

RIGHTS OF THE SUSPECTS UNDER THE SRI LANKAN LAW: AN ANALYSIS

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ABSTRACT

Being a suspect in a criminal investigation could undoubtedly lead to certain restrictions of rights. As a result, suspects could experience different challenges during the criminal investigation process. Many international reports, including the 2016 Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, identify that there is a tendency for the rights of the suspects to be violated during criminal investigation and custodial arrest in Sri Lanka. Despite the possibility that the rights of suspects could be limited, there are certain avenues where their rights can be effectively upheld during criminal investigations. The objective of this paper is to analyse the domestic legal framework of Sri Lanka pertaining to the rights of suspects during the criminal investigation process. A library-based qualitative research method has been employed. This paper argues that although the rights of suspects are sufficiently enumerated in the legal framework, they lack meaningful implementation.

Keywords: suspects rights, protection, criminal investigation, fundamental rights, justice

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1. INTRODUCTION

The general objective of criminal law is to prosecute offenses committed by the accused. The conviction of the offense will be based on the evidence and the collected data through the criminal procedure system. In this process, a suspected person may face some critical conditions. It is evident that although a person has been marked as a suspected person until he is proven guilty, he could be entitled to certain safeguards from the law. However, Sri Lankan domestic laws generally give more prominence to the victims of a crime than the suspect. A primary feature of regular criminal proceedings in the *coram judice* in Sri Lanka is the adoption of the 'adversary', as distinguished from the 'inquisitorial' system, and this is implicit in the whole scheme of the procedural laws of the country.¹ Eminent Sri Lankan Judge Gratien has commented in *De Mell v. Haniffa*² about this context. According to him, "it is very relevant to remind ourselves that our code of criminal procedure, which it superseded, was both designed to regulate the process of bringing an offender to justice in accordance with the 'accusatorial system' which, by the will of succeeding legislatures, has taken firm root in this country".³ This system of administration gave different instructions for following such proceedings. Although this system could restrict the rights of the suspects in such a process, we can still see certain protections that will assist in the protection of the rights of the suspects.

Therefore, this paper, is intended to find out what rights of suspects are protected and guaranteed within the domestic legal framework of Sri Lanka in the criminal investigation process. The Constitutional provisions, Criminal Procedure Code, Evidence Ordinance, and other relevant

¹ G L Peiris, "Human Rights and the System of Criminal Justice in Sri Lanka" (1990) Sri Lankan Journal of International Law 2, 104.

² *De Mell v. Haniffa* (1952), 53 NLR 433.

³ *Ibid.* at 435 – 436.

legislation will be assessed in this paper for this purpose. Since this paper focuses only on the rights of suspects in Sri Lanka, this paper will not emphasize the miscarriage of justice in the criminal justice system as a result of failing to protect suspects' rights.

2. CONSTITUTIONAL PROTECTIONS

The 1978 Second Republican Constitution of Sri Lanka (the Constitution) demonstrates a gradual development in the constitutional parameters of the country. Significant features of the Constitution include a separate fundamental rights chapter, an executive presidency system, a Westminster-modelled Parliament, and devolved power among secondary-level institutions. Within these features, introducing a fundamental rights chapter with a mechanism to litigate fundamental rights violations can be identified as a milestone in the Constitutional history of Sri Lanka.

Article 27(2)(a) of the Constitution states that the "state is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include the full realization of the fundamental rights and freedoms of all persons". This constitutional provision spells that 'all persons' can be eligible for the full realization of fundamental rights in the constitution. Then, it is reasonable to argue that, since the suspect is also a human being, such a suspect could also get the entitlements under the Constitution.⁴

In this regard, it is essential to focus on the fundamental rights chapter of the Constitution. Article 126 and Article 17 of the Constitution introduce a mechanism against an imminent infringement or an infringement of the rights under this Constitution. Accordingly, any victim of such a violation can file a petition with the Supreme Court within one month of the said

⁴ This comes under the 'Directive Principles'-Chapter VI of the 1978 Constitution.

infringement. Additionally, this provision only covers rights that are violated by executive or administrative action. It has been established in this discussion that a majority of suspects' rights are violated by police officers and representatives of the state. Hence, this group can be included in the category of Article 126 of the Constitution.⁵ Although there are rights under Chapter III of the Constitution, suspects can get entitled to a few rights during the criminal investigation process, such as the right to equality, the right to be free from torture, freedom from arbitrary arrest and detention, and the right to access information.

