KUMARANATUNGA
v.
SAMARASINGHE, ADDITIONAL SECRETARY, MINISTRY OF DEFENCE AND OTHERS

SUPREME COURT
SAMARAKOON, C.J., SOZA, J. AND RANASINGHE, J.
S.C. APPLICATION NO. 121/82.
JANUARY 10, 11 AND 21, 1983.

Fundamental Rights — Application under Article 126 of the Constitution — Infringement of the fundamental right of freedom from arrest and detention — Meaning of "preventive detention" — Articles 13(1) (2) (3) and (4), 15(7) and 155(2) of the Constitution — Sections 23, 27, 37 and 260 of the Code of Criminal Procedure Act, No. 15 of 1979. — Expressio unius exclusio ulterius.

Public Security Ordinance — Regulations 17(1) (4), 18(1), 23, 24, 26, 41(2) of the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 2 and No. 3 of 1982.

The Petitioner (Mr. Vijaya Kumaranatunga) complained against two detention orders marked "A" and "B" made by the 1st Respondent (Mr. G. V. P. Samarasinghe, Additional Secretary to the Ministry of Defence;) dated 19th November 1983 and 24th November 1982 and detained by Police Officers acting under the authority of the 2nd Respondent (Mr. Rudra Rajasingham — Inspector General of Police) until 19th January 1983.

The Respondents however, produced an office copy of another detention order marked '1R5' claimed to have been made on 20th November 1982 and they maintained that this order was communicated to the Petitioner on the same day though the latter denied it.

The Petitioner submitted that all these detention orders served on him under regulation 17(1) were ultra vires the Constitution as they infringed on his fundamental right of freedom from arrest and detention guaranteed to him by Article 13(1)(2) and (4) of the Constitution, for the following reasons :

(1) In the absence of a pending investigation or trial, arrest and detention under Order 'A' amounted to punishment.

(2) He had not been served with the detention order '1R5' and was not informed of the reasons for his arrest and detention.

(3) The arrest and detention carried out under order marked 'A' was illegal as it referred to past misconduct and could not, therefore be construed as one made as a precautionary measure.

(4) The order '1R5', on the face of it was *mala fide* mental *volte-face* on the part of the 1st Respondent in the matter of forming an opinion within such a short spell of time.

(5) Conditions laid down in the order 'B' violate the fundamental right of the petitioner to have legal representation.

Held—

(1) Preventive detention is qualitatively different from punitive detention. Preventive detention cannot be regarded as punishment and can be used to restrict the fundamental rights guaranteed by Articles 13(1) and (2). Article 13(4) has no application to preventive detention. Regulation 17(1) is not ultra vires the Constitution.

(2) Freedom from arbitrary arrest and detention is made subject to the Emergency when a state of public emergency has been duly proclaimed. These regulations overshadow the fundamental rights guaranteed by Articles 13(1) and (2) of the Constitution.

(3) The contents of the detention order 'A' gave sufficient indication to the Petitioner that he was being arrested for acts committed in contravention of the Emergency Regulations. The mistake in terms of that order does not in itself invalidate the arrest and detention.

(4) The good faith of order '1R5' has not been successfully impugned. The only justiciable issue is *mala fides*, and no *mala fides* has been established.

(5) In Sri Lanka there is no fundamental right to legal representation in a person held on a detention order under Regulation 17, until, of course, the matter is brought to court.

Held further (Samarakoon C.J. dissenting) :

Although the order 'A' was bad, the arrest and detention under it was not invalid because such arrest and detention could be justified under section 23 and 37 of the Code of Criminal Procedure Act, No. 15 of 1979.

Cases referred to :

1. *Colquhoun v. Brooks* (1887) 19 Q.B.D. 400, 406.

