

Udeni Renuka Gunwardena v. Dr. Gurugue L. Wimalasiri and others.

Supreme Court of Sri Lanka

26 January 2004

Citation:S.C (Special) No. 69/1999 (FR)

Judges: Fernando J, Wingneswaran J, Weerasuriya J.

WIGNESWARAN J.

1. Leave to proceed in respect of the alleged infringement of Article 11 and 12(1) of the Constitution having been granted in this case as far back as on 30.6.99 it came up for argument only on 14.5.2002 and 21.2.2002 before Justice Mark Fernando, Justice D.P.S. Gunasekara. Due to the latter's sickness, another Bench constitution Justice Mark Fernando, Justice T.B. Weerasuriya and Self came to hear the case again on 28.7.2003 and Counsel agreed that the case be disposed of on the basis of Written Submissions. The Docket in this case has been misplaced. Written Submissions having now being filed, this order seeks to examine the matters in dispute.
2. Briefly the facts as gathered from documents filed are as follows:
 - (i) Petitioner was the mother of twins. They were born after a Caesarian section around 1992. She was pregnant again in 1998. According to the "Pregnancy Record" issued by the Hikkaduwa Maternity Clinic (P1) she has been having ante natal care at Hikkaduwa on 24.6.98 (17 weeks 5 days' pregnancy), 5.8.98 (24 weeks), 2.9.98 (28 weeks), 14.10.98 (4 weeks) and 12.11.98 (38 weeks)
 - (ii) Petitioner went to her sister's house in Kundasale for confinement presumably on 12.11.98 (P2)
 - (iii) But the Petitioner appears to have gone earlier to Kandy on 6.11.98. On 7.11.98 she saw the Consultant Visiting Obstetrician and Gynecologist ("V.O.G.") the 1st Respondent, at the Kandy Hospital. There is a dispute as to what transpired. According to the Petitioner, the 1st Respondent, after perusing the pregnancy record and other documents, refused to admit the Petitioner to Kandy General Hospital, saying Regulations required a patient to be admitted to the Government Hospital situated in the area where the patient attended clinics. According to the Petitioner, P3 was a note, recording some details of her medical history, but without a name, given by the 1st Respondent. She alleges that the 1st Respondent promised to attend to her at private hospital for a comparatively lesser fee than other Doctors. According to the 1st Respondent, however, the Petitioner did not produce any pregnancy record or referral letter, and wanted to be admitted to a private nursing home, but her sister preferred the Kandy general Hospital. She also expressed her desire to have a Caesarian section. The 1st Respondent advised her to consult her husband, and to see him thereafter.

- (iv) It appears that on 12.11.98 after the Petitioner failed to get admitted to Kandy Hospital, she had gone back to the Hikkaduwa clinic, and got a letter from the Health Services' Officer in charge requesting that she be registered at the Kundasale Clinic. On the same day she went to Kundasale and the Doctor in charge made an endorsement on her pregnancy record, referring her to the V.O.G/Kandy.
- (v) She thereafter obtained P4 dated 18.11.98 addressed to MO/OPD Kandy from one Doctor M.B. Dissanayake. The expected date of delivery was mentioned in P4 as 21.11.98. P1 originally had the date of last menstrual period ("LRMP") as 20.2.98 and the expected date of delivery as 27.11.98. Someone other than the person who filled up P1 originally had cut off those dates and inserted new dates "24.2.98" and 21.11.98 respectively. The number "2" entered subsequently after deleting the earlier dates, differs substantially. The date of her first visit to the Clinic was 24.6.98, on which date the period of pregnancy was entered as "175/7", (i.e. 17 weeks and 5 days) which tallies exactly with LRMP being 20.2.98. If the LRMP was 14.2.98, the period of pregnancy would have been 18 weeks and 4 days. There is no doubt that P1 had been altered after the first visit.
- (vi) Armed with the above said documents the Petitioner had herself admitted to Ward 6 of the Kandy General Hospital around 8 pm on 18.11.98. The Doctor who examined her sent her to the labour room and she was given a salient solution.
- (vii) According to the Petitioner on 19.11.98 the 1st Respondent on seeing her had apparently got annoyed. According to the Petitioner he had referred to his refusal earlier, "ripped the saline tubes off and had ordered the Petitioner to walk back to the ward." Again on the evening of 20.11.98, the 1st Respondent denied all those allegations.
- (viii) When informed, the Petitioner's husband had admittedly had a brief note on the bed-head ticket and got the Petitioner discharged from hospital and admitted her immediately to Suvasewana Private Hospital, Kandy. The bed-head ticket, consisting of seven pages, was produced. It did not contain any reference to the Petitioner's discharge or the note made by the husband. It is probable that the last page (the eighth) had been surreptitiously removed.
- (ix) At the Hospital Dr. M.C.M.Zubair delivered the baby at 6.35 pm on 20.11.98 after a Caesarian section. Though a statement to the police was made by the Petitioner's husband in this regard on 21.11.98. he did not call upon the police to investigate into the matter. In that statement he set out the gist of the note made by him, namely "I am taking the patient against the advice of the Doctor because the 1st Respondent advised the patient to go to a private nursing home. The 1st Respondent has further said that he is not taking any responsibility for this patient when she is at General Hospital, Kandy".
- (x) The Petitioner has claimed that
- (a) the denial of treatment at Kandy General Hospital,
 - (b) neglect of the Petitioner in her "serious" condition,
 - (c) ripping off the saline tubes and chasing the Petitioner away from the labour room,
 - (d) thereby forcing her to a private nursing home by the 1st Respondent