2.1. Right to Equality

Equality can be interpreted as the core of many other rights. Today, equality is recognized as a basic and essential requirement of a democracy.⁶ This right is incorporated under Article 12(1) of the Constitution, which reads that “all persons are equal before the law and are entitled to the equal protection of the law”. This is also called equality before the law. According to the comment made by Justice Sharvananda in the landmark judgement, *Palihawadana v. AG*⁷, the classification of persons is important to grant this right at different levels.⁸ This right has been given to “all persons”, and it can be interpreted broadly to include suspects within the meaning of the article. Therefore, whatever actions taken by law enforcement officials that restrict this right can be litigated as a violation of a fundamental right. There is no specific case in Sri Lanka that deals only with the suspects' right to equality. Most of the petitions on the right to equality are filed along with the other rights under the

⁵ *Sriyani Silva v. Iddamalgoda, OIC Payagala* (2003) 2 Sri.L.R 63.

⁶ J Wickramaratne (2006), *Fundamental Rights in Sri Lanka*, Stamford Lake Publication, p. 275.

⁷ *Palihawadana v. AG* (1979)1 FDR 1.

⁸ This case dealt with a promotion issue.

Constitution, such as the right to be free from torture, freedom from arbitrary arrest and detention, etc.

2.2. Right to be Freedom from Torture

Article 11 of the Constitution states that “No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.⁹ Amarasinghe defines the term torture as “the suffering occasioned must be of a particular intensity or cruelty. In order that ill-treatment may be regarded as inhuman or degrading, it must be severe”.¹⁰ Therefore, severity as well as cruelty are significant factors under this Article. Torture is a severe experience that most suspects face in Sri Lanka.¹¹ This happens during criminal investigations in Sri Lanka. In *Sivakumar v. Officer-in-Charge and others*¹², the petitioner complained that, while he was in police custody, he was subjected to various forms of torture. In this case, the medical reports confirmed that the petitioner was subjected to cruel torture. This case further establishes the Supreme Court’s recognition of medical reports as essential evidence in proving torture and other cruel, inhuman, or degrading treatment.

Under Article 11 of the Constitution, it is important to assess the level of cruelty or inhumane treatment. *Amal Sudath Silva v. Kodithuwakku*¹³ is another case in which the suspect was subjected to torture and cruel, inhumane treatment during the interrogation. This case is one of the classic examples of custodial violence in Sri Lanka. In this case, the suspect was questioned about a crime, but police officers used the

⁹ The Constitution of Sri Lanka 1978, Art 11.

¹⁰ Amarasinghe A.R.B., (1995), *Our Fundamental Rights of Personal Security and Physical Liberty*, Sarvodaya Book Publishing Services, p. 29.

¹¹ Apart from this constitutional provision, Sri Lanka enacted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act No. 22 of 1994. This Act interprets torture as a crime.

¹² *Sivakumar v. Officer-in-Charge and others* (1987) 2 SLR 119.

¹³ *Amal Sudath Silva v. Kodithuwakku* (1987) 2 SLR 119.

maximum of cruel and inhumane methods, such as chopping the male organs by using drawers in the police station. The Supreme Court held this to be a violation of Article 11 of the Constitution.

The case of *Sanjeewa v. Suraweera, Officer-in-Charge, Police Station, Wattala*¹⁴ (also known as the *Gerald Mervin Perera case*), is yet another example that shows the level of inhuman treatment used by police officers during criminal interrogations in Sri Lanka. Here, police arrested Gerald Mervin Perera without informing him of any reason for the arrest. During the custodial period, he was subjected to torture, and cruel and inhuman treatment. The police officers attempted to get a confession from Gerald. However, Gerald knew nothing about the offense he was being questioned about. The police officer kept Gerald in custody for more than twenty-four hours, and finally, they found that they had arrested the wrong person. By this time, the suspect had been subjected to ruthless treatment by the police officers, and he was hospitalized upon his release from police custody. The Supreme Court held this was a violation of Article 11 of the Constitution. This case shows that most police officers resort to violence and torture to extract confessions from suspected persons, even amidst repeated claims by the suspect that he or she is not aware of the particular offense.

Another challenge that Article 11 encounters is difficulties in establishing torture before a court of law. The case of *Velmurugu v. The Attorney General and Two Others*¹⁵ is an example. The petitioner, in this case, was arrested by army forces and placed in an officer-driven jeep. The petitioner claimed he endured torture and brutal treatment while riding in the jeep.

¹⁴ *Sanjeewa v. Suraweera, Officer-in-Charge, Police Station, Wattala* (2003) 1 Sri L.R. 317.

¹⁵ *Velmurugu v. The Attorney General and Two Others* (1981) 1 Sri L.R. 406.

