WEERAWANSA

v.

THE ATTORNEY-GENERAL AND OTHERS

SUPREME COURT
FERNANDO, J.
AMERASINGHE, J. AND
DHEERARATNE, J.
SC APPLICATION No. 730/96
26TH JUNE, 2000

Fundamental rights - Prevention of Terrorism (Temporary Provisions) Act, (PTA) - Arrest and detention of a person by a police officer for "unlawful activity" - Sections 6(1) and 7(1) of the Act - Detention by order of the Minister - Section 9(1) of the Act - Pre-conditions for a valid arrest and detention - Arrest under section 127 of the Customs Ordinance - Remand of the suspect by a Magistrate - Circumstances in which the remand order would not constitute "judicial action" - Articles 13(1) and 13(2) of the Constitution.

On 04.03.96, the 2nd respondent (DIG - CID) reported to the Director - CID regarding investigations into alleged malpractices in the Port of Colombo, in particular, the removal of containers from the Port on forged documents with the connivance of customs officers. The report stated that there was information which had been checked that certain suspects had smuggled sophisticated weapons and a dismantled air craft for the use of the LTTE. However, there was no comparative record of any such information.

On 18.03.96, the 7th respondent (Director - General of Customs) sent the petitoner and three other officers on compulsory leave without assigning any reason.

On 23.04.96, the CID arrested one Hasheem who stated that he was an importer of textiles and other merchandise and made payments to customs officers including the petitioner and removed containers from the Port on forged documents. He denied that there were any weapons or aircraft parts in those containers.

Pursuant to Hasheem's statement, Chief Inspector Mayadunne acting on the 2nd respondent's instructions arrested the petitioner on 30.04.96

for unlawful activity claiming to act under section 6(1) of the Prevention of Terrorism (Temporary Provisions) Act ("the PTA"). Thereafter the petitioner was detained in the CID from 30.04.96 to 02.05.96 without being produced before a Magistrate.

On 02.05.96, the 2nd respondent applied to the Minister of Defence for a detention order under section 9(1) of the PTA stating that the petitioner was suspected of unlawful activity, to wit, aiding and abetting illegal importation of military hardwere and light aircraft parts to Sri Lanka and clearing the suspected container. However, no material whatsoever was placed before the Minister to support the 2nd respondent's conclusion. He suppressed the only material facts he had (namely, the report dated 04.03.96 and Hasheem's statement) which would have disclosed the falsity of his claim. The Minister issued a detention order on the same day ordering that the petitioner be detained for three months at the CID on the ground that she had reason to suspect that he was concerned in unlawful activity be aiding and abetting the illegal importation of exposives to Sri Lanka.

When the detention order dated 02.05.96 expired, the 2nd respondent applied to the Minister for an extention of that order. By her order dated 01.08.96 the Minister extended it for a further period of three months. The order states that it was made having reviewed all the facts placed before the Minister. That order was made in respect of about 20 persons specified in the schedule thereto; and the 2nd respondent did not even produce the application for the extention or the facts said to have been placed before the Minister.

On 02.10.96, when the CID knew that there was no justification for the petitioner's detention, they produced him before the 4th respondent (Deputy Director of Customs) on the ground that the petitioner was concerned in a large scale revenue fraud. The 4th respondent took the petitioner into custody and had his statement recorded. There was no material to warrant the suspicion that the petitioner was concerned in a revenue fraud. The 2nd respondent also did not notify the petitioner's arrest, detention or his transfer to another place of detention to the Human Rights Commission as required by section 28 of the of Human Rights Commission of Sri Lanka (The HRC) Act, No. 21 of 1996 which came into operation on 21.08.96. The petitioner was also not informed by the 4th respondent of the reason for being taken to

custody. The petitioner had been warded at the National Hospital as he was ill, from where he was removed by the CID for production to customs. After recording the petitioner's statement he was taken back to the National Hospital.

On 03.10.96, while the detention order under section 9(1) of the PTA was still in force the 4th respondent instructed the Customs Prosecuting Officer to produce the petitioner before the Magistrate under section 127A of the Customs Ordinance. The 4th respondent claimed in his affidavit that the petitioner was produced before the Magistrate but the court record shows that he was not produced. The petitioner was warded at the National Hospital; and the Magistrate ordered prison guards to take charge of the petitioner and made several remand orders until 31.12.96 without the petitioner being produced before him. Nor did the Magistrate visit him or arrange for an acting Magistrate to visit him.

Held :

1. In respect of the petitioner's arrest on 30.04.96, no reasonable suspicion of unlawful activity arose either on the basis of the 2nd respondent's report dated 04.03.96 or on the basis of Hasheem's statement dated 30.04.96. Hence the purported arrest directed by the 2nd respondent was not in accordance with section 6(1) of the PTA and violative of the petitioner's right under Article 13(1).

2. As the petitioner had not been arrested in accordance with section 6(1) of the PTA, the CID had no right to keep him in custody without producing him before a Magistrate, in terms of section 7(1); hence the petitioner's fundamental right under Article 13(2) was infringed by the 2nd respondent.

3. The detention order dated 02.05.96 made by the Minister under section 9(1) and the petitioner's detention thereunder were unlawful and invalid in that (a) no material was placed justifying reasonable suspicion of unlawful activity and (b) the order was made on the ground that the petitioner was concerned in the illegal importation of explosives in respect of which there was no material at all. Hence the petitioner's detention was in breach of Article 13(2) for which infringement the State is liable.

Per Fernando, J.

