FAIZ
v.
ATTORNEY-GENERAL AND OTHERS

SUPREME COURT.
FERNANDO, J.
GOONEWARDENA, J. AND
PERERA, J.
SC APPLICATION NO. 89/91
AUGUST 23, 24 AND SEPTEMBER 06, 1993.

Fundamental Rights – Refusal to release persons arrested for illicit felling of timber – Executive and administrative action – Instigation or participation of persons not agents of the executive or administration – Illegal arrest and unlawful detention – Cruel and degrading treatment – Deprivation of equal protection of the law – Failure to record complaint – Section 109 (1) to (5) of Criminal Procedure Code – Articles 11, 12, 13(1) and (2) of the Constitution.

On 26 April 1991 about 9.30 a.m. the petitioner along with 4 game guards had arrested several persons who had been detected illicitly felling timber in the Minneriya – Giritale Native Reserve and taken into custody, a hand tractor and some carts loaded with logged timber and was bringing them along when the 6th respondent C. S. Sooriyaratchi, a Member of Parliament for the Polonnaruwa District came travelling in a jeep and intercepted the petitioner at a place called Deke Ela and wanted the men released. The petitioner said he was only doing his duty and suggested that the 6th respondent speak to the Assistant Director. The 6th respondent left the place in a huff. In the jeep the petitioner identified the 7th respondent Keerthiratne who was a Provincial Councillor of the North Central Provincial Council and several others. The petitioner proceeded a little further and when he was approaching the water tank at Deke Ela, he saw the same jeep halted at a distance and several persons standing on the road, When the hand tractor which was at the vanguard of the procession reached this spot the persons standing near the 6th respondent's jeep, surrounded the tractor and stopped it. The petitioner had his official knife issued to him by his Department tucked in his belt and an iron rod for his protection. The 6th respondent grabbed the iron rod and hit the petitioner with it several times. The petitioner suffered incised injuries in the region of his left eyebrow and on the left shoulder. The 7th respondent also attacked him joined by the other persons in the crowd. The 6th respondent then ordered the suspects whom petitioner had arrested to take the hand tractor and carts and escape. Some of the suspects were being brought by the petitioner in his jeep and they escaped. The game guard who had been entrusted with the hand tractor brought the tractor with its load of timber to the office of the Assistant Director. In the meantime the petitioner too reached the office of the Assistant Director who however was not in the office. The petitioner instructed a game guard to keep the tractor with its timber load at the office of the

Assistant Director and to inform the Assistant Director of the incident when he returned. The petitioner proceeded to the Polonnaruwa Police Station with the rest of his staff. Still bleeding from his injuries he arrived at the Police Station and saw the 6th and 7th respondents and several others already there. The petitioner wanted his statement recorded but the Police Officer on duty said this would be done after the 6th respondent's statement was recorded. About 6.30 p.m. the 3rd respondent (Police Constable 18000) directed the petitioner to sit inside the charge room and not to leave. At this point of time the 3rd respondent arrested him giving no reasons or the charge. Thereafter the 5th respondent H. G. P. Nelson also an MP for Polonnaruwa District and a State Minister came to the Police Station and along with the 6th and 7th respondents entered the charge room where the petitioner was seated. The 5th respondent using the iron rod which the 6th respondent had taken from the petitioner, assaulted the petitioner with it while the 6th and 7th respondents and the 6th respondent's brother assaulted the petitioner using their hands and feet. The petitioner began to bleed afresh from the injuries on the left eyebrow and shoulder. The 3rd and 4th respondents (Reserve Police Constable 16640) were present and did not intervene.

Thereafter the 5th, 6th and 7th respondents with the brother of the 6th respondent entered the office room of the 2nd respondent A. C. Jayasekera HQI Polonnaruwa. Within a few minutes the 5th and 6th respondents came back to the charge room and directed the 4th respondent to remove the belt and knife of the petitioner and the 4th respondent complied. The 4th respondent produced the petitioner before the 2nd respondent. Several others were present in the room. The 5th respondent asked the petitioner whether he was drunk. The petitioner said he did not consume liquor as he was a Muslim. The 5th, 6th and 7th respondents and their companions left the Police Station. The petitioner wanted his complaint recorded but was told it would be recorded later. About 8.30 p.m. the petitioner was taken to the medical officer at Welikanda Hospital. He was examined by the Doctor and brought back to the Polonnaruwa Police Station about 10.30 p.m. The Doctor noted the injuries and did not find him smelling of liquor. The petitioner requested the 2nd respondent to record his statement. The 2nd respondent replied he was leaving station and would record the statement on his return. The petitioner spent the night of the 26th April at the Police Station. On the next day 27th April his statement was recorded with reference to 6th respondent's complaint but it was backdated to 26th April. On the evening of 27-04-91 the petitioner was produced by Polonnaruwa Police before the Acting Magistrate with an application for remand for two weeks but the Magistrate remanded him till 3 May 1991. He spent the night of 27 April 1991 in the Polonnaruwa lockup. Up to this he received no treatment for his injuries. On 29 April 1991 on an application by the Assistant Director of Wild Life the petitioner was bailed out to appear in Polonnaruwa Courts on 03 May 1991. After he was released he made a detailed complaint on 30-04-1991 at the Police Headquarters relating to the incident of the assault on him.

On 17 May 1991 he filed plaints against the suspects he had taken into custody on 26-04-1991 under the provisions of the Fauna and Flora Ordinance and all the accused pleaded guilty to the charges in the Magistrate's Court of Polonnaruwa.

The 6th respondent complained that when he asked the petitioner to release the men as they had only collected firewood, the petitioner had attempted to strike him with the iron rod and later tried to stab him when the crowd wrenched iron rod. A melee ensued. The petitioner was drunk and fell in the melee and the injuries were attributable to the fall.

The Court however accepted the petitioner's version.

Held: (*Goonewardene J. dissenting on the question of detention under Article 13(2) of the Constitution*)

(1) Section 109 of the Criminal Procedure Code makes it mandatory for a police officer to record any information relating to the commission of an offence in the Information Book. Subsection 4 of this section requires a police officer who receives such information, if he is not the officer-in-charge of the police station to forthwith report such facts to the officer-in-charge of the station. Further in terms of section 109(5) if from the information received the officer-in-charge of the police station has reason to believe the commission of a cognizable offence he is required forthwith to send a report to the Magistrate's Court having jurisdiction and to proceed in person or to delegate one of his subordinate officers to proceed to the spot to investigate the facts and circumstances of the case and to take such measures as would be necessary for the discovery and arrest of the offenders.

The second respondent admits that he arrived at the police station by 6.15 p.m. that is within a few minutes of the arrival of the 6th respondent and the petitioner at the police station that day. If the 2nd respondent had on his arrival complied with the imperative provisions of the Criminal Procedure Code set out above it would have been very clear to him that the arrest and detention of the petitioner was absolutely unwarranted.

(2) The arrest and the subsequent detention of the petitioner from 26.04.91 to 27.04.91 by the 2nd and 3rd respondents were unwarranted in law and are violative of Articles 13(1) and 13(2) of the Constitution by executive or administrative action.

(3) Having regard to all the pleadings filed in this case the 3rd and 4th respondents by their strange and inexplicable inaction permitted the 5th, 6th and 7th respondents to subject the petitioner who was at that stage in the custody of the police to cruel and degrading treatment and thereby infringed the Fundamental Right of the petitioner guaranteed by Article 11 of the Constitution by executive or administrative action.

(4) There is substance in the complaint of the petitioner that on the day in question he was deprived of the equal protection of the law by executive or administrative action. No meaningful action whatsoever was taken against the 5th, 6th and 7th respondents who had committed such a serious offence inside the police station itself up to date. The petitioner has established beyond doubt that his Fundamental Right guaranteed by Article 12(1) of the Constitution has been infringed by the 2nd and 3rd respondents by executive or administrative action.

