PETER LEO FERNANDO

v.

THE ATTORNEY-GENERAL AND TWO OTHERS

SUPREME COURT.
COLIN-THOMÉ, J., RANASINGHE, J., ATUKORALE, J., TAMBIAH, J. AND L. H. DE ALWIS, J
S. C. APPLICATION No. 31/85.
JULY 11, 1985.

Constitution – Fundamental Rights – Violation by Judge – Does it amount to infringement by executive or administration action? – Immunity for judicial acts – Articles 4, 11, 13, 14, 17 and 126 of the Constitution – Code of Criminal Procedure Act No. 15 of 1979, s. 136, 139 and 142 – Section 70 of the Penal Code – Crown (Liability in Delict) Act No. 22 of 1969, s. 2 (5).

The petitioner (Peter Leo Fernando) was seated in the well of the Magistrate's Court of Attanagalla when a case between two other parties but involving the estate of which he was the Superintendent was going on. On an allegation by the lawyer appearing for one

of the parties that the petitioner had intimidated his client's wife, the Magistrate of Attanagalla (2nd respondent) who was hearing the case ordered the detention of the petitioner in the Court cell. The petitioner was then kept in the cell in the custody of the Prisons Officer (3rd respondent). About 4 hours later having verified the complaint of intimidation and finding no allegation there against the petitioner, the 2nd respondent directed the petitioner to be released. The petitioner complaining of violation of his fundamental rights guaranteed under the Constitution and under Articles 17 and 126 of the Constitution filed this application seeking relief and damages in a sum of Rs. 50,000.

Held –

(1) The Magistrate's order of detention was wrong for non-compliance with the provisions of the Code of Criminal Procedure Code Act, s. 136, 139 and 142 (2) but there was no evidence of lack of good faith on the part of the Magistrate.

(2) Every judge, whether of superior or inferior courts, enjoys immunity from liability whether in delict or criminal law for acts done in the exercise of his judicial functions.

(3) The 2nd respondent had improperly and unlawfully detained the petitioner. A judicial order does not become converted into an administrative or executive act merely because it is unlawful. The detention of the petitioner does not constitute executive or administrative action within the meaning of Articles 17 and 126 of the Constitution.

(4) The State is not liable for anything done by a judge in the discharge or purported discharge of his functions as a Judge or for anything done by any person in connection with the execution of judicial process.

(5) An officer of the State who in the course of carrying out an order made by a judge in the exercise of his judicial functions violates the fundamental right of a person is free from liability if in doing so he acted in good faith not knowing that the order is invalid.

Cases referred to :

(1) *R. v. Secretary of State for India in Council and Others, Ex parte Ezekiel [1941] 2 All E.R. 546.*

(2) *Kesri v. Muhammad Baksh [1896] 18 All. 221.*

(3) *Sirros v. Moore and Others [1974] 3 All E.R. 776 ; [1975] 1 QB 118.*

(4) *Maharaj v. A. G. of Trinidad and Tobago (No. 2) [1979] A. C. 385 (PC), [1978] 2 All E.R. 670.*

(5) *Maharaj v. A. G. of Trinidad and Tobago (No. 1) [1977] 1 All E. R. 41, (P.C.).*

(6) *In re Mc C. (A Minor) [1984] 3 WLR 1227.*

(7) *A. K. Velmurugu v. A. G. and Others : Fundamental Rights Decisions Vol. 1 p. 180, 224.*

(8) *Perera v. University Grants Commission : Fundamental Rights Decisions Vol. 1 p. 103, 112, 113.*

(9) *Wijetunga v. Insurance Corporation and Another [1982] 1 Sri LR 1, 6. 7 ; Fundamental Rights Decisions Vol. 2 p. 264.*

