EDIRISURIYA
v.
NAVARATNAM AND OTHERS

SUPREME COURT.
SHARVANANDA, C.J., WANASUNDERA, J. AND RANASINGHE, J.
S.C. APPLICATION No. 109/84.
NOVEMBER 28, 29 AND 30, 1984.

Fundamental Rights–Application under Article 126 (2) of the Constitution for violation of fundamental rights of freedom from arbitrary arrest and detention (Article 13 (1) and (2)) and equality (Article 12 (1) and (2))–Time limit for such application–Detention under Regulations 18 (1) and 19 (2) of the Emergency Regulations–Sections 36, 37 and 38 of the Code of Criminal Procedure Act.

On 20th July 1984 the 2nd respondent (Officer-in-charge of the Tissamaharama Police Station) went to the residence of the petitioner along with some police officers, searched his house sometime between 2.15 p.m. and 4.00 p.m. and took him to the old Police Station, Galle which they reached about 8.00 p.m., saying he was wanted by the 1st respondent (Deputy Inspector-General of Police, Southern Range) and also removed some books and journals for which a receipt D was issued. On the night of 21.7.1984 a Detention Order (A/3R1) issued by the 1st respondent purporting to act under Regulation 19 (2) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 7 of 1984 said to be effective from the previous day was served on him. The petitioner was kept under detention at the old Police Station in the charge of the 3rd respondent (Officer-in-charge of the Galle Police Station) and questioned up to about 26.7.84 about the burning of the Tissamaharama Magistrate's Court which had taken place on 29.6.84. The petitioner alleged that he had not at any time been informed of the reasons for his arrest and the arrest was not in fact and in law according to procedure established by law and the questioning of him about the fire in the Magistrate's Court of Tissamaharama was mala fide and because he belonged to a political party opposed to the party now in power.

The 2nd respondent averred that he explained the reason for the arrest to the petitioner that it was in connection with investigations into the offence of setting the Magistrate's Court on fire and the damage so caused. After the arrest the petitioner was detained in pursuance of the Detention Order A/3R1.

He also raised the objection that the petition dated 20.9.1984 was time-barred as it was more than one month after the arrest on 20.7.1984 and that the validity of the Detention Order was not justiciable. The petitioner has countered the allegation that the application was time-barred by the plea that he could not have filed the application between 20.7.84 and 30.8.84 when he was released as the members of his family, his relations and lawyers who had been permitted to see him (and that too after 25.7.84) were strictly forbidden to discuss the case, and that in any event the Court could grant relief under Article 126 (4) of the Constitution.

Held–

1. The time limit of one month set out in Article 126 (2) of the Constitution is mandatory. Yet, in a fit case the Court would entertain an application made outside the limit of one month provided an adequate excuse for the delay could be adduced. If the petitioner had been held incommunicado, the principle lex non cogit ad impossibilia would be applicable. But here there were documents proving that the petitioner had opportunities to discuss his case with his wife and lawyer.

Even if the petitioner was not told on 20.7.1984 or at any time thereafter that he was arrested, the objection that the petitioner has failed to make his application within one month of the arrest is unsustainable and cannot stand in the face of the facts which make it clear that the petitioner was in fact arrested, whether that arrest was according to law or not being another matter.

2. The petitioner's detention from 20.7.84 (8.00 p.m.) till his release on 30.8.1984 was under Regulation 19 (2). A person can be taken in for detention under Regulation 18 (1) either for purposes of search or by way of arrest without warrant and such a person can be detained up to a period of ninety days in a place authorised by the Inspector-General of Police or by a Deputy Inspector-General of Police. When the exercise of powers such as these is challenged it is open to the Court to go into the matter and see whether or not the impugned power has been exercised as required by law in circumstances under which alone such power could have been exercised. Once the existence of facts and circumstances upon which a reasonable man could have so acted is established to the satisfaction of the Court, the 'judicial intrusion' should then come to a halt. It is only if no reasonable man could have, in the circumstances, done what was done, that the Court can justifiably intervene. On the material available at the time incriminating the petitioner (though subsequently recanted) the detention order can be supported.

Sections 36, 37 and 38 of the Code of Criminal Procedure Act (providing for the production of an arrested person before a Magistrate) are not applicable in relation to a person arrested under Regulation 18.

The arrest and detention were legal and the application fails.

Cases referred to :

(1). *Vadivel Mahenthiran v. A.G. et al – S.C. Application No. 68 of 1980, S.C. Minutes of 5.8.1980.*

(2). *B. M. Jayawardena v. A.G. et al – S.C. Application No. 4 of 1981, S.C. Minutes of 6.3.1981.*

(3). *Gunawardena et al v. E. L. Senanayake et al – S.C. Minutes of 8.4.1981.*

(4). *Hewakuruppu v. G. A. de Silva, Tea Commissioner et al – S.C. Application No. 118/84–S. C. Minutes of 10.11.1984.*

(5). *Janatha Finance and Investments Ltd. v. D. J. F. Liyanage – S.C. Application No. 127 of 82 : S.C. Minutes of 14.2.82.*

(6). *Yasapala v. Ranil Wickremasinghe et al – S.C. Application No. 103 of 1980 : S.C. Minutes of 8.12.80.*

(7). *Kumaranatunga v. Samarasinghe and Others : S.C. Application No. 121 of 1982 – S.C. Minutes of 3.2.1983.*

(8). *Venkata Ramiah v. State of Andhra Pradesh AIR 1964 Andh. Pr. 416, 419.*

(9). *Pieris v. Commissioner of Inland Revenue (1963) 65 NLR 457.*

(10). *Deviprasad Khandelwal and Sons Ltd. v. Union of India AIR 1969 Bom. 163, 173.*

APPLICATION under Article 126 of the Constitution.