(5) It is true that a denial of equal protection has hitherto been largely confined to affirmative acts of discrimination. The denial of equal protection has now been recognized by the United States Supreme Court as well. It is clear that Article 126(4) gives this Court very wide powers in this regard. The responsibility under Article 126 would extend to any respondent who has no executive status but is proved to be guilty of impropriety, connivance or any such similar conduct with the executive in wrongful acts violative of fundamental rights.

(6) In the present case the 5th, 6th and 7th respondents were guilty of impropriety or connivance with the executive in wrongful acts or omissions violative of the petitioner's Fundamental Rights under Articles 11, 12(1) and 13(2) of the Constitution.

(7) Petitioner's fundamental rights under Article 11 have been violated by the 5th – 7th respondents. Although not *per se* executive or administrative action, that violation was made possible by executive or administrative action by the 3rd and 4th respondents. Therefore, the violation was by "executive or administrative action" within the meaning of Article 126 and the 3rd to 7th respondents are responsible.

(8) Petitioner's fundamental rights under Article 13(1) and (2) have been violated by the 3rd respondent by executive or administrative action. The 3rd respondent also violated the petitioner's fundamental rights under Article 12(1), by denying him equal treatment, vis-a-vis the 5th to 7th respondents and their associates who were neither arrested nor detained.

(9) The 2nd respondent failed to release the petitioner, and thereby deliberately acquiesced in and condoned the arrest and detention of the petitioner in violation of Articles 12(1), 13(1) and 13(2); he is also responsible for the violation.

(10) The violation was induced or instigated by the 5th to 7th respondents, who are therefore also responsible for the violation.

***Per* Fernando, J:**

1. "It is not possible to treat the assault as being a transaction entirely distinct and separate from the arrest and detention; it was inextricably linked to the previous and subsequent events. There is no doubt that immediately after the assault, the 2nd to 4th respondents acted in a manner plainly partial to the 5th to 7th respondents, and inexcusably hostile to the petitioner."

2. "The acts of the 5th to 7th respondents considered in isolation cannot considered to be "executive or administrative action"; the question is whether the nexus between those acts, and the acts and omissions of the 2nd to 4th respondents was sufficient to alter what would otherwise have been purely private action into "executive or administrative action.". That phrase does not seek to draw a distinction between the acts of "high" officials (as being "executive"), and other officials (as being "administrative"). "Executive" is appropriate in a Constitution, and sufficient, to include the (official) acts of all public officers, high and low, and to exclude acts which are plainly legislative or judicial (and of course purely private acts not done under colour of office). The need for including "administrative" is because there are residual acts which do not fit neatly into this three-fold classification."

3. "Article 126 speaks of an infringement by executive or administrative action: it does not impose a further requirement that such action must be by an executive officer. It follows that the act of a private individual would render him liable, if in the circumstances that act is "executive or administrative". The act of a private individual would be executive if such act is done with the authority of the executive; such authority, transforms an otherwise purely private act into executive or administrative action; authority may be express, or implied from prior or concurrent acts manifesting approval, instigation, connivance, acquiescence, participation, and the like (including inaction in circumstances where there is a duty to act); and from subsequent acts which manifest ratification or adoption. While I use concepts and terminology of the law relating to agency, and vicarious liability in delict, in my view responsibility under Article 126 would extend to all situations in which the nexus between the individual and the executive makes it equitable to attribute such responsibility. The executive, and the executive officers from whom such authority flows would all be responsible for the infringement. Conversely, when an infringement by an executive officer, by executive or administrative action, is directly and effectively the consequence of the act of a private individual (whether by reason of instigation, connivance, participation or otherwise) such individual is also responsible for the executive or administrative action and the infringement caused thereby. In any event this court would have power under Article 126(4) to make orders and directions against such an individual in order to afford relief to the victim."

Cases referred to:

1. *Ramupillai v. Perera* (1991) 1 Sri LR 11, 74 – 75.
2. *Jayathevan v. A.G.* – S.C. application 192/91 – S.C.M. of 17.09.92.
3. *R v. Liyanage* (1962) 64 NLR 313.
4. *Alwis v. Raymond* S.C. Application No. 145/87 S.C. Mns. of 21.07.89.
5. *Shaul Hameed v. Ranasinghe* (1990) 1 Sri LR 104.
6. *Wimalaguna v. Widanegama* S.C. Application No. 11/90 – S.C. Mns. of 5.2.1991.
7. *Somawathie v. Weerasinghe* (1990) 2 Sri LR 121, 128 – 129.
8. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1948) 1 KB 223, 229.
9. *Christy v. Leachinsky* (1947) AC 573, 588.
10. *Dumbell v. Roberts* (1944) 1 All ER 326, 329.
11. *Muthusamy v. Kannangara* (1951) 52 NLR 324, 330.
12. *Burton v. Wilmington Parking Authority et al* (1961) 345 US 715.
13. *Lynch v. USA* 189 F 2nd 476 (5th CIR 1951)

APPLICATION for violation of Fundamental Rights under Articles 11, 12, 13(1) and (2) of the Constitution.

R. K. W. Goonasekera with *Lalanath de Silva* and *J. Gunawardena* for the petitioner.

Upawansa Yapa, P.C. Additional Solicitor General for the 1-4 Respondents.

L.C. Seneviratne, P.C. with Ronald Perera for the 5 and 6 Respondents.

Cur adv vult.

November 19, 1993.

FERNANDO, J.

I entirely agree with the findings and order of my brother Perera, J., whose judgment I have had the advantage of reading. In view of the importance of the questions of law involved I wish to set down my reasons in some detail.

We are faced with two contradictory versions. The petitioner's version is that after he had done his duty by arresting persons engaged in illicit felling, the 6th respondent attempted to intimidate him into releasing them; when he refused, quite properly, the 6th and 7th respondents returned, with reinforcements, and again sought the release of the suspects; when the petitioner refused even to wait till the 5th respondent arrived, the 6th respondent assaulted him with an iron rod. The 5th and 6th respondents' version (the 7th respondent

did not file any objections or affidavit) is that the petitioner unjustly arrested innocent villagers engaged in gathering firewood; when they intervened, the petitioner attempted to assault and stab the 6th respondent, who, however, sustained no injuries. The respondents do not deny that when the 6th respondent first confronted the petitioner, there was timber, and not firewood, in the tractor and the carts; there is no suggestion that the tractor, carts and timber had not been seized from the suspects, or that the timber had been substituted for the firewood which they had collected; there is no affidavit from any of the suspects to that effect. What is more, the suspects subsequently pleaded guilty to charges of illicit felling of trees and escape from lawful custody. This tends to support the petitioner's version: that the 6th respondent, angry that the petitioner had resisted his improper efforts to secure the release of the suspects, resorted to violence. On the other hand, had there been firewood, instead of timber, in the tractor and carts, I could readily have accepted the respondents' version that the petitioner – resentful at being found out – attempted to use force to dissuade the 6th respondent. Further, the 6th respondent gives inconsistent explanations for the petitioner's injuries. In his affidavit he suggests that these may have been the result of an altercation, near the office of the Assistant Director, between the petitioner and some of the persons in the crowd, but in his statement to the Police he had previously suggested that the injuries might have been sustained when the petitioner fell, due to intoxication. Again, the 5th and 6th respondents deny that the petitioner was assaulted at the police station; indeed, their affidavits make no mention of any incident whatsoever, but the 2nd and 3rd respondents substantially confirm the petitioner's version. They suggest that the 5th respondent came to the police station **before** their complaints were recorded, but the 3rd and 4th respondents confirm that the 5th respondent came – and with a crowd – **while** the 6th respondent's complaint was being recorded. While the 5th and 6th respondents try to make out that, immediately after their complaints had been recorded, they left the police station, the 2nd respondent corroborates the petitioner's statement that the 5th, 6th and 7th respondents went into the 2nd respondent's room, and that later he too was taken there. I have therefore no hesitation in holding that the petitioner's version is more probable than that of the 5th and 6th respondents'.