(10) *Wijeratne v. People's Bank [1984] 1 Sri L.R. 1.*

(11) *Naresh S. Murajikar v. State of Maharashtra, AIR [1967] S.C. 1.*

(12) *Chokalinge v. A. G. of Trinidad and Tobago [1981] 1 All E. R. 244.*

(13) *Anderson v. Gorrie [1895] 1 Q.B. 668.*

(14) *Fray v. Blackburn [1863] 3 B. & S. 576, 578.*

(15) *Garnett v. Ferrand [1827] 6 B & C. 611.*

(16) *Miller v. Seare [1777] 2 Wm. B1. 1141, 1145.*

(17) *Mathews et al v. Young [1922] AD 492, 509, 510.*

(18) *Penrice v. Dickinson [1945] AD. 6, 14, 15.*

(19) *Dayananda v. Weeratunga S.I. Police et al. S.C. Application 97/82 – S.C. Minutes of 20.1.1983 ; Fundamental Rights Decisions, Vol. 2 p. 291.*

(20) *Kumarasinghe v. A. G. et al S. C. Application 54/82 – S. C. Minutes of 6.9.1982.*

APPLICATION for infringement of Fundamental Rights under Article 126 of the Constitution.

F. W. Obeysekera with *C. P. Ilangakoon, S. Parameshwaran* and *P. E. Satyaseelan,* for petitioner.

R. K. W. Gunasekera, with *Ranjan Mendis,* and *Chandrasiri Kotigala* for 2nd respondent.

Sarath Silva, D. S. G. with *Ananda Kasthuriaratchi, S.C.* for 3rd respondent.

Cur.adv.vult.

September 9, 1985.

COLIN-THOMÉ, J.

This is an application for relief under Article 126 of the Constitution by the petitioner.

A certain Talgaha Kumbure Banda had privately instituted section 66 proceedings relating to Bebilapitiyawatte against Dr. F. Ranil Senanayake in Magistrate's Court, Attanagalla Case No. 27902. The petitioner is the Superintendent of Bebilapitiyawatte.

The Inquiry into the case was fixed for the 26th February, 1985. On this day the petitioner, who was not a party or witness in the case, was seated in the well of the court with members of the public when Mr. Wijaya Gunaratne, Attorney-at-law, who appeared for the plaintiff

Banda stated to the Magistrate, the 2nd respondent, that the petitioner had on 20.2.1985 gone at night passing the house of the said Banda and threatened to shoot his wife Cicilihamy. Mr. Ashley Herat, who appeared for the defendant, Dr. F. Ranil Senanayake told the Magistrate that there was no complaint of such a threat and challenged the plaintiff and his lawyer to produce the complaint of Cicilihamy to the Police.

The 2nd respondent directed the Mirigama Police to fetch the aforesaid complaint and without intimating to the petitioner the charge against him and without inviting the petitioner to answer any charge the petitioner "was just marched and flung into the cell" by the Fiscal, W. P. Karunadasa, the 3rd respondent, on the orders of the 2nd respondent. The petitioner was locked up in the cell "in disgrace among criminals from 10.45 a.m. to 2.45 p.m.".

The complaint (P1) which was produced by the Police had not a word of the petitioner threatening to shoot Cicilihamy. It stated that one Wije had said if the barking dog is not tied it will be shot. At this stage the 2nd respondent released the petitioner at 2.45 p.m.

Mr. Ashley Herat demanded an apology but it was not given by Banda's lawyer or the 2nd respondent.

The petitioner claims that his fundamental rights under Articles 11, 13 (1), 13 (2) and 14 (1) (*b*) have been infringed and prays for relief and damages in the sum of Rs. 50,000.

The complaint (P1) of Cicilihamy aged 77 years, wife of P. K. Banda, to the Mirigama Police made on 21.2.85 stated :

> "Yesterday when I was at home with my husband and children at about 8.30 p.m. Leo, Gunadasa and Wije came passing near our house. Leo had a gun. At that stage our dog barked at them. Then Wije said if the dog is not kept tied it will be shot. Thereafter Wije abused in filthy language. Gunadasa pelted stones at our house. In this manner these persons harassed us several times."