However, despite the judicial medical officer's assistance, the petitioner could not prove the inhuman treatment.¹⁶

It is evident from the above discussion that Article 11 is an integral Constitutional safeguard for suspected persons during the criminal investigation process. However, in certain cases, there is difficulty in establishing torture and cruel, inhumane treatment.¹⁷ On the other hand, there are reported cases in which, such torturous activities have been successfully proved.¹⁸

2.3. Freedom from Arbitrary Arrest, Detention and Punishment

This right is incorporated under Article 13 of the Constitution. Article 13 can be considered as a provision that encompasses a collection of other important rights. Additionally, this provision can be identified as a procedural safeguard for suspects in Sri Lanka. Procedural safeguards rest upon two underlying assumptions of democracy: the integrity of the individual and the government by law rather than men.¹⁹

According to Article 13(1) of the Constitution, “no person shall be arrested except according to procedure laid down by law. Any person arrested shall be informed of the reason for his arrest”. This indicates a procedural requirement that all police officers should follow during the criminal investigation. In *Piyasiri v. Fernando, A.S.P.*²⁰ the petitioners were asked to go to a particular police station, but no reason was given. The petitioners travelled in their own cars. While they were in the police station, their belongings were searched and then they were asked to go to the

¹⁶ Similarly, in *Namasivayam v. Gunewardena* (1995) 2 Sri L R 167, the petition failed because the claim that the petitioner had been tortured was unsupported by any medical proof.

¹⁷ See *Malinda Channa Peiris and others v. AG and others* (1994) 1 Sri L.R.1.

¹⁸ See *Kapugeekiyana v. Hettiarachchi* (1984) 2 Sri L.R.153.

¹⁹ L Pfeffer, *'The Liberties of an American'*, Beacon Press Boston (1956), p. 158.

²⁰ *Piyasiri v. Fernando, A.S.P* (1988) 1 Sri LR 173.

Bribery Commission in Colombo. Later, they were released after recording their statement. In this case, Justice H.A.G. de Silva explained that ;

custody does not today necessarily import the meaning of confinement but has been extended to mean a lack of freedom of movement brought about not only by detention but also by threatened coercion, the existence of which can be inferred from the surrounding circumstances.

This definition shows that, due to the threat or coercion, if a person's freedom of movement is being restricted, then that is sufficient to prove the violation of this right. Therefore, failing to inform them of the reason for the arrest could lead to a restriction of the right enumerated in Article 13(1) of the Constitution. As per this provision, authorities are bound to follow the procedural requirements stipulated in the procedural law. These processes are codified under the Code of Criminal Procedure Act No. 15 of 1979. As arrest and detention are integral steps in criminal interrogation, Article 13 aims to protect the liberty of the person by following due process of law.²¹ In *Namasivayam v. Gunewardene*²², Chief Justice Sharvananda pointed out the importance of protecting the liberty of a person, even if he is a suspected person. He further stated that the liberty of an individual is a matter of great constitutional importance²³. In addition to the requirements in Article 13(1), there is another requirement that comes along with Article 13(2) of the Constitution. Accordingly, once a suspected person is arrested, it is important to produce the suspect before a judge within the time stipulated under the procedural laws. This is also an essential requirement since the longer the period in police custody, the higher the possibility of more rights being violated. Police

²¹ See *Premalal de Silva v. Inspector Rodrigo* (1991) 2 Sri LR 307 and *Vivienne Goonewardena v. Perera* FRD (2) 426.

²² *Namasivayam v. Gunewardene* (1989) 1 Sri L.R. 394.

²³ [1989] 1 Sri L.R. 394, at p. 402.

officers can use this prolonged time to violate the rights of the suspects for their own benefit.²⁴ Nevertheless, Article 13 (1) and (2) can be restricted based on some reasons, such as national security and public order²⁵. This shows an explicit restriction on these safeguards. In most cases, this right has been restricted by emergency regulations in Sri Lanka²⁶. Even though the restrictions were originally introduced in cases where a terrorist was concerned, these same restrictions paved the way for the rights of a criminal suspect to be violated.

Article 13(3) of the Constitution deals with the importance of a fair trial. The assistance of an Attorney-at-Law and a fair trial by a competent court are the requirements under this provision. This is important to prepare the defense of the suspects. In *Fernando's*²⁷ case, Justice Malcolm Perera stated that “by denying counsel an opportunity to take instructions and prepare for the case, the cherished right to have the assistance of counsel was reduced”. This quotation indicates the importance of legal assistance in presenting the case. Given the vulnerability of criminal suspects, it is imperative that legal assistance be made available immediately following arrest and detention. In the *Kumaratunga v. Samarasinghe*²⁸ case, Justice Soza noted how this right can be implemented, discussing that the right can be applied to the suspects coming under the Code of Criminal Procedure.²⁹ When analysing this view, it is clear that suspects are more entitled to this right. If not, the defense of the case will not become a reality, thereby adversely affecting the objectives of the criminal justice administration at large.