It is clear that the 5th to 7th respondents assaulted the petitioner and thereby subjected him to inhuman and degrading treatment in violation of Article 11; this was done openly; in the presence of the 3rd and 4th respondents. Even if I were to accept their version that the petitioner was not in Police custody and had not been subjected to any restraint upon his freedom to leave the Police station, the Petitioner was lawfully in the Police station for a purpose connected with the discharge of his public duties; these respondents owed him a duty of care greater than that owed to members of the public in general in other circumstances. That duty became even more onerous after they permitted the 5th respondent and an obviously unfriendly crowd (which had no legitimate business to transact at the police station) to come inside. In view of the mood of the 5th – 7th respondents and the crowd, I cannot accept their version that the assault was quite unexpected.

Surprisingly, the 3rd and 4th respondents did not arrest the 5th to 7th respondents or any of the other assailants (using the "minimum force" which the law permits); nor did the 2nd respondent when he came to the Police station shortly thereafter. This unprovoked assault was a blatant violation of the law committed within the precincts of the police station itself, and witnessed by Police officers, who took no action. However, according to the 2nd to 4th respondents, immediately after this cowardly assault by a crowd upon a lone individual, the petitioner (who was bleeding because his old wounds had reopened) was arrested allegedly upon a charge of attempting to cause hurt, without requesting any statement or explanation from him. By depriving the petitioner of his liberty for far less serious reasons, arising from an incident provoked by the improper intervention by the 6th and 7th respondents, while permitting the 5th to 7th respondents and their associates to go free despite clear evidence, the 3rd and 4th respondents denied the petitioner the equal protection of the law. The 2nd respondent, by failing to order the release of the petitioner, acquiesced in and condoned this arrest and detention, in denial of equal protection. Detention was unnecessarily prolonged; no attempt was made to contact the petitioner's superiors, or to offer to release him on bail; thus the 3rd respondent arrested and detained the petitioner in violation of Article 13(1) and (2), and the 2nd respondent acquiesced in and condoned

these violations; in the circumstances, all this was also in violation of Article 12(1).

Two important questions arise in this case; whether under Article 126 the 3rd and 4th respondents had such responsibility for the assault as to make them and/or the 5th to 7th respondents liable in these proceedings, and whether the 5th to 7th respondents had such responsibility for the arrest and detention of the petitioner as to make them liable in addition to the 2nd and 3rd respondents.

It is necessary first to ascertain the precise relationship between these two groups of respondents in regard to the assault, arrest and detention of the petitioner. It is not possible to treat the assault as being a transaction entirely distinct and separate from the arrest and detention; it was inextricably linked to the previous and subsequent events. There is no doubt that immediately after the assault, the 2nd to 4th Respondents acted in a manner plainly partial to the 5th to 7th Respondents, and inexcusably hostile to the petitioner. That this attitude suddenly came into existence, on the spur of the moment, as it were, immediately after the assault, is only a theoretical possibility; an unprovoked assault by a crowd on a single individual would normally evoke feelings of sympathy for, and not of hostility to, the victim; and the Police officers would not react differently. The decision to arrest and detain the petitioner, without taking comparable action in respect of far more serious offence, is therefore referable to a state of mind which must necessarily have existed even before the assault. There was partiality going far beyond the courtesy, respect and deference a public officer may legitimately show to persons holding political office. Further, while it is possible that the 2nd to 4th respondents might have been motivated by a desire to curry favour with the 5th to 7th respondents because of their political offices and influence, the evidence here does suggest that any such partiality was self-induced. The 5th to 7th respondents came to the police station in order to induce action unfavourable to the petitioner; the 6th and 7th respondents undoubtedly knew that their supporters had been arrested for illegally felling trees, and not for gathering firewood, because they would have seen the carts loaded with timber; they knew they were not intervening on behalf of innocent suspects being unlawfully harassed. Even if the 5th respondent did not have such

knowledge, it was his duty to have made some attempt to verify the facts; and in any event he had no justification for bringing a crowd of followers into the police station. In these circumstances it is a reasonable inference that the 5th to 7th respondents came to the Police station in order to influence the Police; and the denial of equal treatment to the petitioner shows that they succeeded. Is it likely that the 5th to 7th respondents would have dared to attack a public officer, at the Polonnaruwa Police Station – with several other officers close at hand, with ready access to weapons of various kinds – unless they had reason to believe that the Police would be approvingly acquiescent? I therefore have no hesitation in concluding that the 2nd to 4th Respondents acted under the influence of the 5th to 7th respondents throughout the transaction – the assault, arrest and detention of the petitioner.

Does that mean that these two questions should be answered in the affirmative? This requires an analysis of the scope of the phrase "executive or administrative action" in Article 126. The acts of the 5th to 7th respondents considered in isolation cannot be considered to be "executive or administrative action"; the question is whether the nexus between those acts, and the acts and omissions of the 2nd to 4th respondents was sufficient to alter what would otherwise have been purely private action into "executive or administrative action". That phrase does not seek to draw a distinction between the acts of "high" officials (as being "executive"), and other officials (as being "administrative"). "Executive" is appropriate in a Constitution, and sufficient, to include the (official) acts of all public officers, high and low, and to exclude acts which are plainly legislative or judicial (and of course purely private acts not done under colour of office). The need for including "administrative" is because there are residual acts which do not fit neatly into this three-fold classification. Thus it may be uncertain whether delegated legislation is "legislative" and therefore outside the scope of Article 126; however, delegated legistation is appropriately termed administrative, although it has both legislative and executive features (cf *Ramupillai v. Perera* [1], and *Jayathevan v. AG* [2].) Thus "administrative" is intended to enlarge the category of acts within the scope of Article 126; it serves to emphasise that what is excluded from Article 126 are only acts which are legislative or judicial, either intrinsically or upon the application of

a historical test (as in *R v. Liyanage*) [3]; it may well be that the act of a court or a legislative body in denying a language right guaranteed by Article 20 or 24 is "administrative" for the purpose of Article 126 even though it is done in the course of a judicial or legislative proceeding. "Executive or administrative action" includes, but is wider than "the acts of a public [i.e. executive or administrative] officer"; it includes not only acts done under authority flowing from an employer-employee relationship with the State, but also acts done by virtue of authority conferred in any other manner – in writing or orally, expressly or impliedly: see the examples suggested in *Alwis v. Raymond* [4] and see also *Shaul Hameed v. Ranasinghe* [5] and *Wimalaguna v. Widanegama* [6].

Especially in the background of the Constitutional mandate to this Court to respect, secure and advance fundamental rights, I do not see in the Constitution an express provision or an implied intention that this Court should either permit the executive to do indirectly what it is forbidden to do directly, or penalise the humble tool used to violate a fundamental right without even a slap on the wrist for the hand which directed it. Does the jurisdiction under Article 126 to deal with an infringement by "executive or administrative action" enable this Court to reach all those responsible for such infringement, at least by means of just and equitable orders and directions under Article 126(4)? That jurisdiction cannot be expanded by twisting, stretching or perverting the Constitutional provisions through a populist process of activist usurpation of the legislative function thus creating a judicial despotism under which the courts assume sovereignty over the Constitution (see *Somawathie v. Weerasinghe* [7],) for the Rule of Law binds the Judiciary as well as the other organs of government. The ambit of that jurisdiction can only be determined by carefully and patiently analysing and understanding the fundamental principles underlying the Constitution, as well as the specific provisions taken in their context, and by applying tried and tested principles of interpretation. The invitation to probe the matter in this way, guided by principle and not passion or prejudice, was extended in *Alwis v. Raymond,* but was inexplicably declined; that it was accepted only four years later tends to suggest inadequacy in the appreciation of Constitutional provisions, rather than in the provisions themselves.