The 2nd respondent stated in his affidavit that on the 26th February 1985 when the case No. 27902 was called in his Court, Mr. Wijaya Gunaratne, Attorney-at-Law, who appeared for the plaintiff complained to court that at about 8.30 p.m. on the 21st February

1985 a person called Leo who was armed with a shotgun along with one Gunadasa and one Wije committed criminal trespass on the compound of Cicilihamy and threatened to open fire. Wije abused Cicilihamy in obscene language and Gunadasa pelted stones at her house. Cicilihamy is the wife of Talgaha Kumbure Banda the informant in case No 27902 which was before Court at the time.

The gravamen of the complaint of Mr. Wijaya Gunaratne was that there was an attempt to undermine the authority of the Magistrate's Court by intimidating those who had at the time invoked the jurisdiction of the Magistrate's Court in order to seek redress for various high-handed acts that had led to an imminent breach of the peace in the area.

Thereafter Mr. Wijaya Gunaratne stated to Court that one of the persons who had committed the offences of trespass, intimidation, mischief and assault, within the meaning of the Penal Code, namely, one Peter Leo was present in Court and pointed at the petitioner who was a member of the public sitting in the Court.

Mr Ashley Herat, Attorney-at-Law, who appeared for the defendant Dr F. Ranil Senanayake stated to Court that there was no such complaint of a threat and no consequent inquiry from the petitioner about such a threat and challenged the plaintiff in M. C. Attanagalla 27902 and his lawyer to produce the complaint by Cicilihamy to the Police that the petitioner, H. Peter Leo Fernando had threatened to shoot her.

The 2nd respondent then directed the Mirigama Police to fetch the complaint immediately.

On the basis of the complaint made by Mr. Wijaya Gunaratne in terms of section 136 (1) (*a*) of the Code of Criminal Procedure Act No 15 of 1979 that an offence had been committed within the territorial jurisdiction of the Magistrate's Court the 2nd respondent directed the 3rd respondent to detain the petitioner immediately. The time was approximately 10.45 a.m.

At about 2.45 p.m. the Mirigama Police produced the complaint P1 Having perused the complaint and on the basis of the submissions made by Mr. Ashley Herat and on the undertaking given by the

petitioner that he would not conduct himself in a manner that would constitute a breach of the peace the 2nd respondent avers that he decided to release the petitoner from detention because it appeared to him that the Police had not concluded their investigation into the complaint.

The 2nd respondent stated that his decision to detain the petitioner was in the exercise of judicial authority and therefore it was a judicial act done in good faith. There was no malice on his part whatsoever when he detained the petitioner. He did not know the petitioner prior to the 26th February, 1985.

The 3rd respondent stated in his affidavit that at all times material to this application he worked as a Jail Guard attached to the Mahara Prison and never held the post or functioned as Fiscal, Gampaha, Western Province, as alleged by the petitioner.

On the 26th February 1985 five Jail Guards including himself were assigned the duty of escorting about 20 persons who were in custody and had to be produced before the Magistrate's Court of Attanagalla on orders received from Court. The 20 persons were kept in a cell within the Court House. This cell was an enclosure with an opening for persons to go in and come out. It had no door and was not lockable. At about 10.45 a.m. the petitioner came into the cell on a direction from the 2nd respondent and he remained there till 2.45 p.m. At that time the other jail guards and he were near the cell engaged in escort duty. He denied having done anything in violation of the rights of the petitioner.

The petitioner in his counter affidavit stated that on the 26th February, 1985, no complaint as a complaint under section 136 of the Code of Criminal Procedure Act was ever made by Mr. Wijaya Gunaratne nor was he examined upon such complaint. A copy of the journal entry of the 26th February, 1985 in M. C. Attanagalla 27902 was produced marked P2 which contains not a word of such an examination of Mr. Wijaya Gunaratne

Mr Gunaratne referred only to the petitioner threatening to shoot Cicilihamy. There was nothing about trespass and mischief.

The petitioner stated that there was not a particle of truth in the statement that the Court released him because he gave an undertaking to Court to behave well in the future.