2. *Lowe v. Darling and Sons* (1906) 2 K. B. 772, 784

3. *Rex* v. *Halliday* (1917) A.C. 260, 269.
4. *Liversidge v. Anderson* (1942) A.C. 206, 254.
5. *Gopalan v. State of Madras,* A.I.R. (37) 1950, S.C. 27,91,92.
6. *Peiris v. the Commissioner of Inland Revenue* 1963 65 N.L.R. 457, 458.
7. *Hazari Mal Kuthiala v. Income Tax Officer* 41 I.T.R. 12.
8. *Mohamed Dastagir Sahib v. The Third Additional Income Tax Officer* 1961 74 L.W. (Madras) 540.
9. *Pitamber Vajirshet v. Dhondu Navalapa* 1887 12 Bom. 487.
10. *Dr. Goenvelt v. Dr. Burwell* 1 Ld. Raym. 454.
11. *Deviprasad Khandelwas & Sons v. Union of India* A.I.R. 1969 Bom 163, 173.
12. *Hirdaramani v. Ratnavale* 1971 75 N.L.R. 67, 77.

APPLICATION Under Article 126 of the Constitution for breach of fundamental rights.

Nimal Senanayake, Senior Attorney-at-Law, with *Kithsiri Gunaratne, Faiz Mustapha, Miss S. M. Senaratne, Saliya Mathew, Daya Guruge, Tilak Balasooriya* and *R. Jeyandran* for the Petitioner.

Sunil de Silva, Additional Solicitor-General with *Upawansa Yapa,* S.S.C., *A.S. Ratnapala,* S.C. and *V. P. Tillekeratne, Senior State Attorney* for the Respondents.

Cur. adv. vult

February 3, 1983.
SAMARAKOON, C.J.

I have had the advantage of reading the judgment of my brother Soza, J. While I agree that Detention Order A is bad in law I cannot agree that it can be justified in the manner stated by Soza, J. The basic principle in justifying such acts has been stated by Bindra in his book "Interpretation of Statutes" at page 153 quoted by Soza J. as follows :—

"It is a well settled principle of interpretation that as long as an authority has power to do a thing it does not matter if it purports to do it by references to a wrong provision of law".

What is the power the 1st Respondent is seeking to exercise? One has to gather this from the terms of the Order A. It is purely a subjective test. It states *inter alia* that the petitioner has "acted in a manner prejudicial to the national security and to the maintenance of the public order and thereby committed offences in contravention of Regulations 23 and 24 of the said Gazette". Two facts are garnered from this statement. Firstly, that the acts referred to were committed in the past, and secondly, that the 1st Respondent has decided that those acts constitute offences enumerated in Regulations 23 and 24. Thereby he has found the Petitioner guilty of offences against the law, passed judgment on him, and "authorised" his arrest and detention. The 1st Respondent has no such powers under Regulation 17 and no other Regulation was cited to which such power was referable. The general law of the land does not give him the power to order preventive arrest and detention. I agree with Soza, J. that Regulation 18(1) cannot justify the arrest and detention of the Petitioner. Article 13(1) states that "No person shall be arrested except according to procedure established by law". This deals only with arrest and not with subsequent detention. The procedure purported to be followed in this case is that stipulated in the Regulations made by the President under section 5 of the Public Security Ordinance (Cap.40) and published in Gazette (Extraordinary) No. 219/21 of 20-11-1982. The 1st Respondent had no power to make an order of arrest and detention under any other law — or even to "authorise", such arrest and detention. He cannot seek refuge under the Criminal Procedure Code. His action in causing the arrest and detention of the Petitioner on the 19th November or Document A was wholly illegal. It is then said that arrest by the police officers could be justified by recourse to the provisions of the Criminal Procedure Code. One must not lose sight of the fact that whoever arrested the Petitioner was acting under the authority of the 1st Respondent and not on his own responsibility for the reason that he himself was of the opinion that the Petitioner had committed an offence. It is probable that he knew nothing or little of the facts. In any event no police officer has been given this power of preventive arrest and detention under the Criminal Procedure

Code. The Petitioner was detained in the Army Hospital until 25th November on which date he was removed to the Welikade Prison. The Army has no powers of preventive detention under the general law.

I am unable to agree with Soza, J. that the arrest and detention on Document A can be otherwise justified. When provisions affecting the liberty of the subject are in question inroads into them must be strictly scrutinised and construed. What is lost on the roundabouts cannot always be made up on the swings. I agree to the Order made by Soza, J. subject to the qualification that the arrest and incarceration (however short) on Document A was in contravention of the Petitioner's fundamental right guaranteed by Article 13 of the Constitution. Counsel for the Petitioner stated that he was not claiming any monetary compensation for the Petitioner.