Article 126, speaks of an infringement by executive or administrative action; it does not impose a further requirement that such action must be by an executive officer. It follows that the act of a private individual would render him liable, if in the circumstances that act is "executive or administrative". The act of a private individual would be executive if such act is done with the authority of the executive: such authority, transforms an otherwise purely private act into executive or administrative action; such authority may be express, or implied from prior or concurrent acts manifesting approval, instigation, connivance, acquiescence, participation, and the like (including inaction in circumstances where there is a duty to act); and from subsequent acts which manifest ratification or adoption. While I use concepts and terminology of the law relating to agency, and vicarious liability in delict, in my view responsibility under Article 126 would extend to all situations in which the nexus between the individual and the executive makes it equitable to attribute such responsibility. The executive, and the executive officers from whom such authority flows would all be responsible for the infringement. Conversely, when an infringement by an executive officer, by executive or administrative action, is directly and effectively the consequence of the act of a private individual (whether by reason of instigation, connivance, participation or otherwise) such individual is also responsible for the executive or administrative action and the infringement caused thereby. In any event this Court would have power under Article 126(4) to make orders and directions against such an individual in order to afford relief to the victim.

It is for these reasons that I agree that the 3rd – 7th respondents are liable for the assault on the petitioner, and the 5th to 7th respondents for his arrest and detention.

I trust that the Inspector General of Police will give appropriate instructions to Officers-in-Charge of Police stations as to the care and courtesy which public officers and private persons having legitimate business in Police stations are entitled to receive, even without a specific direction from this Court.

S. B. Goonewardena, J.

I do not see it as a necessary legal consequence, that every time there is a violation of Article 13(1) of the Constitution by an arrest that is not in conformity with its requirements, the detention following upon such arrest becomes a violation of Article 13(2). The two provisions, to my mind, deal with two different situations and there is not, as of necessity, a link between them. They read thus:–

> 13(1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.
>
> 13(2) 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.

Article 13(1) states that no person shall be arrested except according to procedure established by law. It also states that any person arrested (which would in the context contemplate an arrest according to procedure established by law) shall be informed of the reason for his arrest. These two statements occurring one after the other in this manner in Article 13(1), may well lead one to think that since for the purposes of the Article the person arrested is required to do two things, namely, first to arrest according to procedure established by law and next to inform the person arrested of the reason for his arrest, that there could therefore be an arrest according to procedure established by law, even if the arrest be not followed by the person arrested being informed of the reason for such arrest. Indeed the sequence of events contemplated, namely, the arrest first according to procedure established by law and then the informing of the reason for the arrest, could, as the language of the Article itself suggests, well justify such a view. For myself, I do not think that these two provisions are used in this Article tautologically so as to cover the same ground. It is therefore, as I see it, an unnecessary exercise to characterize any action that does not

conform to the provisions of Article 13(1) as an "illegal arrest". Rather, the appropriate and indeed cautious thing to do, as it commends itself to me, would be to merely declare the Court's finding that there has been no compliance with a provision of Article 13(1) and a consequent violation thereof and in what respect there has been such non compliance.

In like fashion, I venture to think that it is unnecessary and indeed perhaps hazardous, to attempt to characterize a particular action as an "illegal detention", an expression which carries certain overtones which may tend to colour and confuse and carry one away from an objective appraisal of a situation, when what we are concerned with is only an exercise of a special jurisdiction relating to a violation of fundamental rights, and in the instant application it is the allegation of an infringement of Article 13(2) that brings about the need to say something here, after having read in draft the judgment of Perera, J.

Upon a simple reading of its language uncomplicated by reference to the concept of "illegal detention", what do the provisions of Article 13(2) mandate or require to be done? It demands that any 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. What is intended by the expression shall be brought before the judge according to procedure established by law? In my view it is primarily, if not wholly, that such person should be brought before such judge before the expiration of the period of time allowed by law, which according to the Code of Criminal Procedure Act No. 15 of 1979, would be a period of 24 hours from the time of arrest. The further words in this Article "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" supports such a view, the word "further" here assuming a significance strengthening that view. To my mind the object of Article 13(2) is mainly though perhaps not wholly, to secure a transfer of control of custody, detention etc., from non-judicial authority to judicial authority before the expiration of the period of time permitted by law. The corollary would then be that when the period of time allowed by law is exceeded before such person is brought before a

judge, there would be a violation of Article 13(2) whereas if such period has not been exceeded, there would be no such violation and whether or not there has been an infringement of Article 13(1) is irrelevant to the question, and I would so hold. Stated in somewhat different terms, a violation of Article 13(2) can commence only after the expiration of the period of time allowed by law, in circumstances where there being a failure to bring such person before a judge before the expiration of that period.

There is no material in the present application upon which to hold that the petitioner had been detained in police custody beyond the period allowed by law prior to his being produced before the Magistrate. I would therefore hold that there has been no violation of Article 13(2) of the Constitution.

While so holding in regard to Article 13(2), I would go along with the conclusions reached by Perera, J. as to the violation of the other Article referred to by him. As respects the relief granted to the petitioner, I would concur with Perera, J. and order as he has ordered, despite there being no violation of Article 13(2).

PERERA, J.

The petitioner who holds office as a Wildlife Ranger in the Department of Wild Life Conservation has in the present application invoked the jurisdiction vested in this court by Article 126 of the Constitution to hear and determine a question relating to the alleged infringement of his Fundamental Rights guaranteed by Articles 11, 12, 13(1) and 13(2) of the Constitution by the 2nd to 7th respondents by executive or administrative action. The 2nd to 4th respondents to the present application are police officers attached to the Polonnaruwa Police station. The 5th and 6th respondents are Members of Parliament for the Polonnaruwa District and the 7th respondent is a Provincial Councillor of the North Central Province Provincial Council. The 5th respondent also holds office as a State Minister.

I shall first narrate the facts as set out by the petitioner. On the 26th of April 1991 around 8.00 a.m. in pursuance of the performance of his official duties as a Wild Life Officer he proceeded in the official jeep with four game guards from Angamedilla in the Polonnaruwa District to the Minneriya Giritale Nature Reserve as he had received prior instructions from the Director of Wild Life Conservation that much devastation and environmental damage was being caused by organised logging and felling operations within the said reserve. [Vide copy of instructions P1 and P1A].

They reached the reserve around 9.30 a.m. and having parked the jeep in an open area the petitioner with the other officers proceeded into the jungle by a footpath. Shortly thereafter the petitioner had arrested a person engaged in felling trees within the reserve. He had also taken into custody certain implements and bullock carts loaded with timber. The petitioner thereafter arrested four other persons who were felling trees within the reserve. Here again the petitioner had taken charge of three bullock carts loaded with timber. The petitioner had escorted these suspects together with the productions up to the parked jeep and having entrusted the suspects to a game guard and the driver of the jeep had set off once again towards the Sudukanda area of the reserve. In this area he had arrested four persons who were felling trees and had taken into his custody a hand tractor loaded with timber. Having brought the three suspects to the place

where the jeep was parked the petitioner had instructed two of the Wild Life officials to lead the way to the office of the Assistant Director of Wild Life in the hand tractor followed by the bullock carts, and the petitioner followed in the jeep together with 5 of the suspects who had been arrested. While they were so proceeding at a place called Deke Ela he observed a jeep approaching the front of this procession. This jeep came to a halt and a person who alighted from this vehicle walked up to the petitioner's jeep and stated that the 6th respondent wished to speak to the petitioner. The petitioner had then walked up to the jeep in which the 6th respondent travelled. At this stage the 6th respondent had got off the jeep and asked the petitioner thus "where are you taking my innocent people? Release them. What is this crime you are committing? Release my men". The petitioner had then observed the 7th respondent and several other persons inside the 6th respondent's jeep. The petitioner had responded saying "I am doing my duty. Why don't you speak to the Assistant Director at his office". Then the 6th respondent had got into his jeep saying "Ehemada?" (is that so) in a threatening manner and had driven away.