Dr. Colvin R. de Silva with *B. Weerakoon, Miss M. Kanapathipillai, K. Balapatabendi, A. O. R. Fernando* and *Miss Saumya de Silva* for petitioner.

Sunil de Silva, Additional Solicitor-General with *Upawansa Yapa, Deputy Solicitor-General* and *Mrs. S. Tillekawardena* for 2nd, 3rd and 4th respondents.

Cur. adv. vult.

January 15, 1985.

RANASINGHE, J.

The petitioner, who is an attorney-at-law and had also been a Member of Parliament, has come before this Court, under the provisions of Article 126 (2) of the Constitution, alleging that the 1st to 3rd respondents, who are all members of the Sri Lanka Police Force, have "by their actions. . . . . violated the petitioner's fundamental rights as contained in Article 13 (1), (2) (viz. freedom from arbitrary arrest and detention), and also in Article 12 (1) and (2) (viz. right to equality) of the Constitution of the Democratic Socialist Republic of Sri Lanka".

The position taken up by the petitioner is briefly : that, on the 20th July, 1984, the 2nd respondent, who is the Officer-in-charge of the Tissamaharama Police Station, came along with several other police officers to his residence at Hambantota, searched his residence and

"thereafter took him away from his house stating that he was wanted by the Deputy Inspector-General of Police, Southern Range", who is the 1st respondent ; that the 2nd respondent also removed from the petitioner's home "some political books and some journals that had come by post around that time", and in respect of which the receipt, marked "D", was issued by the 2nd respondent ; that the petitioner was driven away in a police vehicle, and was taken to the old Police Station at Galle at about 8p.m. ; that, on the night of the following day, 21.7.84, a Detention Order, issued by the 1st respondent, purporting to act under Regulation 19 (2) of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 7 of 1984, and said to be effective from the previous day, was served on him ; that the petitioner continued to be detained at the said old Police Station in the charge of the 3rd respondent, who was the officer-in-charge of the Galle Police Station ; that "A" is a copy of the said Detention Order ; that the petitioner was not permitted to see either the members of his family or his lawyers for several days ; that from about 25.7.84 the petitioner's wife was allowed to see him ; that thereafter, from time to time, the petitioner's wife and relations and his lawyers were allowed to see him ; that on such occasions the petitioner and his visitors were expressly directed "not to discuss about the case" ; that, during the time he was so detained, the petitioner was questioned, up to about 26.7.84, about the burning of the Tissamaharama Magistrate's Court, (which had taken place on 29.6.84) ; that, on or about 28.8.84, the Court of Appeal issued notice of an application for Habeas Corpus made by the petitioner's wife seeking the release of the petitioner ; that amongst the grounds set out in the said application is a ground set out in this petition, viz. that the said Detention Order could not have been legally issued under the provisions of the said Regulation 19 (2) for the reason that the conditions precedent to such detention had not obtained, and that therefore the petitioner's detention on the orders of the 1st respondent was unlawful ; that at no time was the petitioner informed by the respondents that he was under arrest ; that, even if the respondents were to claim now that the petitioner had been so arrested, such arrest was not, in fact or in law, according to procedure established by law ; that the petitioner was not also informed of any reason for such arrest ; that therefore the respondents have violated the petitioner's fundamental right enshrined in Article 13 (1) of the Constitution ; that the detention and the questioning of the petitioner

in regard to the fire in the Magistrate's Court of Tissamaharama was mala fide ; that the petitioner was never "a communalist or a racialist"; that the Police have acted mala fide for reasons other than those now given merely because he was a former Member of Parliament and belongs to a political party opposed to the party now in power ; that the said unlawful acts of the respondents have caused him damage and financial loss in a sum of Rs. 20,000 which said sum the petitioner claims from the respondents jointly and severally.

When this matter was taken up for inquiry it transpired that notice has not been served upon the 1st respondent who has been reported to be out of the Island ; and the inquiry was proceeded with as against the other respondents.

The position put forward by the 2nd, 3rd and 4th respondents (hereinafter referred to as "the respondents") is briefly : that the 2nd respondent arrested the petitioner on 20.7.84, as he lawfully might, for the purpose of conducting further investigations into the offence of damaging the said Magistrate's Court of Tissamaharama by fire as he, the 2nd respondent, had formed a suspicion, in consequence of certain statements which had been recorded in the course of the investigation into the said offence, that the petitioner himself was guilty of an offence in regard to the said incident ; that, at the time the said arrest was effected, the 2nd respondent explained to the petitioner the reason for such arrest, that "it was in connection with the investigations into the offence committed with the damage to the Tissamaharama Magistrate's Court by setting it on fire"; that the 2nd respondent complied with the procedures established by law for the purpose of making such arrest ; that, at the time of such arrest, the 2nd respondent also recovered from the possession of the petitioner a 12 bore cartridge for the possession of which the petitioner had no licence, which said act also constituted an offence under the said Emergency Regulations 3 of 1983 ; that the petitioner was, after such arrest, detained at the old Police Station in Galle in pursuance of a Detention Order (a copy of which was produced marked 3R1) lawfully issued by the 1st respondent under the provisions of Regulation 19 (2) of the said Emergency Regulations 3 of 1983 ; that the said Detention Order was served on the petitioner ; that during the period the petitioner was so detained, members of the petitioner's family and several attorneys-at-law visited the petitioner.