> "The Minister did not independently exercise her statutory discretion, either upon personal knowledge or credible information. She merely adopted the 2nd respondent's opinion. That was a patent abdication of discretion".

Per Fernando, J.

> "Not only must the Minister of Defence subjectively have the required belief or suspicion, but there must also be objectively, 'reason' for such belief".

4.(a) The extension of the detention order on 01.08.96 and the petitioner's detention thereunder upto 02.10.96, were unlawful and invalid in that the extention was granted without considering whether there was in fact reason to further deprive the petitioner of his liberty; hence the detention was in breach of Article 13(2), for which infringement the State is liable.

4.(b) If a detention order under section 9(1) is obtained within 72 hours of arrest, non-production before a judicial officer is excused by section 7(1). Otherwise the suspect who is detained under such order should be produced before a judicial officer after such detention, which is a safeguard which the PTA has not taken away. Such production is also required by Article 9 of the International Covenant on Civil and Political Rights (ICCPR) (as well as the First Optional Protocol) to which Sri Lanka is a party and which should be respected in terms of Article 27(15) of the Constitution. Since the petitoner was never brought before a judicial officer during the entire period of detention, his fundamental right under Article 13(2) was infringed for which infringement the State is liable.

5. The 4th respondent took the petitioner to customs custody on 02.10.96 without entertaining a reasonable suspicion that the petitioner was concerned in any offence and without informing the reason for the deprivation of his personal liberty. The 2nd

respondent failed to notify the HRC of the fact of the transfer of the petitioner's detention to customs on 02.10.96. The 2nd and the 4th respondents thereby infringed the petitioner's fundamental right under Article 13(1).

6. The order made by the Magistrate on 03.10.96 before the detention order made under the PTA had expired and the remand order made by the Magistrate in the absence of the petitioner were vitiated by a patent want of jurisdiction and did not constitute "judicial acts" which precluded relief under Article 126. It was the executive which had the custody of the petitioner from 03.10.96 and so the petitioner's detention was by "executive or administrative action" not sanctioned by a judicial act. Such detention was in violation of the petitioner's fundamental right under Article 13(2) for which the State is liable.

Cases referred to :

1. *Channa Pieris v. A. G.* (1994) 1 Sri LR 1, 55.
2. *Wickremabandu v. Herath* (1990) 2 Sri LR 384, 355, 365.
3. *Rodrigo v. de Silva* (1997) 3 Sri LR 265, 299.
4. *Edirisuriya v. Navaratnam* (1985) 1 Sri LR 100.
5. *Nallanayagam v. Gunatilake* (1987) 1 Sri LR 293.
6. *Ekanayake v. Herath Banda* SC 25/91 SCM 18.12.91.
7. *W. K. Nihal v. Kotalawela* SC 126/94 SCM 6.10.94.
8. *Kumarasinghe v. A. G.* SC 54/82 SCM 6.9.82.
9. *Jayathevan v. A. G.* (1992) 2 Sri LR 356, 371.
10. *Farook v. Raymond* (1996) 1 Sri LR 217.
11. *Dayananda v. Weerasinghe* (1983) 2 FRD 291.
12. *Leo Fernando v. A. G.* (1985) 2 Sri LR 341.

13. *Sirros v. Moore* (1974) 1 All ER 776. 785.

14. *Sriyawathie v. Shiva Pasupati* SC 112/86 SCM 28.4.87.

15. *Joseph Perera v. A. G.* (1992) 1 Sri LR 199.

APPLICATION for relief for infringment of fundamental rights.

T. J. Marapana, P. C. with *Jayantha Fernando* and *P. H. Ranatunga* for petitioner.

S. Rajaratnam, SSC for the 1st to 7th respondents.

Cur. adv. vult.

August 03, 2000

FERNANDO, J.

The Petitioner is an Assistant Superintendent of Customs. He complains that his fundamental rights under Articles 13(1) and (2) were infringed by reason of (I) his arrest on 30.4.96 by the CID purporting to act under section 6(1) of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (the "PTA"), (II) his detention from 30.4.96 to 2.5.96 under section 7(1) of the PTA, and from 2.5.96 to 2.10.96 under two detention orders purportedly made under section 9(1) of the PTA, (III) his transfer into the custody of the Customs on 2.10.96, and (IV) his detention from 3.10.96 to 31.12.96 under a purported Magisterial remand order.

PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT

The relevant provisions of the PTA are as follows:

"6. (1) Any police officer not below the rank of Superintendent or any other police officer not below the rank of Sub-Inspector authorized in writing by him in that behalf may, without a

warrant and with or without assistance and notwithstanding anything in any other law to the contrary -

(a) *arrest any person;*

(b) enter and search any premises;

(c) stop and search any individual or any vehicle, vessel, train or aircraft; and

(d) seize any document or thing,

connected with or concerned in or reasonably suspected of being connected with or concerned in any unlawful activity . . .

7. (1) Any person *arrested under subsection (1) of section 6* may be kept in custody for a period not exceeding seventy two hours and shall, unless a detention order under section 9 has been made in respect of such person, be produced before a Magistrate before the expiry of such period and the Magistrate *shall*, on an application made in writing in that behalf by a police officer not below the rank of Superintendent, *make order that such person shall be remanded until the conclusion of the trial of such person:*

Provided that, where the Attorney-General consents to the release of such person from custody before the conclusion of the trial, the Magistrate shall release such person from custody.

(2) Where any person *connected with or concerned in or reasonably suspected to be connected with or concerned in the commission of any offence* under this act appears or is

produced before any court other than in the manner referred to in subsection (1), such court *shall order the remand of such person until the conclusion of the trial:* provided that . . .