The petitioner's procession had then proceeded a little further towards the Assistant Director's office and as they were approaching the water tank at Deke Ela the petitioner had observed the same jeep halted at a distance with several persons standing on the road. When the hand tractor which was at the head of the procession reached the place where the jeep was stopped these persons had surrounded the hand tractor and stopped it. The petitioner had then alighted from his jeep and walked up to the hand tractor. The petitioner states that at this time he had on his belt the official knife issued to him by the Department of Wild Life. He also carried a short iron rod which he usually carried in his hand for his protection.

When the petitioner approached the tractor the 6th respondent had grabbed the iron rod which he had, and hit the petitioner several times with it. As a result the petitioner had suffered incised injuries in the region of the left eyebrow and on the left shoulder. The petitioner states that in addition to the 6th respondent he was also attacked by the 7th respondent and some other persons who were in the crowd. Having attacked him thus, the 6th respondent had ordered the suspects who were in the petitioner's custody to take the hand tractor

and the carts and escape. The petitioner had then returned to his jeep to find that the suspects who were in his jeep had also escaped.

The petitioner had then proceeded in his jeep to the office of the Assistant Director of Wild Life. By this time the hand tractor which was loaded with timber was brought to this office by the game guard who was entrusted with it. As the Assistant Director of Wild Life was not available in the office at that time the petitioner had instructed the game guard to be in charge of the tractor with the load of timber and to inform the Assistant Director of this incident and had proceeded to the Polonnaruwa police station with the rest of his staff.

When he arrived at the Polonnaruwa Police Station with bleeding injuries the 6th and 7th respondents and several others were already there. The petitioner requested the Police officer on duty to record his complaint but that officer had replied that his complaint will be recorded after the 6th respondent's statement was recorded. A short while later around 6.30 p.m. the 3rd respondent had instructed the petitioner "to sit inside the 'charge room' and not to leave". The petitioner states that at this point of time the 3rd respondent arrested him and that he was not informed of the reason or the charge upon which he was arrested.

There after the 5th respondent arrived at the Police station and a short while later the 5th, 6th and 7th respondents together with the 6th respondent's brother had entered the charge room where the petitioner was seated. The 5th respondent who was armed with the petitioner's iron rod which had been taken by the 6th respondent earlier in the day, had assaulted the petitioner with the iron rod while the 6th and 7th respondents and the 6th respondent's brother assaulted the petitioner with hands and feet.

As a result of this assault the injuries on the petitioner's left eyebrow and shoulder began to bleed once again. The 3rd and 4th respondents were present in the charge room throughout this assault and the petitioner appealed to them to stop the assault. The 3rd and 4th respondents failed to intervene. Then the 5th, 6th and 7th respondents together with the brother of the 6th respondent entered the 2nd respondent's office room and within a few minutes the 5th

and 6th respondents returned to the charge room and directed the 4th respondent to remove the belt and knife issued to the petitioner, by the Department of Wild Life and the 4th respondent complied with this request. Thereafter the 5th and 6th respondents had once again moved into the 2nd respondent's office room and the 4th respondent produced the petitioner before the 2nd respondent who was then in his office. The 5th, 6th and 7th respondents and several others were also present in the 2nd respondent's office at this time. At this stage the 5th respondent had questioned the petitioner whether he was drunk to which the petitioner had replied that he did not consume liquor as he was a Muslim. The petitioner had then sought permission to meet the other officers who had come with him to the police station. He was allowed to do so and the petitioner having given certain instructions to the driver of the jeep had returned to the charge room and remained there. The 5th, 6th and 7th respondents and the others who accompanied them had then left the Police station. The petitioner had once again requested the 3rd respondent to record his complaint and had been told that his complaint would be recorded later.

Around 8.30 p.m. that night the petitioner had been taken to the medical officer of the Welikanda Government Hospital. The medical officer had examined the petitioner and the petitioner was brought back to the Polonnaruwa Police station.

Around 10.30 p.m. the petitioner once again requested the 2nd respondent to record his complaint. The 2nd respondent had informed him that he was leaving the station and that he would record the petitioner's complaint on his return. The petitioner had spent the rest of the night at the Polonnaruwa Police station.

On the next day (27.04.91) a police officer had recorded his statement on the complaint made by the 6th respondent. The petitioner states that although this statement is dated 26.04.91 it was actually recorded on 27.04.91.

Some time in the evening of 27.04.91 the petitioner was procduced by the Police before the Acting Magistrate of Polonnaruwa with a

request that he be remanded for a period of two weeks. The Magistrate however made an order for remand up to the 3rd of May 1991. He had spent the night of the 27th of April 1991 in the Prisons Department lockup at Polonnaruwa. The petitioner states that up to that time he had received no treatment for his injuries.

On the 29th of April 1991 on an application made by the Assistant Director of Wild Life the petitioner was released on bail with instructions to appear in the Polonnaruwa Magistrate's Court on 03.05.91.

The petitioner states that he made a detailed complaint on 30.04.91 relating to the incident of assault on him at Police Headquarters after he was released on bail. (P – 6)

The petitioner avers further that on the 17th of May 1991 he had filed plaints against the suspects he had taken into custody on 26.04.91 under the provisions of the Protection of the Fauna and Flora Ordinance and all the accused had pleaded guilty to the charges in the Magistrate Court of Polonnaruwa. (Vide P – 7 to P – 12)

The issues which arise for determination on the pleadings filed by the petitioner are whether the 2nd, 3rd and 4th respondents by Executive or Administrative action,

[a] arrested the petitioner on 26.04.91 in violation of Article 13(1) of the constitution;

[b] unlawfully detained the petitioner in custody from 26.04.91 to 27.04.91 in violation of Article 13(2);

[c] subjected the petitioner to cruel and degrading treatment on 26.04.91 in violation of Article 11 of the Constitution;

[d] deprived the petitioner of the equal protection of the law in violation of Article 12 of the Constitution and

[e] whether this court has the power to declare that the 5th, 6th and 7th respondents were also responsible for such infringement by reason of instigation, participation or otherwise and to grant relief to the petitioner as against the 5th, 6th and 7th respondents.

It would be relevant at this stage to set out the respective positions taken up by the respondents to the application. The 2nd respondent who was the Head Quarters Inspector attached to the Polonnaruwa Police Station has stated in his affidavit that on the day in question while he was at the Royal College, Polonnaruwa he received information that two Members of Parliament had come to the Police station. He had therefore returned to the Police station around 6.15 p.m. and found the 5th, 6th and 7th respondents seated in his office. He observed two knives and an iron rod on his table and as the 7th respondent had identified these weapons as those used by the Petitioner to attack the 6th respondent he had taken them in to his custoday as productions. He had also instructed SI Wijekoon to take the petitioner to a Medical officer as he had observed an injury on his left eyebrow. He had taken over the investigations at that stage. The petitioner by then had been, arrested by the 3rd respondent. When the petitioner was brought back to the Police station after the medical examination at 21.35 hours 9.35 p.m. he recorded the statement of the petitioner having explained the charge against him namely that he had attempted to cause hurt to the 6th respondent and ensured that investigations into the complaint made against the petitioner were done as expeditiously as possible. He has admitted that the petitioner was produced before the acting Magistrate on the next day and that the police moved for the remand of the petitioner as the investigations had not been concluded.