Learned Additional Solicitor-General, who appeared for the respondents, also put forward several "counter submissions" objecting to the petitioner's application being inquired into by this Court ; that the said application has not been made within the time limit of one month set out in Article 126 (2) of the Constitution, for the reason that the said petition, which alleges a violation of a fundamental right (declared in Article 13 (1), viz. freedom from arbitrary arrest) on 20.7.84, has been lodged in this Court only on the 20th September 1984 ; that, in terms of Section 8 of the Public Security Ordinance (Chapter 40), the said Detention Order, which has been made under the provisions of the Emergency Regulations, is not subject to review by this Court and is therefore, not justiciable ; that the provisions of Article 15 (7) read with those of Article 155 (2) of the Constitution permit the promulgation of procedures by way of Emergency Regulations, made under the provisions of the Public Security Ordinance (Chapter 40), which will have the effect of overriding, amending or suspending the operation of not only the provisions of the Code of Criminal Procedure Act No. 15 of 1979, but also of the provisions of Article 13 (1) and (2) of the Constitution.

The submissions made on behalf of the petitioner to counter the objection, that the petitioner's complaint of the infringement of the fundamental right under Article 13 (1) of the Constitution is out of time are : that the petitioner was not informed, at the time he was taken away from his home on the 20th July by the 2nd respondent, that he was being arrested : nor was he so informed at any later point of time : that, that being so, the limitation in regard to time would not run against the petitioner : that in any event, the petitioner could not have, during the period 20.7.84. to 30.8.84 taken any steps to have come before this Court : that during the said period even though the petitioner was permitted to see his wife, his relations and his lawyers, yet, he could not have given any instructions to them to take any steps to obtain any relief for him as he, the petitioner, was expressly forbidden to have any discussion with them "about the case" : that in any event this Court could grant the petitioner relief in terms of sub-article (4) of Article 126 of the Constitution.

This Court has consistently proceeded on the basis that the time limit of one month set out in Article 126 (2) of the Constitution, is mandatory : *Vadivel Mahenthiran v. A.G. et al* (1) ; *B. M. Jayawardena v. A.G. et al* (2) ; *Gunawardena et al v. E. L. Senanayake*

et al (3) ; *Hewakuruppu v. G. A. de Silva, Tea Commissioner et al* (4) ; In *Vadivel Mahenthiran's case (supra)* and in *Hewakuruppu's case (supra)*, this Court has expressed the view that this Court has a discretion in a fit case, to entertain an application made outside that said time limit of one month but that, in such cases, the petitioner must provide an adequate excuse for the delay in presenting the petition.

Article 126 (1) of the Constitution has conferred upon this Court sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right declared and recognized by Chapter 3 of the Constitution. The right to invoke such jurisdiction by an aggrieved person is set out in Article 17, which has been given the status of a fundamental right itself. Article 4 (*d*) of the Constitution has ordained that the fundamental rights which are declared and recognized by the Constitution should be respected, secured and advanced by all the organs of government and should not be abridged, restricted or denied save in the manner and to the extent provided by the Constitution itself. A solemn and sacred duty has been imposed by the Constitution upon this Court, as the highest Court of the Republic, to safeguard the fundamental rights which have been assured by the Constitution to the citizens of the Republic as part of their intangible heritage. It, therefore, behoves this Court to see that the full and free exercise of such rights is not impeded by any flimsy and unrealistic considerations.

The learned Additional Solicitor-General conceded that, if the petitioner had, after he was taken into custody by the Police, been held incommunicado, then the period he was so held without having the opportunity of communicating with his relations and or lawyers and of taking any meaningful steps to invoke the jurisdiction of this Court should not and would not be counted in computing the period of one month referred to in sub-article (2) of Article 126 of the Constitution and that the maxim lex non cogit ad impossibilia would, in such a situation, apply. He, however, contended that the petitioner in this case cannot be said to have been held under such restraint, and that there is no justification for not counting the said period of one month from the 20th July 1984 itself – in respect of the complaint of infringement of the provisions of Article 13 (1).