²⁴ This requirement was stressed in *Channa Peiris v. AG* (1994) 1 Sri L.R. 1 and *Edirisuriya v. Navaratnam* (1985) 1 Sri L.R.100.

²⁵ The Second Republican Constitution of Sri Lanka, Article 15(7)

²⁶ *Wickremabandhu v. Herath* (1990) 2 Sri LR 34 and *Visvalingam & Others v. Liyanage* (1983) 2 Sri L. R.312, FRD (2) 529 are some examples.

²⁷ *Fernando v. The Republic of Sri Lanka* 79 (II) NLR 313.

²⁸ *Kumaratunga v. Samarasinghe* (1983) 2 Sri LR 63.

²⁹ See Section 260.

Arbitrary punishment is restricted by Article 13 (4). Accordingly, “no person shall be punished with death or imprisonment except by order of a competent court”. This provision prevents police officers from punishing or treating suspects inhumanely during the custodial period. Article 13(4) has been elaborated further in the case of *Kumaratunga v. Samarasinghe*³⁰. According to this case, arrest and detention, in the absence of a pending investigation or trial, amount to punishment by imprisonment, which is prohibited by Article 13(4). This progressive interpretation connects with keeping the suspect longer than the stipulated time under the procedural law. Moreover, Justice Colin-Thome in *Nanayakkara v. Henry Perera*³¹ states that the detention of a person for an unspecified and unknown purpose would be an infringement of Article 13 (4). Similarly, it seeks to ensure that a suspect is produced before a competent court during a reasonable, stipulated time period. Hence, it is submitted that Article 13 encompasses a series of basic safeguards that are fundamental to the protection of the rights of the criminal suspect. The application of this provision is further enhanced by the judges, thereby progressively shaping the written law of the country.

2.4. Right to Access Information

In general, the right to information enables the suspected person, his Attorney, or his close relatives to obtain the required pieces of information from law enforcement officials. In a situation where the suspect is in police custody and there is no way of receiving any information about the arrest or detention, relatives of the suspect can use this as an avenue to obtain information about the arrest of a suspect.³² Until the 19th Amendment to

³⁰ *Kumaratunga v. Samarasinghe* (1983) 2 Sri LR 63.

³¹ *Nanayakkara v. Henry Perera* (1985) 2 Sri LR 375.

³² The EU's model of the Letter of Rights, 'Understanding your rights in police custody' (*Fair Trial*, January 2022) <<https://www.fairtrials.org/app/uploads/2022/01/LOF-Summary-Spreads.pdf>> (accessed on October 10, 2023).

the 1978 Second Republican Constitution, this was not recognized as a right under the Constitution of the country.³³ Additionally, the application of this right comes with the Right to Information Act No. 12 of 2016 and the Gazette notification No. 2004/66 of February 03, 2017. Section 3 (1) of the Right to Information Act states that “every citizen shall have a right of access to information that is in the possession, custody or control of a public authority”. However, if the disclosure of [any] information would cause grave prejudice to the prevention or detection of any crime or the apprehension or prosecution of offenders, then the Act prevents accessing such information³⁴. This is the only restriction that can be seen in the Act relating to the suspects. Therefore, we can argue that while suspects are in the custodial period, their close relatives can use this legislative enactment to protect the rights of the suspect.

3. THE CODE OF CRIMINAL PROCEDURE ACT NO.15 OF 1979

The Code of Criminal Procedure Act (Code) spells out the procedural requirements to be followed in criminal trials. This originated in 1979 and was subsequently amended several times. The Code includes procedural requirements in investigation, the procedure to arrest, the procedure to find competent jurisdiction, and the authorized individuals in criminal trials. This part assesses the provisions of the code that contribute towards protecting the rights of the suspects in two stages: during the criminal investigation and during the arrest and custodial period.

³³ Constitution of Sri Lanka 1978, art 14A.

³⁴ Right to Information Act No. 12 of 2016, Section 5(1)(h).

