left foot;
9. Contusion 2 inches x 1 inch on the sole of the right foot; and….

The AJMO Dr. Kumudu Kumari Jooza, gave detailed evidence on injuries No's 8 & 9 and explained in detail the nature of these injuries and stated categorically that these injuries could not have happened in any other way except by way of assault. (Kindly see the details of evidence in the draft appeal).

It is a very strange case where the learned judge has not read the evidence recorded in the proceedings and the documents before coming to a finding that there was no injury to the soles of the victim' s feet.

If the judge came to a finding that there was injury on the soles of the feet of the victim that alone would have sufficed to convict the accused. The conviction was avoided by holding that the evidence of the injury to the soles of the feet of the victim was, in fact, false evidence. **This was probably based on the learned High Court judge basing herself on the oral submission of the defense counsel without checking the veracity of the factual information by comparing it with what was, in fact the evidence recorded in the case.**

Regarding injury No. 10 which is a brain injury which kept the virtual complainant unconscious for 16 days, which according to the virtual complainant was due to the accused placing books on his head and then beating them with a pole. According to the learned High Court judge the brain injury was probably due to a viral infection and not a result of assault on the head. In fact, the learned High Court judge omits the evidence given on the assault to the head in this manner from the judgement. It is completely contrary to the

evidence of three doctors including a specialist who gave evidence on this matter.

There are numerous other errors of fact and law in this judgement which are not on the basis of evidence recorded in the case and which are very contrary to the conclusions that could have been arrived at if these facts were properly narrated in her judgement.

Clearly not at least being accurate on the recording of facts on the basis of the existing record is not mere error of law but in the very least, it implies incompetence. A judge is expected to maintain basic professional standards and the judgement fails in that regard.

The complainant in this case who suffered serious injuries thereafter spent six years pursuing this case despite of extremely serious threats. Out of that six years he spent over five years away from his village in Kandana, living in Kandy to avoid the pressures which were trying to silence him.

If the case was lost due to a problem of evidence or prosecution that is not a matter that anyone is entitled to complain of. However, when a case is lost on the basis of blatant incompetence and the causing of errors on record by the judge people have a right to request you as the prosecutor to use your right of appeal.

Anupama De Silva, the State Counsel, who prosecuted this case extremely intelligently and bravely knows the details of this case. The aggrieved party also made a long submission consisting of 92 pages (a copy of which is sent herewith) which dealt with all aspects of the case. Had the learned judge read the submissions of the Sate Counsel and that of the aggrieved party instead of relying entirely on the falsified submission of the defense counsel she would not have made the blatant errors that are found in this judgement.

We urge you to consult the state counsel and file an appeal as this is the least that can be done in order to justify your role in prosecuting

this case and also to recognise the effort of the complainant and the dangers he has faced, thereby giving justice another chance.

We hope that you will do what is professionally appropriate in terms of the office of the Attorney General under the present circumstances.

Thank you

Yours sincerely,
MOON Jeong Ho
Asian Human Rights Commission

Attached: A copy of the judgement of the High Court judge
The draft appeal of the aggrieved party, and
A copy of the written submission of the aggrieved party.

Previous publications by the Asian Human Rights Commission

Conversations in a Failing State

The State of Human Rights in Eleven Asian Nations - 2007

The Asian Charter on The Rule of Law: Consultation on Executive Control of the Judiciary and Judicial Corruption

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