9. (1) Where the Minister *has reason to believe or suspect* that any person is *connected with or concerned in any unlawful activity*, the Minister may order that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister, and any such order may be extended from time to time for a period not exceeding three months at a time . . ." [emphasis added]

Articles 13(1) and 13(2) provide two valuable safeguards each: that a person may be arrested only "according to procedure established by law", and must be told the reason for arrest; and that a person deprived of liberty must be *brought before the judge* of the nearest competent court according to procedure established by law, and must not be further deprived of liberty, except upon and in terms of the order of such judge made in accordance with procedure established by law.

The procedure for arrest established by section 6(1) is not significantly different to the procedure established by law for arrest for other offences, and does not dispense with the need to give reasons. However, sections 7(1) and 9(1) authorise detention by the executive without a prior judicial order and for longer periods than under the general law (but those provisions did not expressly dispense with the need to bring a detainee before a judge). When the PTA Bill

was referred to this Court, the Court did not have to decide whether or not any of those provisions constituted reasonable restrictions on Articles 12(1), 13(1) and 13(2), permitted by Article 15(7) (in the interests of national security, etc), because the Court was informed that it had been decided to pass the Bill with a two-thirds majority (SC SD No. 7/79, 17.7.79). The PTA was enacted with a two-thirds majority, and accordingly, in terms of Article 84, the PTA became law despite any inconsistency with the Constitutional provisions.

I have therefore to consider whether the Petitioner's arrest was "in accordance with procedure established by law", namely by section 6(1), and whether he was informed of the reason for arrest; and also whether his detention was in accordance with Article 13(2), read with sections 7(1) and 9(1).

1. ARREST ON 30.4.96

The CID had been investigating allegations of malpractices in the Port of Colombo relating to imports - in particular, that containers were being taken out of the Port on forged documents with the connivance of Customs officers. On 4.3.96, the 2nd Respondent (DIG, CID) reported to the Director, CID, that :

> " Reliable information has been received that the *suspects* involved in the smuggling of containerized cargo had smuggled into the country, a large number of *sophisticated weapons* and a *dismantled aircraft* for the use of the LTTE.

2. This informant has given me credible information earlier which when checked were found to be correct. Hence all efforts should be taken to *interrogate the persons involved* in these illegal operations to unearth material owing to the security risk involved beside the colossal loss of revenue to the Government." [emphasis added]

I will assume that the 2nd Respondent did in fact receive some information from an informant. However, it is clear that his report was not a contemporaneous record of that information, but only a summary which he made subsequently. At no stage did he produce a contemporaneous record (withholding, as he was entitled to, the name of the informant). In the affidavit which the 2nd Respondent filed in these proceedings he did not assert that the *"suspects"* or *"the persons involved"* included the Petitioner; he stated that he had directed investigations, and that several persons including Customs officials had been interrogated - but not the Petitioner. The "information" had been received just five weeks after the Central Bank bomb explosion, and if it had actually implicated the Petitioner it would have been a serious dereliction of duty for the 2nd Respondent to have delayed questioning him for eight weeks.

Thus we do not know what exactly the informant did tell the 2nd Respondent. It is very likely that the informant did not implicate the petitioner, and I hold that at that stage the 2nd Respondent had no reason to suspect, and did not suspect, the Petitioner of any offence.

By letter dated 18.3.96 the 7th Respondent, the Director-General of Customs, sent the Petitioner (and three

others) on compulsory leave, without stating any reason. The Petitioner and the other three officers submitted appeals dated 27.3.96 and 8.4.96, but received no response. The 7th Respondent has not filed an affidavit explaining the reason for that order nor has he produced the documents which led him to make it. I have therefore no reason to think that that order was based on a suspicion that the Petitioner was guilty of any offence. The 2nd Respondent did not rely on that order.

On 23.4.96, the CID arrested one Hasheem, *alias Nazeer*, for "forging Customs documents and illegal importation of containers into Sri Lanka which are suspected to have contained *military hardware*". No material has been placed before us which justified any suspicion that Hasheem was involved in the importation of *military hardware*".

That there was a link between Hasheem and the Petitioner is not disputed. The Petitioner acknowledged that Hasheem was one of his informants, and that on several occasions Hasheem had given him information which had led to successful detections.

Hasheem made two statements, on 23.4.96 and 25.4.96. He confirmed that he had given information to the Petitioner. He stated that he was an importer of textiles and other merchandise, and that he had made payments to certain Customs Officers, including the Petitioner, in connection with the removal of containers from the Port on forged documents. However, he denied the allegation that there had been any weapons or aircraft parts in any of those containers.

Claiming to act under section 6(1) of the PTA, Chief Inspector Mudannayake (on the 2nd Respondent's instructions) arrested the Petitioner at the CID office at 4.00 p. m. on 30.4.96. He made an entry that the charges against the Petitioner were explained as being aiding and abetting the illegal importation of containers into Sri Lanka and their release from the Port on forged documents, there being information that some of the items in those containers were *weapons* and *light aircraft parts*. Those charges contained three distinct elements: that containers had been illegally imported, that they had been released on forged documents, and that they had contained weapons, etc. Only the third could have been termed a "PTA offence". However, in his affidavit in these proceedings, Mudannayake averred that the arrest was because "he was suspected of aiding and abetting the illegal *import* of containers containing *explosives* and *light aircraft parts*" - i. e. on account of the "PTA offence" alone. He made no mention of the *release* of containers. The 2nd Respondent's affidavit was to the same effect, except that he made no mention of *explosives*.