Notes made by the Police officer who was on duty during the visits paid from 28.7.84, to 29.8.84 to the petitioner by the members of his family and by several attorneys-at-law whilst the petitioner was under detention, have been produced marked 2R6 to 2R18. Whilst 2R7, 2R8, 2R9, 2R10, 2R11, 2R12, 2R14, 2R16 and 2R17 disclose that no discussions took place "about the case" between the petitioner and his visitors ; 2R7 and 2R10 clearly show that the petitioner and his visitors had been expressly directed not to speak or talk "about the case". If that had been the situation which had prevailed throughout the period of detention, then the petitioner cannot be faulted and penalised for not coming before this Court before the expiration of a period of one month from 20.7.84 – or even from 27.7.84. No meaningful step could have been taken, or even attempted to be taken in such circumstances. A consideration of several other documents, out of the group of documents referred to earlier, however, reveals that, although such stern directions had been given at times, yet, at other times the petitioner had had no such constraint imposed upon him and he had not only been able to hand over to his wife a document, which is of the utmost importance in regard to his detention, but had also been able to speak freely to a lawyer, who saw him about the statement he, the petitioner, had made to the Police and also "discuss the case". 2R8 dated 3.8.84 shows that the Detention Order served on the petitioner was handed over by the petitioner to his wife. That the petitioner had spoken, about the statement made by him to the Police, to Sarath Wijesinghe, an attorney-at-law, without any hindrance, and had also similarly "discussed the case" with the said attorney-at-law is evidenced by the document 2R13 dated 19.8.84. The attorney-at-law, through whom the petitioner has filed this application in this Court and who is also closely connected to the petitioner by marriage, had also visited the petitioner on at least two occasions. It is also in evidence that, whilst the petitioner was still under detention, an application for a writ of Habeas Corpus, seeking the release of the petitioner, was filed in the Court of Appeal by the petitioner's wife. It has also to be noted that an application for relief under the provisions of Article 126(2) of the Constitution can be made to this court; in terms of the self same provisions, by an attorney-at-law on behalf of the petitioner. Such an application is not required to be made by the petitioner himself.

It has also been contended on behalf of the petitioner, as set out earlier, that the petitioner not having been told that he has been arrested either on the 20th July 1984, or at any time thereafter the said objection – of not coming before this Court before the expiration of a period of one month from the date of arrest – cannot be sustained. It is the position of the petitioner that he was never arrested, but that he was only told that the 1st respondent wanted to meet him. He bases his claim upon an arrest only because the respondents claim to have arrested the petitioner. Whether the claim, founded upon a breach of a Fundamental Right by an executive or administrative act, is based upon facts which are alleged by the applicant of his own personal knowledge, or whether such claim is based upon a set of facts asserted by the respondents, what gives rise to an application for relief or redress under Article 126 (2) of the Constitution is the infringement (or the imminent infringement) in fact of such Fundamental Right. If there is no such infringement then there is no cause for an application under sec. 126 (2) of the Constitution. Whatever form such complaint takes – whether it be upon the applicant's own knowledge or upon the assertions made by the respondent himself – an infringement is essential. Not only is an infringement essential ; the date of such alleged infringement also becomes essential in view of the element – of one month – set out in the said sub-article (2) of Article 126 of the Constitution.

The position of the 2nd-4th respondents is that the petitioner was arrested – and it is their position that it was a lawful arrest – on the 20th July 1984 at the petitioner's home in Hambantota. Although the exact time of such arrest has not been expressly stated, yet, it is clear that the said arrest would have been effected sometime between 2.15 p.m. and 4 p.m. Having regard to all the circumstances surrounding : the arrival of the 2nd respondent at the petitioner's home on the 20th July 1984 shortly after 2 p.m. with several other police officers ; what the 2nd respondent said and did in that house on that occasion : the petitioner being taken from his home that evening by the 2nd respondent in the police van : the place and the manner in which the petitioner was thereafter kept during the night of the 20th July and the days which followed ; and having regard also to the entry 2R4, to the statement "E" made by the petitioner to the police on 27.7.84, and to the explanation set out in sub-section (1) of sec. 23 of the Code of Criminal Procedure Act No. 15 of 1979, it is clear not only that the petitioner was arrested – whether such arrest was

effected according to law or not is another matter – by the police on the 20th July 1984, and that the Petitioner, who is himself a lawyer, would have realised, at least by the 27th July 1984, that he had in fact been arrested, and was being detained upon the basis of the Detention Order which had been served on him on the 21st July 1984.

The petitioner has not, apart from stating that his wife was permitted to see him only from about the 25th July 1984 and his lawyers only about two weeks thereafter, and that one lawyer, who saw him with the permission of the Inspector-General of Police on one occasion, was instructed by the 3rd respondent not to discuss the case, in his petition referred to his inability to have presented his petition to this Court within the time limit of one month set out in the said Article 126 (2). Nor has he pleaded any excuse or explanation regarding the failure to comply with the said requirement.

On a consideration of the foregoing, I am of opinion that the objection raised on behalf of the respondents – to the consideration by this Court of the claim based upon the alleged infringement of the petitioner's Fundamental Right set out in Article 13 (1) of the Constitution – must be upheld.

Although it is not necessary to consider the other objection put forward on behalf of the respondents, based upon the provisions of sec. 8 of the Public Security Ordinance (Chapter 40), and Articles 15 (7) and 155 (2) of the Constitution, suffice it to say that this Court has on several earlier occasions asserted the right of this Court to entertain complaints in regard to the validity of various Orders made in pursuance of the powers conferred by Emergency Regulations promulgated under the provisions of the Public Security Ordinance (Chapter 40), and has clarified the scope, nature and the extent of the powers of this court to examine and pronounce upon the legality and validity of such Orders – *Janatha Finance and Investments Ltd. v. D. J. F. Liyanage* (5); *Yasapala v. Ranil Wickremasinghe et. al.*, (6); *Kumaranatunga v. Samarasinghe and Others* (7). Having regard to the principles set out in the said Judgments, I am of poinion that this objection must fail.