It is necessary at this stage to examine the submission of the 2nd respondent that on the basis of the complaint made by Mr. Wijaya Gunaratne in terms of section 136 (1) (*a*) of the Code of Criminal Procedure Act, No. 15 of 1979, that an offence had been committed within the territorial jurisdiction of the Magistrate's Court in Attanagalla the 2nd respondent directed the 3rd respondent to detain the petitioner immediately.

Chapter XIV (sections 136 to 144) of the Code of Criminal Procedure Act deals with the procedure governing the "Commencement of Proceedings before Magistrates' Courts". Section 136 (1) (*a*) reads as follows :

"136. (1) Proceedings in a Magistrate's Court shall be instituted in one of the following ways :

(*a*) On a complaint being made orally or in writing to a Magistrate of such court that an offence has been committed which such court has jurisdiction either *to inquire into or try.*

Provided that such a complaint if in writing shall be drawn and countersigned by a pleader and signed by the complainant."

Section 139 deals with the Issue of Process. The relevant portions of section 139 : read–

139.(1) "Where proceedings have been instituted under paragraph (*a*). . . . of section 136 (1) and the Magistrate is of opinion that there is sufficient ground for proceeding against some person who is not in custody :–

(*a*) if the case appears to be one in which according to the fourth column of the First Schedule a summons should issue in the first instance, he shall, subject to the provisions of section 63, issue a *summons* for the attendance of such persons ;

(*b*) if the case appears to be one in which according to that column a *warrant* should issue in the first instance, he shall issue a warrant for causing such person to be brought or to appear before the court at a certain time :

Provided that–

(i) the Magistrate may in any case, if he thinks fit, issue a summons in the first instance instead of a warrant ,

(ii) in any case under paragraph (*a*) . . of section 136 (1), the Magistrate shall, before issuing a warrant, and may, before issuing a summons, examine on oath the complainant or some material witness or witnesses."

Under section 141 . "Every examination held by the Magistrate under section 139 shall be recorded in the manner provided in section 138 (2)."

Section 138 (2) reads :

"Every examination held by the Magistrate. . shall be reduced into writing and after being read over and if need be interpreted to the person examined shall be signed by him and also by the Magistrate and dated."

Under section 142 (2) :

"Where the offence appears to be one triable summarily in a Magistrate's Court the Magistrate shall follow the procedure laid down in Chapter XVII."

Section 182 requires the particulars of the case to be stated to the accused :–

182 (1) "Where the accused is brought or appears before the court the Magistrate shall if there is sufficient ground for proceeding against the accused, frame a charge against the accused.

(2) The Magistrate shall read such charge to the accused and ask him if he has any cause to show why he should not be convicted."

If the accused pleads not guilty to the charge the Magistrate shall proceed to trial according to the procedure laid down in sections 183 and 184

A preliminary question to be decided is whether Mr Wijaya Gunaratne was a complainant in this case in the strict legal sense In, *R v. Secretary of State for India in Council and Others, Ex. parte Exekiel*

(1) at the hearing at Bow Street a junior counsel on one side was called as a witness to prove certain aspects of Indian law and continued thereafter to act as counsel in the case. No objection was taken to this by counsel on the other side. It was held that this was irregular and contrary to practice. A barrister may be briefed as counsel in a case or he may be a witness in a case. He should not act as both counsel and witness in the same case."

In the instant case Mr. Gunaratne was a pleader and not a witness and his remarks to Court were based entirely on hearsay. As the Magistrate took cognizance of an offence on a complaint by Mr. Gunaratne, the only manner in which he could have disposed of it was to have examined the complainant Cicilihamy, and after holding such inquiry as he considered necessary under section 136 (1)(*a*) made either an order of dismissal or issued process against the accused under section 139.

The gravamen of the complaint was one of criminal intimidation, an offence punishable under section 486 of the Penal Code. According to the fourth column of the First Schedule of the Code of Criminal Procedure Act where the offence is criminal intimidation a warrant shall be issued by the Magistrate for causing the accused to be brought or to appear before the court at a certain time. Before issuing a warrant the Magistrate has to examine on oath the complainant or some material witness or witnesses. Every examination held by the Magistrate under section 139 shall be recorded in the manner provided in section 138 (2).