February 3, 1983.
SOZA, J.

The Petitioner in this case seeks a declaration that his fundamental rights of freedom from arrest and detention guaranteed to him by sub-articles (1) and (2) read with sub-article 4 of Article 13 of the Constitution of 1978 have been infringed by his arrest on 19th November, 1982, and continued detention thereafter by police officers acting under the authority of the Inspector-General of Police named as the 2nd Respondent, on orders of arrest and detention made by the Additional Secretary, Ministry of Defence, named as the 1st Respondent. The Petitioner has since been released on the lapse of the Emergency Regulations on 19.1.1983.

On 20th October, 1982, the President of the Republic of Sri Lanka made a Proclamation bringing into operation the provisions of Part II of the Public Security Ordinance and followed this by the promulgation on the same day of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 2 of 1982 operative by law for a period of one month. On

20th November, 1982, the Emergency Regulations, were renewed valid for a further month. The same Regulations were passed anew as the Emergency (Miscellaneous Provisions and Powers) Regulations No. 3 of 1982. Both sets of Regulations, including Regulation 17 with which we are concerned in this case, were identical in terms.

Regulation 17 (1) under which the detention orders impugned in this case were made in the following terms :

> "Where the Secretary to the Ministry of Defence is of opinion with respect to any person that, with a view to preventing such person —
>
> (a) from acting in any manner prejudicial to the national security, or to the maintenance of public order, or to the maintenance of essential services; or
>
> (b) from acting in any manner contrary to any of the provisions of sub-paragraph (a) or sub-paragraph (b) of paragraph 2 of regulation 41 or regulation 26 of these regulations;
>
> it is necessary so to do, the Secretary may make order that such person be taken into custody and detained in custody."

By an amendment duly made, the Additional Secretary to the Ministry of Defence was also vested with powers to make an order of arrest and preventive detention under Regulation 17. I might add that Regulation 41 (2)(a) and (b) and Regulation 26 referred to in Regulation 17 (1) (b) deal with the maintenance of supplies and services essential to the life of the community and sedition and incitement.

In his petition involving the jurisdiction of this Court under Article 126 of the Constitution, the Petitioner complains against only two detention orders made by the 1st respondent: one marked "A" dated 19th November, 1982, and the other marked "B" dated 24th November, 1982. During the argument before us, however, the learned Additional Solicitor-General produced the office copy marked "185" of a detention order dated 20th November, 1982, claimed to have been made by the 1st Respondent under Regulation 17 (1) of the Regulations No. 3 of 1982. It was asserted on behalf of the 2nd Respondent that this order was communicated by one Inspector Premaratne to the petitioner on the same day. The Petitioner, however, denies that he was notified of this order. He disclaims any knowledge of this order. I will come to this presently.

In respect of all the detention orders, it was contended by Senior Counsel for the Petitioner that Regulation 17(1) under which they were made is ultra vires the Constitution. Freedom from arrest and detention is guaranteed by Article 13(1) and (2) of the Constitution. Article 13(1) ensures protection from arbitrary arrest for every person. No person can be arrested except according to procedure established by law. Further, the person arrested must be informed of the reasons for his arrest at the time of the arrest. Article 13(2) makes it imperative that every person held in custody, detained or otherwise deprived of personal liberty should be produced before the judge of the nearest competent court. Except on the orders of such judge made in accordance with procedure established by law, no further holding in custody, detention or deprivation of personal liberty are permissible.

Under Article 155 (2) no regulations can be made which have the legal effect of overriding, amending or suspecting the provisions of the Constitution. The Constitution itself, however, by Article 15(7) provides that the exercise and operation of the fundamental rights declared and recognised by Articles 13 (1) and 13(2) shall be subject to such restrictions as may be prescribed by law in the interest, *inter-alia,* of national security

and public order. But the fundamental rights guaranteed by Article 13(4) are not made subject to any such restrictions. This sub-article reads as follows :

> "No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment".