3.1. During the Criminal Investigation Period

Criminal investigation commences with the recording of the first information, and this can be given orally or in writing to a police officer³⁵. Then, it is the duty of the police officer to record it in the first information book. This step initiates the criminal investigation. Collecting evidence and obtaining statements is the next stage of the criminal investigation. This is facilitated by Section 110 of the Code. As per this provision, police officers can examine, witnesses and record the statements given by such individuals. Section 110 (2) of the code states that “such person shall be bound to answer truly all questions relating to such case put to him by such officer or inquirer other than questions which would have a tendency to expose him to a criminal charge”. This provision can be used in favour of the suspected person as well. For instance, there are many cases where suspects are forced by police officers to give a statement or confession about a fabricated issue. The literal meaning of this provision restricts those and makes a safeguard. Section 110 (3) further states that “a statement made by an accused person in the course of any investigation shall only be used to prove that he made a different statement at a different time”. This safeguard is vital from a suspect’s point of view since some police officers use force to induce suspects to make statements or confessions. However, according to this protection, a police officer is prohibited from using such violence or force against a suspect or an accused. Any statements or confessions thus obtained become inadmissible in this case. In *Queen v. Mapitigama Buddharakkita Thero*³⁶, the court held that “the use of the oral statement made to a police officer by the accused was as obnoxious to the prohibition contained in Section 122 (3) of the Code as the use of the same statement reduced into

³⁵ Criminal Procedure Code Act No. 15 of 1979, s 109(1).

³⁶ *Queen v. Mapitigama Buddharakkita Thero* 63 NLR 433

writing". The same issue was discussed in the case of *Anandagoda v. The Queen* and the court held that it needed to align with the requirements of the Evidence Ordinance and stated that such statements would become inadmissible in the trial.

Further, Section 111 of the Code provides vital protection for a suspect. Accordingly, "any police officer shall not offer or make or cause to be offered or made any inducement, threat, or promise to any person charged with an offense to induce such person to make any statement with reference to the charge against such person". This provision thereby provides a safeguard for suspects in terms of confessions or statements extracted through force or duress.³⁷

One of the objectives of a criminal investigation is to find sufficient evidence that leads to the actual offender of the crime.³⁸ If police officers are unable to find sufficient evidence or reasonable grounds of suspicion to justify the wrongfulness of the suspect, then such a person in police custody can be released.³⁹ This will ensure that suspects are not kept in police custody unreasonably. However, this provision bestows any such discretion on releasing the suspect to the police officers.

These are the main protections that can be identified under the criminal investigation provisions of the Code. This article does not discuss the actual implementation of these provisions.

3.1.1 *During the Arrest and Custodial Period*

The arrest of a suspect supports the criminal investigation. The Code identifies arrest as "making an arrest the person making the same shall actually touch or confine the body of the person to be arrested unless

³⁷ *Queen v. T.M. Appuhamy* 60 NLR 313.

³⁸ R F Becker, *Criminal Investigation* (2nd Edition 2005, Jones and Bartlett) 11.

³⁹ Criminal Procedure Code Act No. 15 of 1979, s 114; *AG v. Punchi Banda and others* (1986) 1 Sri LR 40, is an example of the applicability of this provision.

there be a submission to the custody by word or action shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested".⁴⁰ This definition identifies that the arrest can be made by touching or by confinement, and this provision urges the need to inform the reason or the allegation of the person who will be subjected to arrest. In *Mariyadas Raj v. AG and others*⁴¹, the court noted that "if a police officer arrests without a warrant, upon reasonable suspicion, he must, in ordinary circumstances, inform the person arrested of the true ground of the arrest. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized". Arrest without giving reasons leads to a violation of Article 13(1) of the Constitution. The above case recognizes this safeguard as a right of the suspect who has been subjected to the arrest⁴².

Moreover, when a suspect is taken into police custody, it is required to produce him to the magistrate within twenty-four hours.⁴³ Under section 2 of the Code of Criminal Procedure (Special Provisions) Act, No. 2 of 2013, police officers are given a chance to keep the suspected person for a maximum of forty-eight hours in police custody. In this situation, law enforcement officials are bound to show the need to keep the suspect for further investigation purposes. Yet, increasing the time might lead to the violation of the rights of the people in custody. In *Edirisuriya v. Nawarathnam*⁴⁴, it was held that, when the arrest is done according to the provisions of the Code, then it is considered a legal arrest. Section 37 of the Code contemplates that a person who has been taken into custody without a warrant should be produced before the learned Magistrate as

⁴⁰ Code of Criminal Procedure Act No. 15 of 1979, s 23(1).

⁴¹ *Mariyadas Raj v. AG and others* (1983) 2 Sri LR 461.

⁴² See *Muthusamy v. Kannagara* 52 NLR 324, *Ansalin Fernando v. Sarath Perera, OIC Chilaw* (1992) 1 Sri L.R. 411, and the *King v. Wannaku Tissanahamy* (51 NLR 402)

⁴³ Code of Criminal Procedure Act No. 15 of 1979, s 37.

⁴⁴ *Edirisuriya v. Nawarathnam* (1985) 1 Sri L.R.100.

early as possible and without any unnecessary delay.⁴⁵ In *Kodithuwakkuge Nihal v. Police Sergeant Kotalawala*,⁴⁶ the court held that keeping a suspect for an unreasonable time would violate not only Section 37 but also his constitutionally recognized fundamental rights.