According to the 3rd respondent on the 26th of April 1991 that is the day in question, he was on reserve duty at the Polonnaruwa Police Station with the 4th respondent. Around 5.50 p.m. the 6th respondent had arrived at the police station and made a complaint of assault. While he was recording this complaint the petitioner had walked into the Police station and the 6th respondent had identified the petitioner as the person who attempted to stab him. The 2nd respondent was not present at the Police station at that time. He had arrested the petitioner on the complaint made by the 6th respondent having explained the charge to him. While he was so recording the 6th respondent's statement the 5th respondent together with a few other persons had arrived at the Police station and had proceeded up to the petitioner who was seated in the charge room. The 6th respondent had also joined them. According to the 3rd respondent there had been an exchange of words and a few blows had been dealt on the petitioner by these persons.

This had been an unexpected incident and he together with the 4th respondent had "sent the 5th, 6th and 7th respondents out of that place". He did not allow any one to inflict any harm on the petitioner thereafter. Having sent the crowd away he had completed the recording of the 6th respondent's complaint. The 3rd respondent states that the petitioner made no request to record his complaint up to the time he went off duty at 10.00 p.m. The affidavit filed by the 4th respondent is substantially on the same lines as that filed by the 3rd respondent.

According to the 6th respondent on the day in question some of his constituents had informed him that certain persons had been taken into custody for allegedly felling trees in the Sudkbanda area of the Minneriya – Giritale Nature Reserve. His information was that these persons had been collecting firewood in this reserve and he was requested to intervene with the authorities on their behalf. He had then met the Wild Life Ranger whom he now knows to be the petitioner at Deke Ela and told him that the persons in custody had only been collecting firewood in the reserve and requested him to release them if there was a possibility. The petitioner had declined to accede to this request and had informed him that they should seek their relief from the court. The 6th respondent had then returned home where he found a large number of constituents had gathered at his residence who complained to him about the petitioner's conduct in taking such persons into custody. He therefore sought the assistance of the 7th respondent who was requested to intercede with the petitioner at the office of the Assistant Director of Wild Life Conservation on behalf of the persons in custody. The 6th respondent himself proceeded to the Assistant Director's office around 5.00 p.m. When he arrived at this office he saw about 15 persons at the entrance to the office.

The petitioner also had reached the office of the Assistant Director together with the persons whom he had taken into custody, the vehicles and the productions. According to the 6th respondent the petitioner having seen him had approached him armed with a pointed iron rod in his hand saying "I have already told you that I

cannot do anything about this matter," to which the 6th respondent had replied "wait we can discuss this matter after Mr. Nelson the Minister of State arrives." The petitioner had then said "Even if Nelson or anyone comes I will not change my mind" and lunged at him with the iron rod. The 6th respondent had jumped back to avoid the blow and in the process had fallen. Some of the persons in the crowd had then grabbed the petitioner and wrestled from him the iron rod. Then the petitioner had taken a knife and attempted to stab the 6th respondent who lay fallen on the ground. Some of the persons had intervened and prevented the petitioner from causing injury to the 6th respondent. Thereafter there had been an altercation between the petitioner and some of the persons in the crowd which may have resulted in the petitioner sustaining injuries. The 6th respondent states further that the petitioner's speech and conduct revealed that he was severely under the influence of liquor. Thereafter he together with the 7th respondent had proceeded to the Polonnaruwa Police station to make a complaint relating to the conduct of the petitioner. While the 6th respondent was at the police station the petitioner had also arrived there. A short while later the 5th respondent had also called at the police station. The 6th and 7th respondents after their complaints were recorded by the police had left the police station in the company of the 5th respondent. It must be observed however that the 6th respondent in the complaint made to the police a few minutes after the incident had sought to attribute the injuries sustained by the petitioner to a fall as the petitioner had been in such an advanced state of intoxication at that time. The 6th respondent has specifically denied that the 5th respondent or any one else abused, threatened or assaulted the petitioner while he was at the police station.

The 5th respondent in his affidavit has averred that having received a telephone call from the 6th respondent around 5.00 p.m. regarding certain incidents which happened near the Minneriya – Giritale Nature Reserve, he had arrived at the office of the Assistant Director of Wild Life in Polonnaruwa. He had reached this office around 5.00 p.m. and on being informed that the 6th and 7th respondents had gone to the police station he had proceeded to the

police station himself. There he had met the 6th and 7th respondents who had informed him of the incidents that had occurred in the earlier part of the day. The petitioner was also at the police station. He had not seen the petitioner prior to that day. After the 6th and 7th respondents complaints were recorded by the police he had left the police station in the company of the 6th and 7th respondents. The 5th respondent has specifically denied that he abused, threatened or participated in the assault on the petitioner at the police station.

Mr. R.K.W. Goonasekara, Counsel for the petitioner conceded that the alleged assault on the petitioner by the 6th and 7th respondents in the vicinity of the water tank at Deke Ela was not attributable to executive or administrative action and that this assault could not form the basis of an allegation of the violation of the petitioner's Fundamental Rights. The actual complaint related to the incidents which occurred after the petitioner arrived at the Polonnaruwa police station to complain of an assault on him that day.

It was Counsel's submission that the complicity of the 2nd and 7th respondents was such that they have together and in concert with one another illegally arrested the petitioner, detained him, and inflicted cruel and degrading treatment on him at the police station. Counsel complained that the 2 to 4th respondents manifestly abused their office in order to facilitate the 5th to the 7th respondents who were admittedly not agents of the executive or administrative to inflict cruel and degrading treatment on the petitioner while he was in the custody of the 3rd and 4th respondents who were under a legal duty to ensure the petitioner's "safe custody". The 3rd and 4th respondents by deliberate inaction had permitted such treatment to be meted out to the petitioner.

Additional Solicitor-General, Mr. Yapa submitted that the petitioner was arrested on the day in question and detained lawfully on a complaint made by the 6th respondent. It was his contention therefore that the 2nd,3rd and 4th respondents have not acted in violation of any of the petitioner's fundamental rights guaranteed by the Constitution. As regards the assault on the petitioner while he was

in the custody of the police by the 5th, 6th and 7th respondents, Mr. Yapa urged that it was an unexpected and unforeseen incident and the 3rd and 4th respondents had immediately taken preventive action. Further the 2nd respondent has recorded the statements of all the witnesses in regard to this assault on the petitioner and forwarded the papers to the Attorney General for his advice. Therefore the 2nd respondent has merely complied with the law. In the circumstances it was his submission that the 2nd, 3rd, and 4th respondents have not acted in violation of the petitioner's fundamental rights guaranteed by Articles 11,12, 13(1) and 13(2) of the Constitution. For the reasons given in this judgment I regret that I am unable to accept this submission.

Mr. Seneviratne, President's Counsel on behalf of the 5th and 6th respondents strongly commended the version given by his clients in the affidavits filed in this case. Counsel submitted that after his release from custody there has been a deliberate endeavour on the part of the petitioner to implicate the 5th, 6th and 7th respondents. That in point of fact the petitioner does not claim that he sustained any further injuries as a result of the attack on him at the police station with an iron rod. Counsel dismissed this story of an attack on the petitioner while he was in the charge room as "a mere skirmish and nothing more". There was no evidence to connect the 5th, 6th and 7th respondents with the acts of commission or omission on the part of the police. Therefore the 5th, 6th and 7th respondents could not be held liable for police action or inaction. Counsel, contended further that there was no evidence that the conduct of the police towards the petitioner was due to anything said or done by the 5th, 6th, or the 7th respondents. I have carefully considered these submissions of Mr. Seneviratne but having regard to the totality of the evidence in this case, with this submission of Counsel I am unable to agree.