Learned Senior Counsel for the petitioner contended that arrest and detention amount in the absence of a pending investigation or trial to punishment by imprisonment such as is prohibited by Article 13(4) which in no circumstances can be made subject to any restrictions. Although Regulation 17 does not provide for investigation or trial, there are other regulations which do and in fact, condition No. 2 of detention order marked "B" refers to an on-going investigation.

The contention that arrest and detention under Regulation 17(1) amount to punishment where no investigation or trial is pending is sought to be supported by recourse to the maxim *expressio unius exclusio alterius*. The principle of interpretation that the express mention of one thing implies the exclusion of another is not a rule of law but a rule of construction. The maxim is sought to be applied in the case before us in this way. As arrest, holding in custody or other deprivation of personal liberty pending investigation or trial is not punishment such action (like preventive detention) where no investigation or trial is pending amounts to punishment.

The maxim *expressio unius exclusio alterius* must be applied with caution. It has been described as a good servant but a bad master. Wills J. in the case of *Colquhoun v. Brooks*[1] warned "that the method of construction summarised in the maxim *expressio unius exclusio alterius* is one that certainly requires to be watched. Perhaps few so-called rules of interpretation have been more frequently misapplied and stretched beyond their due

limits. The failure to make the expressio complete very often arises from accident, from the fact that it never struck the draftsman that the thing supposed to be included needed specific mention of any kind".

And I might add the expressio itself may be there as *abundantia cautelae* and intended only to be illustrative or, as in the case before us, explanatory. Further, we must not lose sight of the fact that the maxim being only a rule of construction should be applied only where the legislative intent is doubtful. It is not enough that the express is not consonant with the tacit. It must be clear that they cannot reasonably be intended to co-exist —see the comments of Farell L. J. in *Lowe v. Darling & Sons* [2] and Bindra on the Interpretation of Statutes (1975) 6th Ed. pages 288 to 291.

Preventive detention, it must be borne in mind, is qualitatively different from punitive detention. It is of the very essence of the power of preventive detention that it is exercised in reasonable anticipation to prevent offences being committed in the future. The power of punishment is exercised for past misconduct. Using the language of Lord Finlay in *Rex. v. Halliday* [3] and of *Lord Macmillan in Liversidge v. Anderson* [4], Mukharjan J. in the case of *Gopalan v. State of Madras* [5] explained the essential characteristics of preventive detention as follows :—

> "It (preventive detention) is not a punitive but a precautionary measure. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence".

Therefore, preventive detention cannot be regarded as punishment. From the fact that arrest, holding in custody, detention or other deprivation of personal liberty pending investigation or trial do not constitute punishment, it does not

follow that such action where there is no investigation or trial pending is punishment. Such an inference is not only illegal, but also ignores the plain meaning of the word punishment. Preventive detention cannot be regarded as punishment and can be used to restrict the fundamental rights guaranteed by Articles 13 (1)and (2). Article 13 (4) has no application to preventive detention. Regulation 17 (1) is not ultra vires the Constitution.

I will now turn to the question whether the arrest and detention purported to have been carried out under "detention order" marked "A" was legal.

It will be useful to have before us the full text of the order marked "A".

"Detention Order

By virtue of powers vested in me in terms of Regulation 17 (1) of the Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary No. 215/7 of 20th October, 1982, I, G.V.P. Samarasinghe, the Additional Secretary/Defence is (sic) of the opinion that Vijaya Kumaranatunga of 63, Rosmead Place, Colombo 07, acted in a manner prejudicial to the national security and to the maintenance of the public order and thereby committed offences in contravention of Regulations 23 and 24 of the said Gazette. In terms of Regulation 17 (3) I hereby authorize the detention of Vijaya Kumaranatunga at a place nominated by the Inspector General of Police.

(Signature)
G.V.P.Samarasinghe
Additional Secretary/Defence
19.11.1982."

It will be seen that this order is not, on the face of it, one made as a precautionary measure taken in anticipation of the commission of future acts by the *detenue*. It is past misconduct that is referred to. From the mere mention of Regulation 17(1), it

cannot be implied that that order is really one of preventive detention. Further, the document purports to authorise the detention. More appropriately, it should order the detention. It is hardly necessary to labour the point that the order "A" as a detention order is bad.