I shall now proceed to consider the petitioner's claim of an infringement of his Fundamental Right under Article 13 (2), viz. freedom from arbitrary detention. It is common ground that the

petitioner was detained at the old Police Station, Galle from 8 p.m. on 20.7.84 – after he had been taken away from his home, around 4 p.m. on 20.7.84, in custody by the 2nd respondent – until he was released on 30.8.84, in charge of the 3rd Respondent. The respondents rely upon the Order – marked "A" and also 3R2 – to justify the said detention. The said Order is as follows :

"DETENTION ORDER

By virtue of powers vested on me in terms of Regulation No. 19 (2) of the Government Gazette No. 306/8 of 18.7.84.

I, A. Navaratnam, Deputy Inspector-General of Police, Southern Range, do hereby authorise Officer-in-Charge of Police Station, Galle the detention of suspect TENNYSON EDIRISOORIYA of Sea Spray, Galewela, Hambantota in his custody at Old Police Station Galle from 20.7.84 to 17.10.84.

21.7.84.
Date.

A. Navaratnam,
Deputy Inspector-General of Police,
Southern Range."

The principal submission put forward on behalf of the Petitioner against the validity of the said Detention Order is : that the 1st Respondent, who is said to have made the said Order, had no power to have made such an Order : that Regulation 19 (2) of the said Emergency Regulations does not operate to confer power upon the Inspector-General of Police (or on any Deputy Inspector-General of Police) to make an Order of Detention such as "A" (or 3R1) for the reason that the said Regulation is not an empowering provision such as, for example, the preceding Regulations 16 and 17 are.

Regulation 18 (1) empowers inter alia, any police officer to "search, detain for purposes of such search or arrest without warrant any person . . . . . whom he has reasonable ground for suspecting to be concerned in or to be committing or to have committed an offence under any emergency regulation, ..." Regulation 19, whilst it provides in paragraph (1) that the provisions of Sec. 36, 37, and 38 of the Code of Criminal procedure Act No. 15 of 79 shall not apply in relation to persons arrested under regulation 18, provides in paragraph (2) that "any person detained in pursuance of the provisions of regulation 18 in a place authorized by the Inspector-General of

Police may be so detained for a period not exceeding ninety days reckoned from the date of his arrest under that regulation, and shall at the end of that period be released by the officer-in-charge of that place unless such person . . . . ."

A consideration of the provisions of Regulations 18 and 19, referred to above, shows that the combined effect of these two Regulations is that where a person, who falls within any one of the three categories of persons referred to in the latter half of paragraph (1) of Regulation 18, is either "detained for purposes of search" or "arrested without a warrant" by any of the persons referred to at the commencement of the said paragraph (1), then that person, if he is detained in a place authorized by the Inspector-General of Police (or by a Deputy Inspector-General of Police) could continue to be so detained for a period of ninety days, and that the said period of ninety days is to be calculated from the date on which he was arrested under Regulation 18. The period of ninety days referred to in paragraph (2) of Regulation 19 applies only to a person who is detained in a place authorized by the Inspector-General of Police (or by a Deputy Inspector-General of Police). A person who can be so detained in such an authorized place is a person who has either been detained for purposes of search or has been arrested without a warrant under Regulation 18. The pre-requisites to a detention extending up to ninety days empowered by paragraph (2) of Regulation 19 are : a person who has already been taken in for detention under paragraph (1) of Regulation 18, either for purposes of search or by way of arrest without a warrant, and : a place authorized for such detention by the Inspector-General of Police (or a Deputy Inspector-General of Police). The power to take a person in, either by way of detention for purposes of search or by way of arrest without a warrant, is provided by Regulation 18 (1). The power to keep such a person in detention thereafter from that point of time up to ninety days is furnished by Regulation 19 (2). That the wording of paragraph (2) of Regulation 19 is sufficient to empower the Inspector-General of Police (or a Deputy Inspector-General of Police) to authorize a place of detention admits of no doubt :– *Bindra : Interpretation of Statutes (6 edt.) p 49 ; Venkata Ramiah v. State of Andra Pradesh* (8).

The nature, scope and the extent of the powers of this Court when an Order, which is said to have been made under the provisions of an emergency regulation such as the said Emergency Regulation No. 7 of

1984 and which is regular on the face of it, is produced have been discussed in the several judgments of this Court referred to earlier – the *Janatha Finance and Investments Ltd., case (supra); Yasapala's case (supra); and Kumaranatunga's case (supra).*

Paragraph (1) of Regulation 18 also sets out, in the second half of that paragraph, the circumstances under which the powers of detention and of arrest, specified therein, can be exercised by those to whom such authority is granted. The existence of at least one of the grounds specified therein is a condition precedent to the exercise of the power of detention or of arrest. It does not confer a power to arrest arbitrarily. It is a power to be exercised only upon the existence of the cicumstances expressly stated therein. When the exercise of such powers is challenged it is open to the Court to go into it and see whether or not the impugned power has been exercised as required by law in circumstances under which alone such power could have been exercised. Once the existence of facts and circumstances, upon which a reasonable man could have so acted is established to the satisfaction of the Court, the "judicial intrusion" should then come to a halt. It is not open to the Court to substitute its own opinion for that of the person who has been vested with the power to act. It is only if the facts and circumstances, upon which the impugned order is sought to be justified by those who have exercised the powers in question, are such that it is clear that no reasonable man could have, in these circumstances, done what has been done, that the court can justifiably intervene.