The requirement as to the examination of the complainant is imperative and should be strictly complied with in order to prevent a false, frivolous and vexatious complaint being made to harass an innocent party and to waste the time of the Court. The substance of the examination, reduced to writing, should be distinct from the complaint itself. The examination is not to be a mere form, but must be a full and intelligent inquiry into the subject-matter of the complaint, carried far enough to enable the Magistrate to exercise his judgment and see if there is a *prima facie* case or sufficient ground for proceeding. The examination should be on facts which are within the complainant's knowledge : *Kesri v. Muhammad Baksh* (2) ; Chitaley and Rao, *The Code of Criminal Procedure*, Vol. 1, 1121 ; Sohoni's *The Code of Criminal Procedure*, 16th Ed., Vol. 11, 1235.

I hold that in the instant case the Magistrate had misinterpreted the procedure laid down in section 136 (1) (*a*), 139 and 142 (2) resulting in the petitioner being improperly detained for four hours in a cell. There is however no evidence of the absence of good faith on the part of the Magistrate.

The main question for determination in this case is whether the action of the 2nd respondent ordering the detention of the petitioner constitutes "executive or administrative action" within the meaning of Articles 17 and 126 of the Constitution :

17. "Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter."

126(1) "The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV."

The phrase "executive or administrative action" in Articles 17 and 126 has to be interpreted in the context of the provisions of the Constitution.

Articles 3 and 4 which are the basic Articles of the Constitution read :

"3. In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.

4. The Sovereignty of the People shall be exercised and enjoyed in the following manner :–

(*a*) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum ;

(*b*) The executive power of the people, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People.

(*c*) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law ;

(*d*) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided ;"

The legislative power provided for in Article 4(*a*) is elaborated in Chapters X, XI, XII and XIII of the Constitution.

The executive power provided for in Article 4(*b*) is elaborated in Chapters VII, VIII and IX of the Constitution.

The judicial power which is provided for in Article 4(*c*) is elaborated in Chapters XV and XVI of the Constitution.

Although there is a duty cast by other constitutional provisions, for example, Articles 4(*d*), 27(2) (*a*), 28 and 156, on organs of the State in general and on others, to respect, secure and advance fundamental rights this is not to be confused with the special procedure established for obtaining relief and redress from the Supreme Court under Article 126. The special procedure can be availed of only in respect of "executive and administrative action."

Learned Counsel for the petitioner submitted that when a judge orders the detention of a person without authority the order is not a judicial act it is an administrative act.

In *Sirros v. Moore and Others* (3) a judge of a Crown Court had dismissed an appeal against a recommendation for deportation and after giving judgment ordered the appellant to be arrested and detained which the judge had no jurisdiction to do. The appellant was detained in the court cells for about 24 hours. The appellant was released by habeas corpus but failed in an action for assault and false

imprisonment against the judge and against the police officers who executed the order. It was held that though the judge was mistaken yet he acted judicially and for that reason no action will lie against him. Likewise, no action will lie against the police officers. They are protected in respect of anything they did at his direction, not knowing it was wrong

Judges in courts of law enjoy special immunity from actions in tort. Under the old common law the immunity in regard to the Superior Court, was absolute and universal ; with respect to the inferior courts it is only while they act within their jurisdiction.

The dichotomy between superior and inferior courts has been abolished by the Court of Appeal in *Sirros v. Moore (supra)* which has declared that in the changed judicial system of today there must be the same rule for all judges, including magistrates. Lord Denning, M. R said (785)

"In this new age I would take my stand on this. As a matter of principle the judges of superior courts have no greater claim to immunity than the judges of the lower courts. Every judge of the courts of this land – from the highest to the lowest – should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure 'that they may be free in thought and independent in judgment' it applies to every judge, whatever his rank. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself : 'If I do this, shall I be liable in damages ? So long as he 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 so 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."