But do the arrest and detention, become invalid by the mistake in terms of the "detention order" of 19th November, 1982? I think not. As Sansoni J. (late, C.J.) said in the case of *Peiris v. The Commissioner of Inland Revenue* [6].

> "It is well-settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, and there was in force another Statute which conferred that power".

Sansoni J. was here repeating with approval the words of their Lordships of the Supreme Court of India in the case of *Hazari Mal Kuthiala v. Income tax Officer* [7] where in considering the validity of action taken under a wrong Statute they said :

> "This argument, however, loses point because the exercise of a power will be rereferable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle is well-settled."

This passage was cited with approval by Siriniwasam J. in the case of *Mohamed Dastagir Sahib v. The Third Additional Income Tax Officer* [8]. A similar principle was laid down by West J. in the case of *Pitamber Vajirshet v. Dhondu Navalapa*[9] where the Court had to deal with the question of a judge purporing to act under a wrong jurisdiction although he had the right jurisdiction. West J. said as follows at pp. 489,•490 :

> "Having the Small Cause Court jurisdiction the Subordinate Judge must have dealt with this case under that jurisdiction,

> **even if he was not quite alive to it at the time** — *Dr. Goenvelt v. Dr. Burwell*[10]. We must ascribe his acts to an actual existing authority under whch they would have validity rather than to one under which they would be void." (emphasis mine).

Bindra in his work on the **Interpretation of Statutes** (supra) states the principle as follows at p. 153 :

> "It is a well-settled principle of interpretation that as long as an authority has power to do a thing, it does not matter if it purports to do it by reference to a wrong provision of law".
>
> Bindra is here stating the principle as it was enunciated by Nain J. in the case of *Deviprasad Khandelwas & Sons v. Union of India* [11]."
>
> "It is a well-settled principle of interpretation that as long as an authority has the power to do a thing, it does not matter if he purports to do it by reference to a wrong provision of law. The order made can always be justified by reference to the correct provision of law empowering the authority making the order to make such order".

In the instant case, we have to consider the validity of the arrest and detention by the Police Officers on 19th November, 1982.

Under Regulation 18 (1) of the Emergency Regulations any Police Officer can arrest and detain any person but for this such Police Officer himself must have reasonable ground for suspecting the person being arrested to be concerned in or to be committing or to have committed an offence under an emergency regulation. In the instant case, the Police Officer who arrested the petitioner was merely acting under the authority of his superior, the 2nd respondent. Hence, the arrest and detention cannot be justified under Regulation 18 (1). Such an arrest without a warrant and detention up to twenty-four hours can, however, be justified under Sections 23 and 37 of the Code of Criminal Procedure Act No. 15 of 1979. The person arresting

must "inform the person to be arrested of the nature of the charge or the allegation upon which he is arrested" (Sec.23). The contents of the order "A" sufficiently apprised the petitioner that he was being arrested for acts committed in contravention of Regulations 23 and 24 of the Emergency Regulations. Among the offences specified in Regulation 24 there are the offences of arson and theft which are offences under the Penal Code for which arrest without a warrant is justifiable under the Code of Criminal Procedure Act. So here we have an arrest by a Police Officer with reasons given and despite the fact that he was acting under the authority of the "detention order" marked "A", his action can be justified under the powers vested in him under the Code of Criminal Procedure Act. Such an arrest is in accord with the provisions of Article 13(1) of the Constitution.

Under Section 37 of the Code of Criminal Procedure Act the person arrested should not be confined for a longer period than under all the circumstances of the case is reasonable, but must be produced before a Magistrate having jurisdiction in the case. In any case, he cannot be confined for longer than twenty-four hours inclusive of the time necessary for the journey from the place of arrest to the Magistrate.