The 2nd respondent seeks to justify his action upon the contents of the two statements, 2R2A, dated 12.7.84, and 2R1A, dated 15.7.84, made by the two suspects K. Gamini and L. Prematilaka respectively, both of which had been recorded in the course of the police investigations into the burning of the Tissamaharama Magistrate's Court building on the night of 29.6.84. In their statements the suspects implicate the petitioner as having engaged them to set fire to the court building. The 2nd respondent, though he was the officer-in-charge of the Police Station, Tissamaharama and could have acted on his own, had, nevertheless, decided to consult his superior officers. It was only thereafter, on the 20th July, 1984, upon receipt of the directions from the 1st respondent set out in 2R19R1, that the 2nd respondent had proceeded to the petitioner's home and taken him into custody. The 2nd respondent has, in his

affidavit filed in this Court, averred in paragraph 6 : "I only admit that I arrested the petitioner at his residence on 20.7.84 on the orders of the 1st respondent". This averment, it must be noted, has been made by the 2nd respondent whilst expressly answering an averment in the petition. I do not think that this averment must be taken to mean that, in taking the petitioner into custody, he was merely carrying out an order he had received from a superior, and that he himself had no knowledge of the facts and circumstances upon which the petitioner was being taken into custody, and that there was no occasion for him to exercise his own independent judgment in regard to this matter. In fact, the succeeding averments in this affidavit, particularly paragraphs 7, 8 and 9, make it quite clear that he was himself aware of all the relevant facts and circumstances and had himself considered the matter and taken the view that the petitioner had to be taken into custody for further investigations. 2R1,9R1 had been in the nature of an approval of what he himself had thought should be done. Two counter affidavits have been filed by the petitioner, marked "G" and "H", from K. Gamini, who had earlier made the statement 2R1A, and L. Prematilaka, who had earlier made the statement 2R2A, respectively. In these affidavits these two persons retract their earlier statements, which incriminate the petitioner and state that their earlier statements incriminating the petitioner were made at the instigation of the 2nd respondent. These two affidavits, though dated 24.10.84, were filed in this Court only on 21.11.84, the day before this matter was due to be taken up for inquiry by this Court on 22.11.84 ; and no opportunity was thus given to the 2nd respondent to file a counter affidavit in regard to the said allegations. In those circumstances it is not possible, upon the material before this Court, to pronounce upon the truth or falsity of the said allegations. This matter has, therefore, to be considered upon the material placed before this Court as the material available to, and upon which the 1st and 2nd respondents acted on the 20th and 21st July 1984.

It was contended that the fact that the 1st respondent directed the release of the petitioner a few hours after the Court of Appeal directed the issue of notice in the Habeas Corpus application amounts to an admission that such detention could not be supported. As set out earlier, the 1st respondent had not been served with notice and was not, therefore, present at the inquiry before this Court. It was contended, on behalf of the 2nd–4th respondents, that no adverse inference should be drawn against the respondents ; for the reason

why the 1st respondent acted in the way he did would only be a matter for conjecture. This submission made on behalf of the respondents should, in my opinion, be accepted.

The Order 3R1 (or A) has, admittedly, been made on 21.7.84. Although it is sought to be made applicable from 20.7.84, 3R1 (or A) cannot, in law, have any retrospective effect. It will, therefore, be operative only from the earliest moment of that day, 21st July 1984.

Regulation 19 (1) makes the provisions of secs. 36, 37 and 38 of the Code of Criminal Procedure Act No. 15 of 1979 not applicable in relation to persons arrested under Regulation 18. Thus the provisions of the Code of Criminal Procedure Act requiring : the person arrested to be sent before a Magistrate without unnecessary delay : the person arrested not to be detained in any event for a longer period than twenty-four hours : arrests without warrant to be reported to the Magistrate, will not apply in regard to those arrested under the said Regulation 18. Even if the arrest of the petitioner attracted to it the provisions of secs. 36 and 37 of the Code of Criminal Procedure Act No. 15 of 1979, yet, the detention of the petitioner from about 2.15 p.m. on 20.7.84 to midnight of the 20th–21st July would not be illegal.

In this connection it is also relevant to bear in mind the principle : 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, and the order can always be justified by reference to the correct provision of law empowering the authority making the order to make such order–*Bindra (6 edt.) Interpretation of Statutes p. 153 ; Peiris v. Commissioner of Inland Revenue* (9) *Deviprasad Khandelvel and Sons Ltd. v. Union of India* (10) ; *Kumaranatunga's Case (supra).*

In this view of the matter, I am of opinion that the detention of the petitioner, from the time he was taken into custody on 20.7.84 until he was released on 30.8.84, did not constitute an infringement of the petitioner's Fundamental Rights declared and recognised in Article 13(2) of the Constitution.

The petitioner has, in his petition, complained of infringements of his Fundamental Rights embodied in Article 12(1) and (2) of the Constitution. No submissions were, however, made to this Court in regard to them at the hearing of this application. Having regard to the

principles that have been laid down by this Court in applications alleging infringements of the Fundamental Rights embodied in Article 12(1) and (2) of the Constitution, it appears to me that the material set out in the petition is insufficient to establish the claim put forward under the said Article.