- i. had together violated her fundamental right to equality guaranteed under Article 12(1) of the Constitution.
- (xi) She had further claimed that
 - by ordering the Petitioner to walk back to the Ward from the labour room,
 - by ripping off the saline tubes,
 - by severely rebuking the Petitioner in her delicate condition and
 - by not providing her any treatment to the Petitioner from 19.11.98 to 20.11.98,

The 1st Respondent had violated the fundamental right of freedom from cruel, inhuman and degrading treatment guaranteed to the Petitioner under Article 11 of the Constitution.

(xii) The Petitioner had asked for a declaration in her favour that there had indeed been a violation of Articles 11 and 12 (1) of the Constitution and has prayed for a compensation.

3. The 1st Respondent has denied the charges leveled against him and specifically stated that the baby was due on 27.11.98 and not any earlier. In other words the E.D.D (27.11.98) mentioned originally as the expected date of delivery was P1 and later cut off by someone to read as 21.11.98, is confirmed as correct E.D.D. He says when he examined the Petitioner on 7.11.98 the Petitioner was 37 weeks' pregnant with 3 weeks more for the expected date of delivery, which was the 27th day of November 1998. (P3) This is confirmed by the endorsement made at the clinic at page 2 to P1 where almost one week later on 12.11.98 the POA has been inserted as 38 weeks. It is significant to note that on 5.8.98 the POA was given as 24 weeks, on 2.9.98 as 28 weeks and on 14.10.98 as 34 weeks. They had all been calculated on the basis the Last Menstrual Period (LRMP) was 20.2.98 and not 14.2.98. The gestation period is generally 280 days which is 40 weeks. Therefore the correction on P1 deleting 20th to read as 14th, 27th to read as 21st must have been done with the intention of giving the Doctor the impression that the baby was due sooner than actually expected. It could not have been a genuine mistake made at the time of entry. The entries were not then and there amended at the time of entry. If so amended the POA would have subsequently been calculated accordingly. It was a case of tampering with an official record with an ulterior motive.
4. If the EDD has been advanced on P1 from 20.2.98 to 14.2.98 then it was possible to feign labour pains shortly before 21.11.98 to induce the doctor to agree to a caesarian section. Therefore the explanation give by the 1st Respondent becomes plausible. It was the contention of the 1st Respondent that the Petitioner indicated her unwillingness to have a normal delivery and requested the 1st Respondent declined since there were no medical indications warranting surgical intervention at that time. He also said that although the Petitioner complained of pain there were no signs of the onset of labour.
5. The house Officers as well as other Hospital employees have filed affidavits, substantially confirming the 1st Respondent's version: in particular that the

Petitioner showed no sign of the onset of labour, that the 1st Respondent did not rip the saline tubes off on 19.11.98, and that he did not fling documents at her on 20.11.98.