Further, when suspects are arrested without a warrant, it is a statutory requirement that a particular police officer has a duty to report such arrest to the relevant Magistrate in the district.⁴⁷ These reporting mechanisms are envisaged to limit the practice of arbitrary arrest and detention.

It is clear that these provisions safeguard the rights of the suspected person or accused while they are in custody. However, relevant provisions of the Code should be referred to along with the other appropriate legislative enactments in Sri Lanka.

3.1.2. Evidence Ordinance

Evidence Ordinance (The Ordinance) plays a substantial role in criminal as well as civil cases since evidence is mandatory to prove certain facts of a case. "There are three broad facets of this Ordinance: it determines what facts are relevant; it states how relevant facts may be proved in a judicial proceeding; and it governs the production and effect of different types of evidence".⁴⁸ According to Coomaraswamy, "without evidence, trials might be indefinitely prolonged to the great detriment of the public and the vexation and expense of suitors".⁴⁹ Therefore, these scholarly opinions mirror the need for evidence in any case.

⁴⁵ *Samarasekara v. Vijitha Alwis, OIC Ginigathena* (2010) BLR 19.

⁴⁶ *Kodithuwakkuge Nihal v. Police Sergeant Kotalawala* (2000) 1 Sri L.R. 2017.

⁴⁷ Code of Criminal Procedure Act No. 15 of 1979, s 39.

⁴⁸ G L Peiris 'The Law of Evidence in Sri Lanka,' (4th ed, Stamford Lake Publication, (2011) p. 3.

⁴⁹ E R S R Coomaraswamy, 'The Law of Evidence (with special reference to the Law of Sri Lanka)', (2nd ed, Stamford Lake Publication, (2012), p. 8.

In a criminal case, it is a well-established principle that the facts need to be proved beyond reasonable doubt. If the prosecution cannot establish the case beyond a reasonable doubt, then the case will be decided in favour of the suspect or accused. Section 101 of the Ordinance states that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist”. Hence, the burden of proving the accuracy of one’s statement falls on the person who made the statement. In other words, when a victim states that a suspect assaulted him, the burden of proving that fact falls on the victim.⁵⁰ However, if the suspect wants to come up with a defense in his favour, then the ordinance imposes the burden of proof on the suspected person or accused. This is shown by the illustration (a) of Section 105 of the Ordinance. In *Karunaratne v. the State*⁵¹, Justice Sirimanne stated that “there was a burden on the accused to prove on a balance of probability their denial of the fact of the case”. This indicates that the suspect or the accused need not prove the defense to a high degree. However, the application of Section 105 comes next to the role of the prosecution. Enabling the suspects to bring forth their defenses not only safeguard their rights but also upholds the concept of the presumption of innocence.⁵²

Moreover, the ordinance renders inadmissible any confessions made by the suspects while in police custody.⁵³ During a criminal investigation, there is a high tendency for the inquiring officers to force the suspects into confessing or admitting guilt. Sometimes, inquiring officers could fabricate some facts and force the suspect to accept them through a confession.

⁵⁰ This is further elaborated by the illustrations (a) and (b) of Section 101 of the Evidence Ordinance.

⁵¹ *Karunaratne v. the State* (1975), 77 NLR 527.

⁵² See *Attorney-General v. Rahim* (1966) 69 NLR 51 and *Cornelis v. Inspector of Police Kamburupitiya* (1963) 66 NLR 185.

⁵³ This is an exception to Section 17(2) of the Evidence Ordinance.

Accordingly, when it appears to the court that the confession has been obtained by making a threat, promise or inducement to the suspected person, such a confession will become inadmissible.⁵⁴ Coomaraswamy identifies the principle of voluntariness as the underpinning principle in Section 24.⁵⁵ In *R. v. Thompson*⁵⁶ Justice Cave states that “to be admissible, confession must be free and voluntary. Hence if the confession has been obtained by the suspects using force, the confession is involuntary, and thereby inadmissible”.

Section 25 of the Ordinance is yet another shield for the suspects while they are in police custody. No confession made to a police officer shall be proved against a person accused of any offense.⁵⁷ While suspects are in police custody, they may be compelled to accept the guilt, and due to their vulnerability, they might admit the guilt if they have no other option in such an atmosphere. However, the Ordinance does not accept those confessions as admissible unless they are made before a magistrate⁵⁸. This protection discourages police officers from using force to extract confessions. In *King v. Kalu Banda*⁵⁹, Chief Justice Lascelles stated that “it was recognized that police officers in Ceylon, as in India, are not always proof against the temptation of deposing that the accused made some statement, the effect of which is to strengthen the case for the prosecution or to clinch the charge against the accused”. This precedent was followed by many later cases in Sri Lanka. Therefore, the court recognizes the risk of using confessions in court. *The Queen v. Murugan Ramasamy*⁶⁰, the

⁵⁴ Evidence Ordinance, s 24.