For these reasons, I am of opinion that the petitioner's claim must fail. The application is accordingly dismissed, but without costs.

SHARVANANDA, C. J. – I agree.

WANASUNDERA, J.

I have read the judgment of Ranasinghe J. and I am in agreement with the order proposed by him. Since I have arrived at this same conclusion for reasons somewhat different from him on some matters and my reasoning may be of some interest in construing the legal provisions considered by us, I think it would be useful if I were briefly to set them down here.

It is not necessary to recapitulate the facts which are detailed by Ranasinghe J. in his judgment. First, I shall turn to the two preliminary objections raised by the learned Deputy Solicitor-General Ranasinghe, J. has upheld the first of these objections, namely, that the petition is out of time as it has not been filed within one month of the alleged violation of the fundamental right as required by Article 126 (2) of the position to avail himself of his constitutional remedies within the time limit could be accepted.

The validity of the first preliminary objection depends on the questions – first, whether or not the petitioner can be said to have been arrested and the date of such arrest and, second, whether or not the excuse of the petitioner that he was under restraint and not in a position to avail himself of his constitutional remedies within the time limit could be accepted.

In regard to the first question, I agree with Ranasinghe J. that the petitioner would or should have been aware that he was under arrest at least by 27th July 1984. I am inclined to think that in making the so called arrest on 20th July at the petitioner's residence at Hambantota, spoken to by the police, while the police intended to arrest the petitioner, and in their own minds thought that they were making an arrest, they had probably out of tact or regard for the standing and

status of the petitioner, conducted themselves in such a manner as to make it equivocal and ambiguous to the petitioner and the by-standers whether what was taking place was an arrest or the petitioner was being taken merely for questioning. Viewed in this light, I can see no real conflict between the affidavits relied on by the petitioner and the respondents. In view of this finding, his petition is out of time and cannot be entertained by us unless he can provide some legal justification for the delay.

My brother Ranasinghe, J. has taken the view that, while the delay could be excused up to a point of time during his detention, the petitioner was thereafter in a position to avail himself of his legal rights and therefore his application would still fall outside the prescribed time limit. It is conceded by counsel that if the petitioner during his period of detention was not afforded an opportunity of communicating with his relations and lawyers or was so placed that he could not or was unable to take any meaningful steps to invoke the jurisdiction of this Court, then such period should be left out of the reckoning in computing the time limit under Article 126 (2). It is also conceded that while under detention orders the petitioner was expressly enjoined not to speak or discuss "about the case" with any of his visitors. "The case" referred to is the investigation into the setting fire to the Magistrate's Court, Hambantota, which the police were investigating and in respect of which the petitioner states he was unlawfully detained.

My brother Ranasinghe, J. refers to a few instances when; according to him, this injunction not to discuss "the case" had not been complied with. For example, the petitioner had been able to hand over the Detention Order served on him to his wife. It would appear that on one occasion he had also managed to discuss the statement he made to the police with the attorney-at-law Sarath Wijesinghe. Ranasinghe, J. also states that Mr. Fernando his present attorney and a close relation had visited him on about two occasions. Finally, during his period of detention, his wife had filed an application for Habeas Corpus, which had directly or indirectly led to his release, apparently the suggestion being that this may have been done on his instructions. On this material, Ranasinghe J. is of the view that the petitioner did in fact have the opportunity of availing himself of his legal remedies within the time limit.

As against this, it is conceded that after his arrest the petitioner was held incommunicado and it was only on the 25th July that his wife was allowed to see him. After the lapse of about two weeks his lawyers

were allowed to see him. But all this time he was under a strict injunction not to discuss his case. Even the lawyer who obtained the Inspector-General's permission to visit him was expressly instructed by the 3rd respondent not to "discuss the case". The injunction it appears operated both ways, i.e., imposed both on the petitioner and his visitor. The discussions, if any, referred to by my brother would have been in violation of these express instructions and must necessarily have been of a furtive, hurried and incomplete nature. It is significant that in documents 2R7, 2R8, 2R9, 2R10, 2R11, 2R12, 2R14, 2R15, 2R16, 2R17 and 2R18 – the record of such visits – specific note has been made of the fact that nothing relating to the case was discussed at such meetings. This would give some idea of the strictness and force of the injunction and how meticulously it was enforced. In fact, even a letter addressed to the Inspector-General of Police, handed by the petitioner to the detaining authorities questioning his detention, was returned to him. My brother himself has thought that they were "stern instructions".

the only document suggesting anything to the contrary is 2R 13. This is a record of the visit on 19th August 1984 by Mr. Sarath Wijesinghe. On this occasion, apart from Mr. Sarath Wijesinghe, the petitioner's wife and two daughters, his brother and brother's son were all present. The entry shows that those persons arrived at 10.45 a.m. The note states that the petitioner discussed his statement to the police with Mr. Wijesinghe and Mr. Wijesinghe left at 11.25 a.m. Thereafter the entry goes on to say that they discussed the case and the others left at 12.10 p.m. It is therefore far from clear from this subsequent sentence who the "they" meant, i.e., as to whether it was with Mr. Wijesinghe or with the others that the petitioner discussed the case apart from the discussion of his statement to the police mentioned earlier. In any event, could it be said on this flimsy material that the petitioner had been afforded that amount of facilities, time and freedom that is reasonably expected by the law in the case of a person so placed, so as to enable him to discuss his case and instruct counsel ? I am unable to say that even the minimum standards expected in such a situation have been met in this case. I would therefore overrule both the preliminary objections.