The 2nd Respondent's affidavit confirms that it was only after Hasheem's "disclosures" that the Petitioner was asked to report to the CID on 30.4.96. His own summary of Hasheem's "disclosures" was as follows: Hasheem "was able to import illegally several containers of *merchandise* with the connivance and assistance of the Petitioner and some others"; "some containers which arrived at the Colombo Harbour had been cleared illegally with the connivance of some Customs officials"; and "the contents of these containers are *unknown*". However, he added:

> "There was *reasonable information* that container loads of arms and ammunition and light aircraft parts have surreptitiously reached the L. T. T. E. after arriving at the Colombo Harbour." [emphasis added]

No details were given about that *"information"*. When questioned, Hasheem had denied that particular allegation, and it was unreasonable to have believed or suspected from his statements that the Petitioner was connected with or concerned in any "unlawful activity" as defined in the PTA. The Respondents did not produce any other material to support that allegation.

It is probable that the Petitioner was told the reason for arrest, namely that he was suspected of "unlawful activity". However, neither the alleged informant's disclosures on 4.3.96 nor Hasheem's statements gave rise to a reasonable suspicion of "unlawful activity". I hold that the Petitioner's arrest was not in accordance with the procedure established by law (i. e. section 6(1) of the PTA), and that the 2nd Respondent procured the infringement of his fundamental right under Article 13(1).

Possibly, Hasheem's statements to the CID may have given rise to a suspicion that the Petitioner was involved in the illegal import and removal of containers from the Port. I do not have to determine whether that was a reasonable suspicion justifying an arrest on that basis because the affidavits filed by the Respondents in this case establish that that was not the real reason for his arrest. In any event, an arrest on that basis would have required prompt production before a Magistrate, and would not have justified detention under the PTA.

II. DETENTION

(1) Detention under section 7(1)

The Petitioner was kept in CID custody, without being promptly produced before a Magistrate. The validity of his detention up to 2.5.96 depends on whether there was compliance with section 7(1) of the PTA, which permits a person "arrested *under* section 6(1)" to be kept in custody for a period not exceeding seventy two hours.

A "person arrested *under* section 6(1)" necessarily means a person arrested because he was "connected with or concerned in or reasonably suspected of being connected with or concerned in any unlawful activity". That phrase does not include a person arrested for *other* reasons (e. g. under the Customs Ordinance), or for no reason: such persons will continue to enjoy the full protection of Article 13. A pre-requisite for detention under section 7(1) is a valid and proper arrest under section 6(1): an arrest in conformity with section 6(1), and not one which is *contrary* to that section, or which is only a *pretended* or *purported* arrest under that section. "Under" in this context has the same meaning as "in pursuance of" which was similarly interpreted (in relation to Emergency Regulations 18 and 19) by Amerasinghe, *J*, in *Channa Pieris v. A. G.*[1]. In other words, while the general rule is that all arrests and consequent detentions are subject to the Constitutional safeguards in Article 13, the exception created by the PTA will apply only where the stipulated pre-condition of an arrest *under* section 6(1) exists. Those safeguards can never be circumvented by a false assertion or a mere pretence that an arrest was under section 6(1).

I hold that the Petitioner was not arrested "under" section 6(1), but otherwise than in accordance with section 6(1). Accordingly, the 2nd Respondent and the other CID officers did not have the right to keep him in custody in terms of section 7(1), but were obliged to comply with Article 13(2). The Petitioner's fundamental right under Article 13(2) was thus infringed by the 2nd Respondent.

(2) Detention under section 9(1)

An arrested person must be produced before a Magistrate, before the period of seventy two hours allowed by section 7(1) comes to an end, *unless* a detention order has been made "under" section 9(1). Such an order can only be made if "the Minister has *reason to believe or suspect* that [such] person is connected with or concerned in any unlawful activity". Not only must the Minister of Defence, subjectively, have the required belief or suspicion, but there must also be, objectively, "reason" for such belief. While Article 13(2) permits detention only upon a judicial order, section 9(1) allows a Ministerial order. However, being an order which results in a deprivation of liberty, it must be made with no less care and consideration.

The Minister's order does not depend on the validity of the preceding arrest and detention. Even if such arrest and detention were invalid, nevertheless if at the time the detention order was made the Minister did have reason to believe or suspect that the detainee was "connected with or concerned in any unlawful activity", the detention order and subsequent detention would be lawful.

By letter dated 2.5.96 the 2nd Respondent informed the Minister of Defence (who is H. E. the President) that the Petitioner had been taken into custody under section 6(1) of the PTA, and applied for a three-month detention order under section 9(1), claiming that:

> "2. Investigations conducted by the C. I. D. had revealed that this person is suspected to be connected with or concerned in unlawful activity to wit:
>
> 'Aided and abetted the illegal importation of *military hardware* and *light aircraft parts* to Sri Lanka by processing the documents portainting [sic] of the Customs Department at the time of clearing the suspected container said to have been [sic] contained the send [sic] article [sic].
>
> 3. It is necessary to detain him further, with a view to probe into his unlawful activities under the provisions of the Prevention of Terrorism Act." [emphasis added]

He did not forward - or even mention - any information, statements or other material on which he based his conclusions. Obviously, there was none. He thus deceived the Minister into believing that the CID investigations had in fact revealed that the Petitioner was suspected of involvement in unlawful activity. Furthermore, he suppressed the only material facts which he had (namely, the report dated 4.3.96 and Hasheem's statements), obviously because they would have disclosed to the Minister the falsity of his claims.