⁵⁵ Coomaraswamy. E.R.S.R., ‘*The Law of Evidence (with special reference to the Law of Sri Lanka)*, 2nd ed, Stamford Lake Publication, (2012), p. 404.

⁵⁶ *R. v. Thompson* (1893), 2 Q.B. 12.

⁵⁷ Evidence Ordinance, s 25(1).

⁵⁸ Evidence Ordinance, s 26.

⁵⁹ *King v. Kalu Banda* (1912), 15 NLR 422.

⁶⁰ *Queen v. Murugan Ramasamy* (1964), 66 NLR 265.

*Queen v. Gnanaseeha Thero*⁶¹, and *King v. Kiriwasthu*⁶² are some later cases resonating with the same opinion.

These are the main safeguards available in the Ordinance, in favour of the suspects. These provisions prohibit police officers and other relevant officials from collecting evidence against the suspects by using force or coercion.

3.1.3. *Bail Act No. 30 of 1997*

Bail means “the release from the custody of the state of a person who is accused of having committed an act or acts which are considered offenses under a particular penal system”.⁶³ Bail is a temporary relief for the suspect when such a person is arrested or in custody. Initially, the law relating to bail was operated under the Code of Criminal Procedure Act in Sri Lanka, and later, the Bail Act No. 30 of 1997 became the core legislation in this area. The preamble of the Bail Act states that :

[T]his Act is to provide for release on bail of persons suspected or accused of being concerned in committing or of having committed an offense; to provide for the granting of anticipatory bail and for matters connected therewith or incidental thereto.

The preamble indicates that the guiding principle of this legislation is the release of suspects or accused by granting bail.⁶⁴ Bail is important since the longer the period in custody, there is a likelihood of violation of the rights of the suspects. Even though the Bail Act, applies to the offenses under the major penal laws in Sri Lanka it excludes certain legislation

⁶¹ *Queen v. Gnanaseeha Thero* (1968) 73 NLR 154.

⁶² *King v. Kiriwasthu* (1939) 40 NLR 289.

⁶³ Indatissa K., ‘*Law Relating to Bail in Sri Lanka and a Commentary on the Bail Act*,’ (2nd ed, Author publication, (2008), 3.

⁶⁴ *Anuruddha Ratwatte v. AG* (SC Appeal No. 02/2003) S.N. de Silva J pointed out this principle by interpreting Section 2 of the Bail Act No. 30 of 1997.

including the Prevention of Terrorism Act and Regulations made under the Public Security Ordinance, etc.⁶⁵

The applicability of the Bail Act depends on the nature of the offense, such as whether it is a bailable or a non-bailable offense. The suspect who is being suspected of a bailable offense can be granted bail.⁶⁶ A non-bailable offense does not mean that those suspects are not entitled to obtain bail. According to Section 5 of the Bail Act, suspects of such non-bailable offenses can be granted bail based on the discretion of the court. Further, when police officers are investigating a bailable offense, they can grant bail to a suspect when there is no evidence available against the suspect.⁶⁷ This is also called police bail.⁶⁸ However, in these cases, the police officers may exercise unfettered discretion. Even though the purpose of the provision is to provide some relief to the suspect, the police may not grant bail in certain instances, such as to maintain public security, to protect victims and to protect witnesses.

Another feature of the Bail Act is 'anticipatory bail'. This was introduced by Section 21 of the Bail Act. Anticipatory bail means:

that a person who has reason to believe that the authorities require him for the purpose of an offense and that where there is material to believe that he may be arrested immediately, any such person could make an application to the relevant court to obtain bail prior to his arrest.⁶⁹

⁶⁵ Bail Act No. 30 of 1997, s 3(1), the application of this provision was debatable decided in *Sumathipala v. AG* (CA 171/2004); *Mohomed Shiyam v. AG* (SC, Appeal 28/2005).

⁶⁶ Bail Act No. 30 of 1997, s 4.

⁶⁷ Bail Act No. 30 of 1997, s 6.

⁶⁸ Connect with Section 37 of the Code of Criminal Procedure Act No. 15 of 1979.

⁶⁹ Indatissa K., '*Law Relating to Bail in Sri Lanka and a Commentary on the Bail Act*, (2nd ed, Author publication, 2008), p. 117.