I am however in agreement with the submissions of Mr. Goonasekara which are amply borne out by the evidence in the present case. It is manifestly clear that the 2nd to the 4th respondents have unreasonably and for some extraneous reason

failed to take any meaningful steps to safeguard the rights of the petitioner and had therefore acted *mala fide*. This is in accord with the view expressed by Lord Greene M R in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [8] where his Lordship observed that " *mala fide* is interchangeable with unreasonableness and extraneous consideration." The conduct of the 2nd to the 4th respondents in the present case appears to have necessarily been motivated by some extraneous consideration although they may not be guilty of intentional dishonesty.

It is clear from the events that transpired at the Polonnaruwa police station on 26.04.91 that the 2nd to the 4th respondents have from the outset adopted an indifferent if not a hostile attitude towards the petitioner. There is no reason whatsoever to doubt the statement made by the petitioner that he had come to the Polonnaruwa police station with bleeding injuries on the day in question for the purpose of lodging a complaint of an alleged assault on him. The fact that up to the time the petitioner was produced by the Police before the Acting Magistrate in the evening of the next day, that is on 27.04.91 his complaint had not been recorded is also not in dispute. Admittedly the petitioner arrived at the police station on that day voluntarily and not on a request made by any police officer to do so. Having regard to the circumstances of this case I am therefore unable to accept the version given by the 2nd to the 4th respondents that the petitioner did not make a request to the police on that day to record his complaint.

Section 109 of the Criminal Procedure Code makes it mandatory for a police officer to record any information relating to the commission of an offence in the Information Book. Subsection 4 of this section requires a police officer who receives such information if he is not the Officer in charge of the police station to forthwith report such facts to the officer in charge of the station. Further in terms of Sections 109 (5) if from the information received the officer in charge of the police station has reason to believe the commission of a cognisable offence he is required forthwith to send a report to the Magistrate's Court having jurisdiction and to proceed in person or to delegate one of his subordinate officers to proceed to the spot to investigate the facts and circumstances of the case and to take such

measures as would be necessary for the discovery and arrest of the offenders.

The second respondent admits that he arrived at the police station by 6.15 p.m. that is within a few minutes of the arrival of the 6th respondent and the petitioner at the police station that day. If the 2nd respondent had on his arrival complied with the imperative provisions of the Criminal Procedure Code set out above it would have been very clear to him that the arrest and detention of the petitioner was absolutely unwarranted.

Besides having regard to the material that has been placed before this court and the nonchalant manner in which the 2nd and 4th respondents on their own admission have reacted to the assault on the petitioner while he was in the charge room, I prefer to accept the statement of the petitioner that no charges were explained to him before he was arrested by the police on this day. If the 3rd respondent who affected his arrest explained the charge upon which the petitioner was arrested, I have no doubt whatsoever that the petitioner would have taken that opportunity to give an explanation as to the correct state of facts which would have enabled the police to conduct further inquiries and save the petitioner from the indignity of being arrested on a false accusation.

The fact that the petitioner was merely discharging his duties as a public officer on the day in question is amply borne out by the fact that the suspects whom the petitioner had taken into custody for contravening certain provisions of the Fauna and Flora Protection Ordinance had been subsequently charged in the Magistrate's Court of Polonnaruwa and had pleaded guilty to the charges. The charges related to —

[a] entering a nature reserve without a permit;

[b] felling trees;

[c] escaping from custody.

The Magistrate in these cases has warned and discharged the accused having directed them to pay state costs.

Thus had the 2nd respondent complied with the provisions of Section 109 of the Criminal Procedure Code and recorded the complaint of the petitioner it would have been clear to him that there was no necessity to effect the arrest of the petitioner who was a responsible public officer. I must also observe that the conduct of the 2nd respondent in producing the petitioner before the Magistrate and moving for his remand can in no way be justified. It is also significant that up to date no plaint has been filed by the Polonnaruwa police in this connection against the petitioner, a period of over two and a half years after the alleged incident. I am satisfied having regard to the evidence in this case that the arrest of the petitioner by the 3rd respondent on 26.04.91 was unlawful. Although according to the affidavits filed by the 2nd, 3rd and 4th respondents the 2nd respondent was not at the police station at the time of the alleged arrest, it is common ground that the 2nd respondent returned to the station within a very short time. The fact that he had not forthwith taken steps to release the petitioner supports the view that he himself had deliberately acquiesced and condoned the illegal arrest and detention of the petitioner.

It would be relevant at this stage to reiterate the observations of Viscount Simon Lord Chancellor in *Christy v. Leachinsky* [9].

> "If the charge or suspicion upon which the man is arrested is then and there made known to him, he has the opportunity of giving an explanation of any misunderstanding or of calling attention to other persons for whom he may have been mistaken with the result that further inquiries may save him from the consequences of false accusations."

Further it would also be appropriate to refer to the observations of Scott, LJ in *Dumbell v. Roberts* [10] cited with approval by Gratiaen, J in *Muththusamy v. Kannangara* [11] as follows:

> "The principle of personal freedom, that every man should be presumed innocent until he is found guilty applies also to the police function of arrest ...for that reason it is of importance that no one should be arrested by the police except on grounds which the particular circumstances of the arrest really justified the entertainment of a reasonable suspicion."

It is imperative therefore for a police officer before he affects the arrest of any person without a warrant to be satisfied that the complaint or the suspicion, upon which he acts as the case may be must be reasonable or that the information is credible. Because in the words of Lord Simonds in *Leachinsky's* case (*Supra*) "It is the right of every citizen to be free from arrest unless there is in some other person, whether a constable or not, the right to arrest him."

I therefore hold that the arrest and the subsequent detention of the petitioner from 26.04.91 to 27.04.91 by the 2nd and 3rd respondents was unwarranted in law and is violation of Articles 13(1) and 13(2) of the Constitution by executive or administrative action.

The allegation of the petitioner that on that day he was subjected to an assault (cruel and degrading treatment) by the 5th, 6th and 7th respondents and certain other persons while he was in police custody inside the charge room has also in my view been established. The 3rd and 4th respondents in their affidavits have admitted the fact that the 5th, 6th and 7th respondents with certain others had assaulted the petitioner while he was seated in the charge room. Having regard to this admission which supports the petitioner's allegation on this matter the specific denial of this assault by the 5th and 6th respondents has necessarily to be rejected. I am also unable to accept the submission that the Polonnaruwa Police Station was in such a hopelessly helpless state that they did not have the necessary manpower and were not geared to prevent such an eventuality. The conduct of the 2nd, 3rd and 4th respondents in failing to apprehend the offenders who had committed such serious offences inside the police station under their very eyes and to bring them to book up to date is to any the least most reprehensible. Moreso because when

the 2nd respondent arrived at the police station shortly after the assault on the petitioner the 5th, 6th and 7th respondents on his own admission were seated in his office.

Having regard to all the pleadings filed in this case I hold that the 3rd and 4th respondents by their strange and inexplicable inaction permitted the 5th, 6th and 7th respondents to subject the petitioner who was at that stage in the custody of the police to cruel and degrading treatment and thereby infringed the fundamental right of the petitioner guaranteed by Article 11 of the Constitution by executive or administrative action.

I shall now deal with the complaint of the petitioner that his fundamental right guaranteed by Article 12(1) has been infringed. He complains that on the day in question he was deprived of the equal protection of the law by executive or administrative action. I am satisfied that there is substance in this complaint as well.

As I observed before the material placed before this court demonstrates that from the time the petitioner arrived at the police station to make a complaint of an assault on him by certain persons while he was performing his official duties the police officers have acted with some degree of indifference if not hostility towards him. His complaint had not been recorded at the Polonnaruwa Police Station. It is in evidence that the petitioner's complaint had only been recorded at Police Headquarters on the 30th of April 1991 [vide p-6] after he was released on bail by the Magistrate.