The Minister issued a detention order the same day, *ordering* that the Petitioner be detained for three months *at the*

CID office, on the ground that she had reason to suspect that he was:

"connected with or concerned in unlawful activity to wit:

'Aided and abetted the illegal importation of *explosives* to Sri Lanka by checking and processing the documents pertaining to the Customs Department at the time of clearing the suspected Container said to have contained the said *explosives*' " [emphasis added]

Dealing with the question whether there was a reasonable suspicion justifying arrest, Amerasinghe, J, held in *Pieris v. A. G.* [1994] 1 Sri LR 1, . . . that;

"A reasonable suspicion may be based either upon matters within the officer's knowledge or upon credible information furnished to him, or a combination of both sources. He may inform himself either by personal investigation or by adopting information supplied to him or by doing both. A suspicion does not become 'reasonable' merely because the source of the information is creditworthy."

Those observations apply with much greater force to the question whether a detention order is valid on the basis that the Minister had "reason to suspect", because, *inter alia*, a detention order drastically curtails personal liberty without the protection of a judicial order and for much longer periods. A valid detention order requires the independent exercise of the discretion conferred by section 9(1). Since the Minister had no personal knowledge of the facts, it was essential that

she should have been supplied with "credible information". Where such information is contained in documents and statements, those documents and statements must be made available to the Minister. But I will assume for the purposes of this case that a *correct* summary of the relevant portions of those documents and statements, set out in a report made by a responsible officer, may sometimes give the Minister "reason to suspect . . ." In this case even that did not happen. The 2nd Respondent merely informed the Minister of his *conclusions*. The detention order was therefore flawed. The Minister did not independently exercise her statutory discretion, either upon personal knowledge or credible information: she merely adopted the 2nd Respondent's opinion. That was a patent abdication of discretion. Further, even if I were to disregard all those flaws, the detention order would nevertheless be invalid because it was founded wholly upon the 2nd Respondent's conclusions which were not merely mistaken but wilfully false, perverse, and unreasonable.

There is another unexplained feature in this case. In the detention order the Minister made reference only to the abetment of the importation of *explosives*, and made no mention of *weapons* and *light aircraft parts*. That means that the Minister did not believe or suspect that the Petitioner was implicated in the importation of *weapons* and *light aircraft parts*. But at that point of time there was no material at all pertaining to *explosives*. The 2nd Respondent made no reference to *explosives* at any stage; and neither did Mudannayake in the contemporaneous entry he made on 30.4.96. It was only *after* this application was filed that Mudannayake fell into line with the detention order by referring to *explosives* in his affidavit in these proceedings. The detention order was flawed because

there was no reason for the Minister to have any belief or suspicion about *explosives.*

I hold that the detention order dated 2.5.96 and the Petitioner's detention thereunder for three months were unlawful and invalid, and in breach of Article 13(2), for which infringement the State is liable.

When that period of three months was coming to an end, according to the 2nd Respondent's affidavit:

> "As the investigations into this matter *was concluded* [sic], an application was made to the Minister of Defence to extend the detention order served on the Petitioner. Accordingly, the Minister of Defence *having reviewed the facts placed before her,* extended the Petitioner's detention by detention order dated 1st August 1996 issued in terms of section 9(1) . . ." [emphasis added]

The affidavit had not another word about those "facts". The Minister stated in that detention order:

> ". . . *having reviewed all the facts placed before me* in respect of each person, [I] do hereby extend the Detention Orders issued in respect of the persons whose names appear in the Schedule hereto for a period of three months from the dates mentioned against their names." [emphasis added]

About twenty persons were named in the schedule. The schedule referred to D. O. No. 1598 issued on 5.5.*95*, and D. O. No. 2024 issued on 4.5.*96* - which suggests that 427 detention orders had been issued in twelve months.

The higher the number of such orders, the greater the care to be exercised in regard to requests for, and the grant and extension of such orders.

In this instance, the Respondents have not even produced the request for extension - let alone the "facts" said to have been placed before the Minister. It is very likely that no material or report was submitted, and that the statement in the detention order that the facts were reviewed was not correct. Without considering whether there was in fact any reason further to deprive the Petitioner of his liberty (and if so, for how long, and on what conditions) a three-month extension was granted on request. Detention orders (including extensions), whether under the PTA, or Emergency Regulations, or otherwise, should not be made mechanically (see *Wickremabandu v. Herath*[2], *Rodrigo v. de. Silva*[3] and the decisions cited in *Channa Pieris* at 57). One matter which should have been considered was the Petitioner's health. He was being detained at the CID office. According to the 2nd Respondent, he fell ill during the month of June, "and was constantly taken to a private medical clinic for treatment". It does not appear that even his poor health - relevant both to the place and the period of future detention - was brought to the notice of the Minister.

I hold that the extension of the detention order on 1.8.96, and the Petitioner's detention thereunder up to 2.10.96, were unlawful and invalid, and in breach of Article 13(2) for which infringement the State is liable.

(3) The need for production before a Magistrate, notwithstanding the issue of a detention order

As already noted, Article 13(2) provides two safeguards: first, that a person deprived of liberty must be brought before a judicial officer, and second, that any further deprivation of liberty can only be upon a judicial order. Section 9(1) expressly authorised such further deprivation of liberty upon an executive detention order, and thus nullified the second safeguard - and that is "law", because the PTA was enacted with a two-thirds majority.