In the instant case, the petitioner according to his Court, was arrested on 19th November, 1982, about 2.00 p.m. The position of the Respondents is that another detention order came into operation from the first dawn of the 20th November, 1982, made under the authority of Regulation 17 (1) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 3 of 1982. On the assumption that the new detention order is valid a ten hour detention on 19th November, 1982 is all that the Respondents will have to justify under the provisions of the Code of Criminal Procedure Act. In the circumstances under which the Petitioner was first arrested and detained and the preliminaries that would have had to be attended to like recording of statements a ten hour detention accountable under the Code of Criminal Procedure Act cannot be said to be longer than reasonable.

I will now discuss the validity of the detention order alleged to have been made on 20th November, 1982. A copy of this order claimed to be an office copy maintained in the files of the 1st Respondent and bearing his initials was produced marked 185 during the argument. In view of the non-production of the original of this order, it is necessary to consider whether the 1st Respondent did make such an order.

The office copy of this order still in a file was shown to the Court and to learned Senior Counsel for the petitioner by the learned Additional Solicitor-General when the question of the basis of the Petitioner's detention during the period 20th November to 24th November, 1982, arose unexpectedly during the hearing on 11th January, 1983. On this occasion it was mentioned to the Court by the learned Additional Solicitor-General that the 1st Respondent was not in the Island when the question of filing additional affidavits was discussed. The affidavits of the 1st and 2nd Respondents filed on 19th January, 1983 are also to the effect that a new detention order in terms of 1R5 was made on 20th November, 1982. In these circumstances, it is reasonable to infer that a detention order of which 1R5 is the office copy was in fact made and I make this inference despite the non-production of the original of 1R5.

It is conceded on behalf of the 2nd Respondent that the original of 1R5 was not served on the petitioner. The 2nd Respondent, however, avers that one Inspector Premaratne communicated to the Petitioner the fact that a new detention order had been made on 20th November, 1982. Inspector Premaratne has also testified to this fact in an affidavit filed by him. The Petitioner, however, denies this. On this point, it is worthy of mention that on a bench order issued by my Lord the Chief Justice during the hearing before us on the morning of 21st January, 1983, Inspector Premaratne was directed to produce his notes of the 20th November, 1982. The notes were produced within a short time and the Court found the following relevant entry made by Inspector Premaratne under his signature:

> "20/11/82 at 11.45 a.m. at Army Hospital: V. Kumaranatunga is resting. During the conversation I told

him that a new detention order has been issued today and his detention will be continued for some time".

On the top of the page on which this passage appears, there is the signature of the Petitioner himself obviously appended to his statement followed by a certificate of the recording Police Officer as follows :

"I hereby declare that I have faithfully and accurately recorded the statement of Mr. Kumaranatunge".

This is followed by two further entries under the date 20.11.1982, one at 10.00 a.m. and the other at 11.00 a.m. regarding arrangements for Mrs. Kumaranatunge to bring the petitioner his lunch.

As against all this material must be weighed the denial of the Petitioner which stands weakened by his averment in his affidavit dated 18th January, 1983 where he confesses, to certain incorrect averments in his original petition attributing them, *inter-alia,* to "faulty recollection".

I might add that it is unlikely that when in fact a new detention was made no communication about it was made to the petitioner. There is indeed no reason why the fact need have been concealed or withheld from the Petitioner.

For these reasons, I accept the affidavit of Inspector Premaratne that he did on 20th November, 1982, about 11.45 a.m. communicate to the Petitioner the fact that his detention would be continued under a new detention order which it is reasonable to accept was the original of 1R5.

The detention order in its format even learned Counsel for the Petitioner conceded was unexceptionable. But he contended the order on the face of it was *mala fide.* It could be safely assumed that the 1st Respondent was still acting on the same material as that on which he made the order "A". In "A" the 1st Respondent

referred only to past misconduct constituting offences under Regulations 23 and 24. Within a day he appears to have changed his views and he made the order which reads as follows :

> "By virtue of the powers vested in me by paragraph (1) of Regulation 17 of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 3 of 1982, I, G.V.P. Samarasinghe, Additional Secretary to the Ministry of Defence, being of opinion that, with a view to preventing the person specified in Column 1 of the Schedule to this Order and residing at the place shown in the corresponding entry in Colomn 11 of that Schedule from acting in any manner prejudicial to the national security or to the maintenance of public order, it is necessary so to do, do hereby order that such person be taken into custody and detained in Cutsody."