I now turn to the merits of the case. I am in agreement with Ranasinghe, J. that regulation 18 empowered the police to arrest the petitioner without warrant and that at the time of the arrest there was sufficient material to justify such arrest. A person so arrested can be

detained for a period of 90 days. The power for such detention is contained in regulation 19 itself and takes effect automatically by operation of law. In addition, regulation 19 empowers the I.G.P. to nominate the place of detention.

While regulation 19 (1) makes the provisions of sections 36, 37 and 38 of the Code of Criminal Procedure Act inapplicable in relation to a person arrested under regulation 4, I do not think that as the regulation stands, it dispenses with the requirement for the arrested person to be produced before a Magistrate. While the effect of regulations 18 and 19 is to obviate the need for a magisterial order in respect of the period of detention or as regards the place of detention, yet the requirement for production of an arrested person before a Magistrate remains untouched. Such a requirement is always considered a salutary provision to ensure the safety and protection of an arrested person. It is more than a mere formality or an empty ritual, but is generally recognised by all communities committed to the Rule of Law as an essential component of human rights and fundamental freedoms. In fact, if the petitioner had been produced before a Magistrate upon his arrest, some of the matters now in issue before us may not have arisen for consideration. Accordingly, in my view, the production of the detainee is still a requirement of the law even though upon such production the police can do no more than invite the Magistrate's attention to the provisions of regulations 18 and 19. In the face of these provisions, I presume the Magistrate cannot make any order except to make a note of this and thereupon for all practical purposes his concern in the matter will cease.

I have arrived at the above conclusions witnout disputing Mr. Sunil de Silva's submission that Article 15 (7) of the Constitution enables restrictions to be imposed by Emergency Regulations on the fundamental rights contained in Article 13 (2). But the relevant provisions must be subjected to a close scrutiny to indicate my reasoning.

Let me begin with Article 13 (2), which is worded as follows :–

"Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."

It would be observed that this constitutional requirement in so far as it is relevant to the matter now being discussed contains two components, namely –

1. that a detained person shall be brought before the judge of the nearest competent court, and
2. that this should be done according to procedure established by law.

I do not think that it can be seriously suggested that the requirement for an accused person to be produced before a Magistrate is provided for in the ordinary law, namely the Code of Criminal Procedure Act, referred to below and not in the Constitution. For, if so, why did the draftsman of the Constitution labour to include a provision such as Article 13 (2) in the Constitution ?

The Code of Criminal Procedure Act 15 of 1979 contains the following provisions, establishing the procedures contemplated in (2) above. These sections are as follows :–

> "36. A peace officer making an arrest without warrant shall without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case.
>
> "37. Any peace officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate.
>
> "38. Officers in charge of police stations shall report to the Magistrates' Courts of their respective districts the cases of all persons arrested without warrant by any police officer attached to their stations or brought before them and whether such persons have been admitted to bail or otherwise."

Now, in whatever way these provisions may be worded, the reference therein to the need for the production of a suspect before a Magistrate is merely a repetition and a recital of the constitutional requirement and is set down by way of preface. That requirement is one not provided by the Code but by the Constitution and what the sections of the Code really provide for is the procedure for bringing such person before a Magistrate and for the period of detention.

Accepting learned Deputy Solicitor – General's submission that the fundamental right can be restricted, the queston is whether that has been done or been done effectively in the present case. He has pointed to regulation 19 (1), which states :

> "The provisions of sections 36, 37 and 38 of the Code of Criminal Procedure Act, No. 15 of 1979, shall not apply in relation to persons arrested under regulation 18."

This provision certainly has the effect of overriding the provisions of the Code of Criminal Procedure Act, but leaves untouched and unaffected the requirement of Article 13 (2). If it is intended to restrict the requirement of 13 (2) – which undoubtedly can be done by a suitable wording of the regulation so as to have a direct impact on Article 13 (2) itself, when natural security or public order demands it – this must be specifically done. Article 13 (2) cannot be restricted without a specific reference to it. But this has not been done. Instead we have a restriction imposed on the operation of sections 36 to 38 of the Code. In the result the constitutional requirement that a detained person "shall be brought before the judge of the nearest competent court" remains unaffected. Though it will continue to exist in a truncated form still being a constitutional requirement, it must be complied with in a reasonable way and within a reasonable time.

What then are the consequences of this omission ? No constitutional requirement relating to fundamental rights can generally be treated as a technicality. It behoves us therefore to see that provisions such as this, safeguarding human rights and human freedom are exactly complied with. But in the present case, the arrest and the detention (both as regards the period and place of detention) have been otherwise provided for by the law and are valid. They are not made to depend on a magisterial order. The conclusion I have arrived at turns on a question of construction. It is essentially a legal issue. The police appear to have been unaware of these implications, but there is nothing to suggest that the police had intended to ride rough-shod over the law. The petitioner has also not been prejudiced by this omission in any substantial way. In these circumstances I feel that an order against the respondents would not be justified.

In the result I would dismiss this application, but without costs.

Application dismissed.