6. Thus if the story of the Petitioner is to be believed that the 1st Respondent was prepared to perform a Caesarian section at a private nursing home for a fee and not in the Kandy General Hospital, then it is to be inferred that the Petitioner preferred an induced delivery to a normal delivery. The suggestion for a Caesarian section must therefore have come from the Petitioner herself. The unauthorized amendment of P1 probably took place within the knowledge of the Petitioner.
7. Dr. Zubair's affidavit shows that the Petitioner did not need surgery on 20.11.98. In paragraph 7 to 13 of his affidavit dated 15.9.1999 he stated as follows:
 - a. "7. Upon examination I found her (the Petitioner's) pulse, blood pressure and temperature and general condition to be normal and that she carries (sic) a single live fetus in normal head presentation.
 - b. 8. She gave the last date of her Menstrual period as being 17.2.98 and the expected date of delivery was 24.11.1998. As such, she had four more days for labour. A true copy of the relevant diagnosis card which bears out the fact that the expected date of delivery was on 24.1.1998 is annexed hereto marked "Z".
 - c. 9. However, she complained of abdominal pain and appeared to be very frightened of having labour pains and the prospect of going through labour. In view of her extremely frightened state and the trauma expressed by her and also as there was no danger either to her or her baby if a Caesarian section was done, I decided to deliver the baby by Caesarian section four days before the expected date of the delivery.
 - d. 10. I accordingly fixed surgery for 8 pm on 20th November, 1998 as by that time I expected to have finished my consultations and the operating theater was expected to be free.
 - e. 11. I performed the surgery as stated above and at the time of surgery, I did not find any evidence of uterine rupture or any danger whatsoever to the patient or her baby. The baby was examined by a Pediatrician who was of the opinion that the baby was normal.
 - f. 12. I stated that Mrs. Gunawardana did not have any complications during the surgery or any post operative complications either and left the hospital after 2 days.
 - g. 13. I stated that it is my considered opinion that Mrs. Gunawardana, had she been permitted to reach the normal onset of labour, could have had a normal delivery."

8. These statements averred in the affidavit of the Consultant Obstetrician and Gynaecologist at the Suwasewana Hospital (Pvt) Ltd., Kandy who ultimately delivered the baby of the Petitioner, confirms the fact that the Petitioner was frightened of labour pains and preferred the induced delivery of the baby rather than allow a normal delivery.
9. It is significant to note that the Petitioner did not furnish her previous clinical Pregnancy Records to Dr. Zubair but gave the LRMP as 17.2.98 which was different from the original date inserted in P1 (20.2.98) and the amended date inserted in P1 (14.2.98). Obviously she had done this to advance the date of expected delivery from 27.11.98 to 24.11.98.
10. The learned Counsel for the Petitioner submitted that the endorsement on P7 “admitted with severe supra pubic pain? Impending rupture of C.S. scar” went contrary to the endorsements in X5 where it was minuted that there was “ no scar tenderness”. If we note the question mark appearing before the word “Impending” in P7 with her complaining that she had severe supra pubic pain. In other words the Petitioner was admitted with her complaining that she had tenderness and pain over the earlier Caesarian section scar. The Doctor therefore notes a possible cause and consequences as follows: “? Impending rupture of C.S. scar”. In other words the question was posed whether the pain declared by the patient suggested an impending rupture of the Caesarian section scar. This endorsement did not suggest that there was indeed a scar tenderness. Dr. Zubair has specifically stated in his affidavit that at the time of surgery he “did not find any evidence of uterine rupture or any danger whatsoever to the patient or her baby”. There are therefore adequate reasons to conclude that there was no scar tenderness though the patient was seemingly interested in projecting a contrary viewpoint. In reading medical reports and endorsements on them we must distinguish between symptoms and conditions and the states of being which patients inform their Doctors and which are accurately taken down by the Hospital staff, and subsequent findings of the Doctors after examination which may or may not confirm the viewpoints or complaints of patients. Thus in X5A the Senior House Officer who examined the Petitioner on 18.11.98 has stated as follows- “I examined among others the patient Renuka Gunawardena (the Petitioner) and she complained of abdominal pain. After examination I decided that she had a normal pregnancy and that she was at the time not in labour and that there was no necessity for intervention”. Thus despite the complaint of abdominal pain by the Petitioner the Doctor’s conclusion regarding her condition was different. Coupled with the observations by Doctor Zubair that the Petitioner’s complaint of abdominal pain at the relevant times seems more the outcome of psychological traumatic experiences rather than actual physical abdominal pain arising out of a tenderness of her scars let by her previous childbirth.
11. Where placenta is described as praevia it is wholly or partly attached to the lower uterine segment. The significant condition that entails in such an event is hemorrhage when labour begins. Labour pains had not started in this instance. Upon examination the patient was found to have her pulse, blood pressure, temperature and general condition normal and she carried a single live fetus in normal head presentation. The reference to the finding of second-

degree posterior placenta praevia in P7 seems more the excuse for a forced delivery rather than after vaginal delivery. Doctors and patients no doubt resort to Caesarian sections for very selfish reasons, the former for economic and the latter for physical. There is no reason to believe in this case that if the Petitioner had been permitted to reach the normal onset of labour she would not have had a normal delivery. It appears that selfish reason on the part of both the Doctor and the patient prompted induced delivery rather than any adverse conditions in the patient.