However, I am satisfied that the PTA did not take away the first safeguard. That has to be considered in relation to two periods: the period *preceding* the making of an executive detention order that has been made, and the *subsequent* period.

If no detention order is made, the detainee must be produced before a judicial officer within seventy two hours of arrest - the safeguard exists, although diluted (by section 7(1)) to the extent that production within twenty four hours is not necessary.

If a detention order is obtained within seventy two hours of arrest, non-production before a judicial officer during that period is excused or ratified by section 7(1).

However, neither section 9(1), nor any other provision of the PTA, dispenses with the need for such production *subsequent* to the making of an executive detention order.

To put in another way, a person detained under such a detention order is "a person held in custody, detained

or otherwise deprived of personal liberty"; the first safeguard in Article 13(2) is that he be brought before a judicial officer; and the PTA makes no contrary or inconsistent provision. That safeguard therefore continues undiluted. Accordingly, such non-production *subsequent* to the detention order is not sanctioned by the procedure established by law.

It may perhaps be suggested that such production is "of little consequence or a minor matter", because a judicial officer cannot order the release of the detainee. Nevertheless, it has been held that such production "is more than a mere formality or an empty ritual, but is recognized by all communities committed to the Rule of Law as an essential component of human rights and fundamental freedoms", and "must be exactly complied with by the executive" (see *Edirisuriya v Navaratnam*,[4] *Nallanayagam v Gunatilake*,[5] and *Rodrigo v de Silva*, at 323-5). That safeguard serves many important purposes. A judicial officer would be able, at least, to record the detainee's complaints (and his own observations) about various matters: such as ill - treatment, the failure to provide medical treatment, the violation of the conditions of detention prescribed by the detention order and/or relevant statutes and regulations, the infringement of the detainee's other legal rights *qua* detainee, etc. Indeed, he may even be able to give relief in respect of some matters.

Furthermore, many decisions of this Court have drawn attention to the fact that that safeguard is internationally recognised. Sri Lanka is a party to the International Covenant on Civil and Political Rights (as well as the Optional Protocol).

Article 9 of the Covenant mandates, *inter alia*, that "no one shall be subjected to arbitrary arrest or detention"; that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power"; and that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful". A person deprived of personal liberty has a right of access to the judiciary, and that right is now internationally entrenched, to the extent that a detainee who is denied that right may even complain to the Human Rights Committee.

Should this Court have regard to the provisions of the Covenant? I think it must. Article 27(15) requires the State to "endeavour to foster respect for international law and treaty obligations in dealings among nations". That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognises.

In that background, it would be wrong to attribute to Parliament an intention to disregard those safeguards. The PTA cannot be interpreted as dispensing, by implication or inference, with the safeguard of prompt production before a judicial officer under and in terms of Article 13(2). Such production is imperative. Since the petitioner was never brought before a judicial officer during the entire

period of detention, I hold that his fundamental right under Article 13(2) was infringed for which infringement the State is liable.

III. TRANSFER TO THE CUSTODY OF THE CUSTOMS

The Petitioner's wife filed a *habeas corpus* application in the Court of Appeal. Notice was issued, returnable on 25. 9. 96, on which date State Counsel asked for further time to file objections.

On 2. 10. 96 the Petitioner was warded at the National Hospital, Colombo. Before that day - probably in consequence of the *habeas corpus* application - the Attorney-General had advised the CID that there was no justification to detain the Petitioner under the PTA. It must be noted that the detention order (if valid) continued to be operative. It did not merely *authorise* the CID to detain the Petitioner, but *ordered* such detention; and it ordered detention *at the CID office* (and not at the National Hospital, or at the Customs office, or elsewhere). and it directed detention *for three months*, and not just for two. On 2.10.96 the CID ignored those provisions.

Although the CID knew full well that there was no justification for the Petitioner's continued detention under the PTA, nevertheless they did not request a revocation or variation of the detention order. Instead of releasing the Petitioner or producing him before a Magistrate, CID officers obtained permission from the Hospital authorities to take him away for two hours. At 12.30 p. m. they took him to the CID office, and from there to the Prosecution office of the Preventive Branch of the Customs. There, at about 2.30 p. m., the 2nd Respondent "produced" him before the 4th

Respondent (Deputy Director of Customs) and other Customs officers - because, they claimed, "the investigations raised a reasonable suspicion that the petitioner was involved in a large scale revenue fraud which constitutes an offence under the Customs Ordinance". The 4th Respondent confirmed that the CID officers so stated, but did not claim either that he himself entertained any suspicion in that respect or that he informed the petitioner that this was the reason why the Customs took him into custody. He did not produce any material which would have given rise to such a suspicion. He says that he merely instructed the 5th and 6th Respondents to record a statement. The Petitioner avers that he "inquired from the 4th Respondent whether there [were] any allegations against him [and] the 5th and 6th Respondents answered in the negative". The 4th to 6th Respondents have not denied that averment.

The 5th Respondent commenced recording the Petitioner's statement at around 6.00 p. m. He was questioned about his career and performance in the Customs; he felt ill, and when he inquired whether he would not be taken back to Hospital, the 5th Respondent replied that he would be detained at the Customs that day; and he then remarked that the 4th to 6th Respondents would have to take the responsibility if anything happened to his life. In the meantime the 6th Respondent told the Petitioner that the National Hospital was making inquiries about the delay in returning him to the Hospital. None of this was denied. It was only thereafter that on the 4th Respondent's instructions the Petitioner was taken back to the Hospital at 10.30 p. m., where he was guarded by Customs officials.