This provision gives an opportunity to a person to obtain bail when he or she has a suspicion of being arrested. Analysis of the Bail Act No. 13 of 1997 reveals suspects of criminal cases can enjoy certain rights by obtaining bail.

4. HUMAN RIGHTS COMMISSION ACT NO. 21 OF 1996

The main objective of the Human Rights Commission Act is the establishment of the Human Rights Commission in Sri Lanka (HRCSL).⁷⁰ The vision of the Commission is to ensure human rights for all and promote and protect the rule of law.⁷¹ The leading role of the commission includes:

inquir(ing) into and investigating, complaints regarding procedures, with a view to ensuring compliance with the provisions of the Constitution relating to fundamental rights and to promoting respect for and observance of fundamental rights, inquire into and investigate, complaints regarding infringements or imminent infringements of fundamental rights, and to provide for resolution thereof by conciliation and mediation in accordance with the provisions hereinafter provided, etc.⁷²

Therefore, this commission works towards ensuring fundamental rights in Sri Lanka. Further, the Supreme Court may refer certain matters to the Commission.⁷³ When a matter thus directed to the Commission takes more than one month, then the computation of the one month under Article 126 of the Constitution will not factor in the investigation time of the

⁷⁰ Hereinafter, the Commission.

⁷¹ HRCSL, <<http://hrctl.lk/english/>> accessed on August 07, 2022.

⁷² Human Rights Commission of Sri Lanka Act No. 21 of 1996, s 10.

⁷³ *Ibid* s 11.

Commission.⁷⁴ This provision shows the recognition of the Commission. Any person is entitled to make a petition to the commission when his or her fundamental rights are violated. Therefore, when the rights of the suspects are violated during the criminal investigation, they are also entitled to make a petition to the commission. The power to conduct an inquiry comes under Section 18 of the HRCSL Act. These powers include collecting evidence, examining witnesses and summoning people. The reports of the inquiries may be directed to the court, but these reports of the commission do not bind the Supreme Court. However, the commission can still make a strong impression on the court. Although there are many criticisms against the Commission, the establishment of such an institution should nevertheless be considered a progressive step. Compared to making a fundamental rights petition to the Supreme Court, the Commission has a less formal process. It is not time-consuming, not expensive and allows the complaint to be lodged even from outside of Colombo. These are some of the key benefits of having this commission. Therefore, when suspects' rights are adversely violated, they can seek relief through this commission before making a petition to the Supreme Court in Sri Lanka.

5. CONCLUSION

The Sri Lankan criminal justice process relies on many legislative provisions. It is essential to protect the rights of the people during the investigation. The suspect, being a vulnerable person in the police custodial atmosphere, can be subjected to ill-treatment. The Constitution of Sri Lanka recognizes some fundamental rights under Chapter III of the Constitution. Any person in the country is entitled to these rights. The Supreme Court of Sri Lanka grants relief for violation of such rights under

⁷⁴ Ibid s 13(1).

Article 126 of the Constitution. Similarly, any such victim can make a complaint to the Human Rights Commission of Sri Lanka.⁷⁵

The bureaucratic practices and lack of binding force of the recommendations of the Human Rights Commission raise a reasonable question of whether we can consider it as an effective mechanism to protect the rights of the suspects. Having considered the shortfalls of the Human Rights Commission, it is appropriate to state that suspects rights are better protected under Chapter III of the Constitution.

The Code of Criminal Procedure and the Evidence Ordinance have laid down, certain mechanisms to protect suspects. These safeguards include eliminating confessions given to the police officers, the time limit to custody, investigations without undue delay, restricting arbitrary arrest and detention, and informing the public of the reason for the arrest.

The Bail Act enables suspects to be released from custody based on certain prerequisites. The Act introduces procedural mechanisms to grant bail not only for bailable offenses but also for non-bailable offenses. This Act is a progressive initiative to protect suspects from prolonged detention.

The above analysis reveals that Sri Lanka has adequate legislative provisions, institutional mechanisms, and judicial processes to safeguard suspects' rights in the criminal investigation process. Despite, the comprehensive mechanisms in place, the rights of suspects during criminal investigations may be violated due to various reasons. Therefore,

⁷⁵ According to the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka (2016) "In practice, the only effective avenues for complaints are filing a "fundamental rights" case before the Supreme Court or submitting the case to the National Human Rights Commission. However, fundamental rights applications involve costly, complex litigation and are therefore not accessible to all victims" (A/HRC/34/54/Add.2 December 2016) at 15. <<https://digitallibrary.un.org/record/861186?ln=en>> (accessed on 10, October 2023).

in order to strengthen the protection of the suspects, the officers and stakeholders involved in the criminal investigation processes need to have a firmer grasp of these legislative and other mechanisms.