12. The learned Counsel for the Petitioner also referred to A9 issued by Dr. Lakshman Fernando to clarify Maternity Card issued by Dr. M.C.M.Zubair. It is significant that A9 was issued one year after the birth of the child, on 5.11.99. The opinion of this consultant is based on certain presumptions such as that

there was an impending rupture of the scar consequent to the previous Caesarian section and that
the placenta was obstructing normal delivery

13. The “scar tenderness” referred to in the Patient’s Hospital Record had a question mark behind it. Thereafter on examination it was noted that there was in fact a mild tenderness. There was no bleeding noted. She was continuously checked for scar tenderness throughout the night. In such a background the endorsement that there was no scar tenderness when examined at 9 am on 19.11.98 does not seem to be an after thought. Therefore there was no reason for Dr. Lakshman Fernando to have presumed an impending rupture of the scar.
14. If the “serious” condition attributed to the Petitioner is in doubt then the denial of treatment and neglect of the Petitioner by the 1st Respondent attributed to him, loses significance. Ripping of the saline tubes has been denied. The affidavit of the hospital staff also confirms such denial. Even if something to that effect did take place the Petitioner was not in any “serious” condition to have been in any danger of any adverse consequences except mild discomfort if the saline tubes were “ripped off” and the patient was asked to walk back to the ward. The bed head ticket shows that at 3.15 pm on 20.11.98 the 1st Respondent had prescribed some routine treatment for the Petitioner. This contradicts her allegation as to denial or refusal of treatment.
15. Though the Petitioner claims her entry into the Kandy Hospital as a consequence of regular referrals by Doctors at Hikkaduwa and Kundasale, these refusals were obtained after the Petitioner was refused entry to the Hospital on 7.11.98. Even the entry on 12.11.98 was irregular since the practice was for a patient on referral to attend the Antenatal Clinic at the General Hospital, Kandy which in this instance was not followed.
16. Hospital records show that Petitioner’s pregnancy, despite the birth of twins earlier, was normal and there was no medical indication which warranted surgical intervention at the time she was admitted to the Kandy Hospital.

- 17.** The amendment of the LRMP and the EDD on P1 point accusing fingers at the Petitioner than anyone else. The “pregnancy record” issued by the Hikkaduwa clinic indicated the LRMP to be 20.2.98 rather than 14.2.98 and the EDD to be 27.11.98. The obvious beneficiary from such amendment was the Petitioner. If the husband of the Petitioner was really concerned about his compliance to the Police he would have expected the Police to investigate this matter. He had specifically prevented investigation.
- 18.** No medical reports were made available to Dr.M.C.M. Zubair and the LRMP and EDD dates were again changed and given, obviously to precipitate immediate action to prevent normal delivery. The missing page of the bed head ticket has given her cause for concern. However, the Petitioner’s husband’s note has been quoted by her counsel. It would appear from the quotation that discharging the patient was against the doctors’ advice—suggesting that the doctor was willing to treat her. The reference to the 1st Respondent advising the patient to go to a private nursing home is consistent with the 1st Respondent refusing to perform a Caesarian section though requested by her. The note is therefore not evidence of an unequivocal disclaimer of responsibility by the 1st Respondent.
- 19.** In my view, it is more probable that, as averred by the 1st Respondent, that the Petitioner wanted a Caesarian section rather than a normal delivery, and had tried to manipulate details of her history to persuade the 1st Respondent to perform caesarian section at the Kandy Hospital (free of charge), which he refused. When this failed she had got herself admitted to a private nursing home where rules governing Caesarian section seem to have been less strict.
- 20.** I therefore find that there had been no violation of Article 11 and 12(i) of the Constitution. There may have been an unfortunate aggressive reaction on the part of the 1st Respondent, consequent to the Petitioner’s manipulation to get herself admitted to the Kandy Hospital after the 1st Respondent’s refusal to perform Caesarian section on 7.11.98. But there is inadequate evidence of such reaction and in any event there appears no medical record of any “serious” condition for the Petitioner getting herself admitted to the Kandy Hospital after the 1st Respondent’s refusal to perform Caesarian section on 7.11.98. But there is inadequate evidence of such reaction and in any event there appears no medical record of any “serious” condition on the part of the Petitioner at the relevant time. The real reason for the Petitioner getting herself discharged appears to have been her desire for a Caesarian section, to which the 1st Respondent did not agree at least to be performed in the Kandy Hospital.