The second respondent states however that he recorded the Petitioner's statement having explained the charge to him on the complaint made by the 6th respondent. This statement was also recorded only at 21.35 hours [9.35 p.m.]. On the directions of the 2nd respondent the petitioner had been examined by the medical officer in charge of the Welikanda hospital to ascertain whether the petitioner had consumed liquor or was under the influence of liquor and in regard to the injuries he had sustained. According to the medical officer the petitioner was not even smelling of liquor. It is

relevant to note that in the complaint made by the 6th respondent at 5.35 p.m. that day [3R 1] the petitioner was described as, having been in a severe state of intoxication. Admittedly the petitioner arrived at the police station a few minutes after the 6th respondent but there is no material to show that he was in such a state of drunkeness at that stage. Acting on this complaint of the 6th respondent the petitioner was arrested, detained and produced before the Magistrate on the next day with a request by the police that he be remanded for a period of two weeks.

However the action taken by the 2nd and 3rd respondents in regard to the offences committed by the 5th, 6th and 7th respondents inside the police station is quite in contrast. As I have stated earlier the, 2nd respondent admits that when he returned to the police station at 6.15 p.m. the 5th, 6th and 7th respondents were seated in his office room. This was only a few minutes after the alleged assault on the petitioner who was seated in the charge room in the custody of the police. Admittedly neither the 2nd respondent nor the 3rd and 4th respondents who were eye witnesses to this assault had made any endeavour to apprehend the suspects or to take any further steps under the law. According to the 3rd and 4th respondents the only action taken by them in this connection was "to intervene and take the 5th, 6th and 7th respondents out of that place". In this instance it is clear that the 2nd and 3rd respondents deliberately refrained from apprehending the suspects as they were entitled to do in law. It was conceded by the Additional Solicitor-General that up to date no plaint had been filed by the police against the 5th, 6th and 7th respondents. While the respondent police officers had taken action with such astounding promptitude against the petitioner on the complaint of the 6th respondent of an attempt to cause hurt to him and had ensured that the petitioner was remanded, no meaningful action whatsoever has been taken against the 5th, 6th and 7th respondent who had committed such serious offences inside the police station itself up to date. I hold therefore that the petitioner has established beyond doubt that his fundamental right guaranteed by Article 12(1) of the Constitution has been infringed by the 2nd and 3rd respondents be executive or administrative action.

It is true that a denial of equal protection has hitherto been largely confined to affirmative acts of discrimination. The view that culpable official state inaction may also constitute a denial of equal protection has now been recognized by the United States Supreme Court as well. In *Burton v. Wilmington Parking Authority et al* [12] Justice Clark delivering the opinion of the Court, observed thus "by its inaction the Authority and through it the state, has not only made itself a party to the refusal of service but has elected to place its power property and prestige behind the admitted discrimination." In *Lynch v. USA* [13] the Federal Court of Appeal stated the opinion thus, "there was a time when the denial of equal protection of the law was confined to affirmative acts, but the law now is that culpable official inaction may also constitute a denial of equal protection."

Mr. Goonasekera also invited the court to hold that the 5th to the 7th respondents although they were not agents of the executive or administrative had also infringed the fundamental rights of the petitioner as the 2nd to 7th respondents had acted together and in concert with one another in illegally arresting the petitioner, detaining him and inflicting cruel and degrading treatment on him. Having regard to the evidence in this case I am of the view that there is merit in this submission of counsel.

Although there is no direct evidence of the complicity between the 2nd, 3rd and 4th respondents and the 5th, 6th and 7th respondents in the action which resulted in the violation of the petitioner's fundamental rights, it is clear from the established facts and circumstances that the reprehensible and inexplicable conduct of the 2nd, 3rd and 4th respondents on this date was heavily influenced by the overbearing presence and participation of the 5th, 6th and 7th respondents who were powerful political personalities involved in this entire transaction.

In *Shahul Hameed's case* [5] it was held that this court has the power to make an appropriate order even against a respondent who has no executive status where such respondent is proved to be guilty of impropriety or connivance with the executive in the wrongful acts violative of fundamental rights.

It is clear that Article 126(4) gives this Court very wide powers in this regard. I am of the view that responsibility under Article 126 would extend to any respondent who has no executive status but is proved to be guilty of impropriety, connivance or any such similar conduct with the executive in the wrongful acts violative of fundamental rights.

In the present case, I am satisfied that the 5th, 6th and 7th respondents were guilty of impropriety or connivance with the executive in the wrongful acts or omissions violative of the petitioner's Fundamental Rights under Articles 11, 12(1) and 13(2) of the Constitution.

In the circumstances, I hold that –

1. petitioner's fundamental right under Article 11 has been violated by the 5th – 7th respondents. Although not *per se* executive or administrative action, that violation was made possible by executive or administrative action by the 3rd and 4th respondents. Therefore, the violation was by "executive or administrative action within the meaning of Article 126 and the 3rd – 7th respondents are responsible.

2. petitioner's fundamental rights under Article 13(1) and (2) have been violated by the 3rd respondent; by "executive or administrative' action. The 3rd respondent also violated the petitioner's fundamental rights under Article 12(1), by denying him equal treatment, *vis-a-vis* the 5th to 7th respondents and their associates who were neither arrested nor detained.

The 2nd respondent failed to release the petitioner, and thereby deliberately acquiesced in and condoned the arrest and detention of the petitioner in violation of Articles 12(1), 13(1) and 13(2); he is also responsible for the violation.

The violation was induced or instigated by the 5th to 7th respondents, who are therefore also responsible for the violation.

In considering the relief to be granted in this case one has necessarily to be mindful of the fact that the petitioner's predicament on this day was entirely attributable to his endeavour to perform his official functions without fear or favour. This Court would be failing in its duty if public servants are not given every possible encouragement to perform their functions in an impartial manner without any inhibitions. We also take into account the fact that the violations did not occur under conditions of war, insurrection or emergency.

I would accordingly grant the petitioner the following reliefs:

1. In respect of the violation of the petitioner's rights under Articles 11, 12(1), 13(1) and 13(2):

   (a) the State is ordered to pay compensation in a sum of Rs. 10,000/- and costs in a sum of Rs. 5,000/- ;

   (b) the 5th – 7th respondents are each ordered to pay compensation in a sum of Rs. 10,000/- .

2. In respect of the violation of the petitioner's right under Article 11, the 3rd and 4th respondents are each ordered to pay compensation in a sum of Rs. 2,000/- ;

3. In respect of the violation of the petitioner's right under Articles 12(1), 13(1), and 13(2), the 2nd respondent is ordered to pay compensation in a sum of Rs. 4,000/- ; and the 3rd respondent is ordered to pay compensation in a sum of Rs. 2,000/- .

The petitioner will thus receive a sum of Rs. 50,000/- as compensation and Rs. 5,000/- as costs.

Relief granted.

Compensation Ordered.

FERNANDO, J.

I entirely agree with the findings and order of my brother Perera J, whose judgment I have had the advantage of reading. In view of the importance of the questions of law involved I wish to set down my reasons in some detail.

I trust that the IGP will give appropriate instructions to officers in charge of police stations as to the care and courtesy which public officers and private persons having legitimate business in police stations are entitled to receive, even without a specific direction from this court.

GOONAWARDANA, J.

There is no material in the present application upon which to hold that the petitioner had been detained in police custody beyond the period allowed by law prior to his being produced before the Magistrate. I would therefore hold that there has been no violation of Article 13(2) of the Constitution.

While so holding in regard to Article 13(2) I would go along with the conclusions reached by Perera, J as to the violation of the other Articles referred to by him. As respects the relief granted to the petitioner, I would concur with Perera, J and order as he has ordered, despite there being no violation of Article 13(2).