I hold that the 4th Respondent took the Petitioner into Customs custody at 2.30 p. m. on 2.10.96, without entertaining a reasonable suspicion that the Petitioner was concerned in any offence, and without informing him of the reason for the deprivation of his personal liberty.

The 2nd Respondent also failed to comply with section 28 of the Human Rights Commission of Sri Lanka Act, No 21 of 1996, which came into operation on 21.8.96. That section requires (a) the person making an arrest or an order for detention under the PTA or the Emergency Regulations, and (b) any person making an order for the transfer of a detainee to another place of detention, to inform the Commission. Thus, on 2.10.96, the procedure established by law in respect of the deprivation of liberty - whether upon initial arrest or detention, or upon a transfer of custody - included a requirement that the Commission be notified. The 2nd Respondent does not claim that he did so.

I hold that the 2nd and 4th Respondents infringed the Petitioner's fundamental right under Article 13 (1).

IV. DETENTION UPON MAGISTRATE'S REMAND ORDERS

The 4th Respondent averred that he instructed the Customs prosecuting officer "to take necessary action to produce the Petitioner before the Magistrate and make an application in terms of section 127A of the Customs Ordinance". At that time there was pending in the Harbour Magistrate's Court a case against several other Customs Officers. The Customs filed a further report in that case on 3.10.96, seeking to make the Petitioner a party to that case.

The 4th Respondent falsely claimed in his affidavit that the Petitioner was produced before the Magistrate on 3.10.96: the Court record confirms the Petitioner's assertion that he was not produced. Despite that, the Magistrate (the 8th Respondent) made order, directing two Prison guards, Jayaweera and Ranjith, to take charge of the Petitioner until he recovered; he also called for a medical report from the Hospital. He recorded that after he had adjourned, Jayaweera met him in chambers and stated that Jayaweera had no authority to be in charge of the Petitioner while he was in the Hospital. The 8th Respondent thereupon made order directing the Superintendent of Prisons, Welikada, "to take steps" in regard to the Petitioner. The warrant of detention, if any, was not produced.

Although the Petitioner was never brought before him, the 8th Respondent made several remand orders thereafter, and released him on bail only on 31.12.96.

During this entire period, the 8th Respondent did not visit or communicate with the Petitioner, nor did he arrange for an acting Magistrate to do so.

The Petitioner's detention from 3.10.96 to 31.12.96 was not under the PTA, but under the general law. Two distinct questions arise: Was that detention in violation of Article 13(2), and if so can the Petitioner obtain relief in respect thereof in these proceedings under Article 126?

(1) Violation of Article 13(2)

Article 13(2) requires that an arrested person be *brought before the judge of the nearest competent court. How he should be brought before* the judge can be laid down by ordinary law, but the requirements that he be *brought before a* judge, *and* that it is not any judge but the judge of the *nearest competent court*, cannot be varied or dispensed with. Those are not matters of discretion, but pre-conditions which go to jurisdiction. Section 115 of the Code of Criminal Procedure Act and section 127A of the Customs Ordinance require an arrested person to be "forwarded to" or "produced before" - which I regard as synonymous with *bringing before* - a Magistrate. It is not enough to show him to a judge, or to bring him into physical proximity to a judge; he must at least be given an opportunity to communicate with the judge: *Ekanayake v Herath Banda.*[6] The present case is virtually identical to *W. K. Nihal v Kotalawela.*[7] There, while the petitioner was warded in hospital, in police custody, the Police applied to the Magistrate for an order that he be transferred to Prison custody and produced *ten days later* before the Magistrate. The Magistrate granted that application. Dheeraratne, J. observed that there was no provision of law "granting sanction for a Magistrate to make such a remand order which is capable of so insidiously eroding the liberty of the subject (see Article 13(2) . . ." See also the other decisions cited in *Channa Pieris* at 76-77 In my view, two things are essential: the suspect must be taken to where the nearest competent judge is, or that judge must go to where the suspect is, *and* the suspect must have an opportunity to communicate with the judge. If those conditions are not satisfied, the

judge would have no jurisdiction in respect of that suspect, to make a remand order.

Discussing section 115(1) of the Code, Wimalaratne, J. observed in *Kumarasinghe v. A. G.*[8] that, on occasions when a suspect warded in hospital cannot be produced before the Magistrate within the stipulated period, the Police may produce a medical report to the effect that it would be hazardous to move him from hospital. With respect, I cannot agree. Such an exception of that sort cannot be implied in respect of a safeguard for liberty laid down in ordinary law, in the absence of some ambiguity, injustice, absurdity, anomaly, inconvenience, etc, which would justify such an inference. If there is good reason why the Magistrate himself cannot go to the hospital, he can delegate an acting Magistrate. Article 13(2) embodies a basic Constitutional safeguard, almost universally recognised: that judge and suspect must be brought face-to-face, before liberty is curtailed.

I hold that the first remand order, and the subsequent extensions, were not made in accordance with the procedure established by law. The Petitioner was therefore detained in violation of Article 13(2).

(2) Relief under Article 126

Nevertheless, the Petitioner would be entitled to relief in these proceedings only if those remand orders constitute "executive or administrative action".

The act of a judicial officer done in the exercise of judicial power does not fall within the ambit of "executive

or administrative action". It does not follow, however, that every act done by a judicial officer is excluded, because a judicial officer may sometimes perform some functions which are not judicial in character: *Jayathevan v AG.*[9] Further, as *Amerasinghe, J.* observed in *Farook v Raymond.*[10] "Judicial power can only be exercised if the court . . . has jurisdiction".