(Here appear what purports to be initials of the 1st Respondent on the office copy)

Colombo, 20th November, 1982.

Schedule

Column 1	Column II
Person	**Place**
Vijaya Kumaranatunga	63, Rosmead Place, Colombo 7.

The above named should be detained in Rockhouse Army Camp.

Mutwal
Colombo 1982 I.G.P."

There is now no assertion of past misconduct. Instead there is anticipation of future misconduct of a type prejudicial to the national security or to the maintenance of public order.

Learned Senior Counsel for the Petitioner argues that on no additional material, there has been in the space of no more than the twenty-four hours that lapsed between the making of the order "A" and the order 1R5 a *mala fide* mental volte-face on the part of the 1st respondent in the matter of forming an opinion. The change to the text of the order 1R5 must, however, be considered from the point of view of the fact that when the 1st Respondent made the order "A" he made express reference to Regulation 17 (1) of the Emergency Regulations showing that he really wanted to make an order of preventive detention. He did not, however, achieve this object. But this has very little bearing on the honesty of his opinion or the adequacy of the material on which he formed it. There is nothing before us to say that the material on which the alleged past misconduct by the *detenue* in the order "A" was insufficient also to found the opinion he declared in order 1R5 that with a view to preventing the *detenue* from acting in any manner prejudicial to the national security or to the maintenance of public order, it is necessary to order that the *detenue* be taken into custody and detained in custody. There are no inherent contradictions in the two orders. The question of whether the opinion was justified is not for this Court in the absence of positive proof of *mala fides.* Here, we must also remember that the material available to the 1st respondent may not and indeed need not, pass the tests governing the reception of evidence in a court of law. Further, the material may be of a confidential nature and it may be contrary to the public interests to disclose it. The question of whether an order of preventive detention should be made or not is a matter for the subjective decision of the authority competent to make it. It cannot be subjected to objective tests in a Court of law. As H. N. G. Fernando, C.J. said in the case of *Hirdaramani v. Ratnavale*[12].

> "Even a mistaken opinion will not invalidate a detention order, and want of good faith can be established only by proof positive that the Permanent Secretary did not indeed form that opinion".

The authenticity of the detention order of which 1R5 is the office copy has been established. The good faith of the order has not been successfully impugned.

When power is granted as here in subjective terms, its exercise can fall into one of three categories :

1. A power which cannot be exercised unless certain physical facts exist. If the validity of the exercise of the power is disputed then the executive must prove that the requisite physical facts actually existed.

2. A power exercisable by a specified authority if **he is satisfied** of the existence of certain facts. If the validity of the exercise of such a power is disputed the Court will inquire into the question whether it was reasonable for the authority to be satisfied of the existence of the facts.

3. A power exercisable merely **on the opinion of the authority** in whom it is vested that it is necessary to exercise it. In the case of a challenge the only justiciable issue is *mala fides.* In the absence of positive proof of *mala fides,* the mere production of the instrument whereby the power is exercised concludes the matter.

This categorisation was laid down by H.N.G. Fernando C.J. in **Hirdaramani's Case.** (supra). The power exercised in the instant case falls into the third category. The only justiciable issue is *mala fides* and no *mala fides* has been established. Therefore, the detention order is good.

Two further matters await consideration in relation to the order of detenion of which 1R5 is the office copy: firstly, the Petitioner was not served with the detention order and, secondly, the Petitioner was not informed of the reasons for the arrest and detention.

I have already pointed out that the freedom from arbitrary arrest and detention guaranteed by Articles 13(1) and (2) of the

Constitution is subject to such restrictions as may be prescribed by law in the interests, *inter-alia,* of national security and public order. Law in this context is defined as including "regulations made under the law for the time being relating to public security". It is well recognised that individual freedom has in times of public danger to be restricted when the community itself is in jeopardy, when the foundations of organised government are threatened and its existence as a constitutional state is imperilled. Ours is a principled commitment to personal liberties. In the exercise of its regulatory functions in times of national crisis, the Government is vested with power to impose much restraints as are necessary in the interests of national security and the maintenance of public order. Freedom from arbitrary arrest and detention is made subject to the Emergency Regulations when a state of public emergency has been duly proclaimed. These Regulations overshadow the fundamental rights guaranteed by Articles 13(1) of the Constitution.