Turning to remand orders in particular, it cannot be said that such orders are intrinsically or necessarily "judicial" in character - because an order that a suspect be detained pending investigation into an offence deprives the suspect of his personal liberty in much the same way, whether that order is made by a judicial officer or by an officer of the Executive. It cannot be assumed, therefore, that the impugned remand orders were intrinsically judicial in character, and it is necessary to examine the circumstances and the manner in which they were made.

Several decisions of this Court involving remand orders made by judicial officers were analysed in *Farook v Raymond.* I will refer to some of them.

In *Kumarasinghe v A.G.*, the suspect who was in hospital was not brought before the Magistrate, and the Police failed to file a medical report. The Court was of the opinion that the period of remand ordered by the Magistrate was quite excessive. It was held that there was a breach of Article 13(2), but that was "more the consequence of the wrongful exercise of judicial discretion as a result of a misleading Police report"

Although no relief was granted, the Petitioner was awarded costs. (The Court did not take the view that the failure to bring the suspect before the Magistrate deprived him of jurisdiction.)

The same principle was applied in *Dayananda v Weerasinghe*[11]. There the suspect had been brought before the Magistrate.

Those two decisions were approved in *Leo Fernando v A. G.*,[12] a decision of a bench of five judges. The first question that arose related to judicial immunity from suit. Both Colin-Thome, J, and Ranasinghe, J, (as he then was), agreed with the observations of Lord Denning, MR, in *Sirros v Moore*.[13]

> ". . . So long as (a judge) does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does *may be outside his jurisdiction* - in fact or in law - but as long as he honestly believes it to be within his jurisdiction, he should not be liable . . . nothing will make him liable except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it."

Ranasinghe, J. proceeded to consider the further question (see p 369) whether "even though the judge himself is so immune from any liability, the State would yet be liable, in the field of fundamental rights, for any act of a judge which would operate to infringe a fundamental right. . ." It was contended on behalf of the petitioner (see page 30)

that "the impugned act was not an act committed by the (judge) in his capacity as a judge for the reason that [he] had no power or authority as a judge to do what he did and was therefore acting outside his jurisdiction". Ranasinghe, J. dismissed that contenion because he took the view that the judge "did undoubtedly have the power to make, upon proper material, an order remanding the petitioner pending further investigation into an offence. . ."

The petitioner in *Sriyawathie v Shiva Pasupati*[14] had been remanded on a charge of murder, not for the period of 15 days permitted by section 115(2), but *sine die:* no warrant of commitment under section 159 had been issued. No indictment was served on her, and she continued in remand for seven years. Holding that her detention was illegal, the Court directed her immediate release, and compensation in a sum of Rs 15,000.

In *Joseph Perera v A.G.*,[15] another decision of a bench of five judges, the three petitioners had been remanded by a Magistrate. The Magistrate had no power under the Emergency Regulations to grant bail except with the consent of the Attorney-General. L. H. de Alwis, J, held (at p 247) that the unlawful detention of the petitioners had been by executive or administrative action, and not in judicial proceedings; the order of remand, though made by the Magistrate, was not in the exercise of his judicial discretion since he had none under the Emergency Regulations.

In *Farook v Raymond* the suspects had been remanded to Police custody. Since the Magistrate had no power to

remand to Police custody, it was held that detention was not in accordance with the procedure established by law. Turning to the question whether the order constituted "executive or administrative" action, and after reviewing the case law, Amerasinghe, J, drew a distinction which I respectfully adopt.

If an officer appointed to perform judicial functions exercised the discretion vested in him, but did so erroneously, his order would nevertheless be "judicial". However, an order made by such an officer would not be "judicial" if he had not exercised his discretion, for example, if he had abdicated his authority, or had acted mechanically, by simply acceding to or acquiescing in proposals made by the police - of which there was insufficient evidence in that case.

On the other hand, if a judicial officer was required by law to perform some function in respect of which the law itself had deprived him of any discretion, then his act was not judicial.

The principal circumstance which distinguishes this case is the failure to bring the Petitioner before the 8th Respondent. That resulted in a patent want of jurisdiction. It also caused a failure of natural justice, because the 8th Respondent acted without asking the Petitioner what he had to say.

Further, on 3.10.96 the detention order made under the PTA had not expired. It had neither been revoked nor declared invalid. Nevertheless, the 8th Respondent did not even consider whether that order affected his jurisdiction: e.g.

Whether it took away his power to release the Petitioner on bail? Whether he could have ordered detention in a different place?

Having regard to the patent want of jurisdiction, and the failure to consider whether he had jurisdiction, I hold that the remand orders made by the 8th Respondent were not "judicial" acts done in the exercise of judicial power. It was the executive which had custody of the Petitioner from 3.10.96, and so the Petitioner's detention was by "executive or administrative action", not sanctioned by a judicial act. Detention was in violation of the Petitioner's fundamental right under Article 13(2), and for that the State is liable.

ORDER

I hold that the Petitioner's fundamental rights under Articles 13(1) and 13(2) have been infringed as set out above, and award the Petitioner a sum of Rs. 300,000 as compensation and costs, payable on or before 30.9.2000. Of this sum, Rs. 200,000 shall be paid by the State, Rs. 75,000 by the 2nd Respondent personally, and Rs. 25,000 by the 4th Respondent personally.

AMERASINGHE, J. - I agree.

DHEERARATNE, J. - I agree.

Relief granted.