The second spell of detention of the petitioner which began on 20th November, 1982, was one ordered by the 1st Respondent acting under Regulation 17(1). Nowhere is service of the detention order made imperative by any rule of law. The order really serves as authority for the person putting it into effect. In fact, even under the Code of Criminal Procedure Act, no service of a charge-sheet or warrant of arrest where the arrest is on a warrant is provided for. The person being arrested can ask to see the warrant or order but there is no legal requirement that it should be served. No legal consequences flow from the non-service of the order.

Secondly the communication of the reasons for the arrest at the time of the arrest is not imperative when the emergency regulations are in operation. This is obviously because if the reasons are disclosed at the time of taking a person into custody, it may enable counteraction to be taken to frustrate the very purpose of the arrest and hamper and hinder the steps being taken by the Government to protect the community and prevent grave public disorder. No doubt, a person being arrested must

know why he is arrested. During times of national emergency, this requisite has to be satisfied in accordance with the Emergency Regulations at a later stage and soon enough for the *detenue* to make representations against his arrest and detention. According to Regulation 17 (4) it is obligatory for one or more Advisory Committees to be set up consisting of persons appointed by the President. Any person aggrieved by an order made against him under Regulation 17 may make his objections to the appropriate Advisory Committee. It is the duty of the Chairman of the Committee to inform the objector of the grounds on which the order under this regulation has been made and to furnish him with such particulars as are in the opinion of the Chairman sufficient to enable him to present his case. It is, therefore, always open to the *detenue* to apprise himself of the grounds for his arrest. The express provision in our Regulations stipulating that the Chairman of the Advisory Committee should inform the *detenue* of the grounds of detention implicitly makes a communication of reasons at the time of arrest unnecessary.

Therefore, neither the failure to serve the detention order on the petitioner nor the omission to give reasons will invalidate the detention order the office copy of which is before us as 1R5.

It is now left for me to consider the detention order marked "B" by which the petitioner's detention was continued from 24th November, 1982. This order was found to be necessary because of a decision to transfer the custody of the petitioner to the Commissioner of Prisons, Colombo. That this order is *ex facie* valid is not disputed. But exception is taken to the conditions of the detention which were as follows :

"1. One visit per day with lunch by the wife in the presence of officers from 1 S D & C.I.D.

2. Shall not receive or deliver any correspondence and other communications relating to his arrest and investigation.

The second condition, it is submitted was tantamount to preventing the Petitioner from obtaining legal assistance in regard to his arrest and investigation and is in violation of the fundamental right of the Petitioner to have legal representation. The fundamental right to have legal representation is found in Article 13(3) of the Constitution and reads thus :

> "Any person charged with an offence shall be entitled to be heard in person or by an attorney-at-law at a fair trial by a competent court."

In the Code of Criminal Procedure Act, we have Section 260 which is as follows :

> "Subject to the provisions of this Code and any written law every person accused before any criminal court may of right be defended by an attorney-at-law and every aggrieved party shall have the right to be represented in court by an attorney-at-law".

It will be seen that Article 13(3) of the Constitution and Section 260 of the Code of Criminal Procedure Act deal with persons accused in a court. But in the instant case, we are dealing with a situation where as Lord Wright pointed out in *Liversidge v. Anderson* (supra 265) the control sought to be exercised over the person detained through the detention order is preventive, not punitive and the action is executive, not judicial."

I regret, therefore, to have to hold that in Sri Lanka there is no fundamental right to legal representation in a person held on a detention order under Regulation 17 until, of course, the matter is brought to court. I might add that as a matter of practice, the courts have whenever the circumstances warranted it and with suitable safeguards, permitted visits by lawyers to *detenues* to enable them to make representations against the validity of detention orders. In the instant case, such an order was made.

For those reasons, I dismiss the petitioner's application, but because of the view I have taken in regard to order "A", I order no costs.

RANASINGHE, J. — I agree

Application dismissed.