The immunity of a judge in delict under Roman-Dutch Law is similar : "No action lies against a judge for acts done or words spoken in honest exercise of his judicial office. If he acts in bad faith or with injurious intention, he will, perhaps, be liable"–R. W. Lee, *An Introduction to Roman-Dutch Law,* 4th Ed. 341.

Voet has pertinently stated the rule as follows :-

"But in our customs and those of many other nations it is rather rare for the judge to make the suit his own by ill-judging. That is because it is a trite rule that he is not made liable by mere lack of knowledge or unwisdom, but by fraud only, which is commonly difficult of proof. It would be a bad business with judges especially lower judges who have no skill in law if in so widespread a science of law and practice, such a variety of views, and such a crowd of cases which will not brook but sweep aside delay, they should be held personally liable to the risk of individual suits, when their unfair judgement springs not from fraud, but from mistake, lack of knowledge or unwisdom"-*Voet. Commentary on the Pandects,* translated by Percival Gane (1955), Vol. II, 73.

In Roman-Dutch Law the same principles govern the immunity of judges of the superior and inferior courts from action in delict

With regard to criminal liability section 70 of the Penal Code states :

70. "Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is or which in good faith he believes to be given to him by law".

In *Maharaj v. A. G. of Trinidad and Tobago No. 2* a barrister was committed to prison for seven days for contempt on the order of the High Court Judge. In an earlier appeal reported at *Maharaj v. A. G. of Trinidad and Tobago No. 1* (5) the Privy Council held that the judge, however inadvertently, had failed to observe a fundamental rule of natural justice; that a person accused of an offence should be told what he is said to have done plainly enough to give him an opportunity to put forward any explanation or excuse that he may wish to advance. The question in the second appeal was whether this procedure adopted by the Judge before committing the appellant to prison for contempt constituted a deprivation of liberty otherwise than by due process of law, within the meaning of section 1(*a*) of the Constitution of Trinidad and Tobago of 1962, for which the appellant was entitled to redress by way of monetary compensation under section 6. The majority of the Judicial Committee of the Privy Council held that section 6 of the constitution created a new remedy for the contravention of constitutional rights without reference to existing remedies ; that the word "redress" in section 6 meant compensation,

including monetary compensation ; and that the claim was not a claim in private law for damages for the tort of false imprisonment, but was a claim in public law for compensation from the State for deprivation of liberty alone. The appeal was allowed and the case was remitted to the High Court to assess the amount of monetary compensation to which the appellant was entitled.

Lord Hailsham in a strong dissenting judgment stated at p. 409 in the *Maharaj Case No. 2 (supra)* :

"I must add that I find it difficult to accommodate within the concepts of the law a type of liability for damages for the wrong of another to whom the wrongdoer himself is under no liability at all and the wrong itself is not a tort or delict. It was strenuously argued for the appellant that the liability of the state in the instant case was not vicarious, but some sort of primary liability. But I find this difficult to understand. It was argued that the state consisted of three branches, judicial, executive, and legislative and that as one of those branches, the judicial, had in the instant case contravened the appellant's constitutional rights, the state became by virtue of section 6 responsible in damages for the action of its judicial branch. This seems a strange and unnatural way of saying that the judge had committed to prison the appellant who was innocent and had done so without due process of law and that someone other than the judge must pay for it (in this case the taxpayer)."

It should be noted, however, that the Constitution of Trinidad and Tobago of 1962 has no provision corresponding to Article 126 of the Constitution of Sri Lanka restricting the jurisdiction of the Supreme Court to hear and determine any question relating to the infringement or imminent infringement "by executive or administrative action" of any fundamental right declared and recognized by Chapter III.

Similarly, in *In re Mc C (a minor)* (6) a case from Northern Ireland, the defendant, aged 14 years, pleaded guilty before a juvenile court to charges relating to a motor vehicle and was ordered to attend the attendance centre. As he failed to attend the attendance centre on four occasions the justices ordered that he be sent to a training school and he was detained pursuant to that order. The defendant commenced a civil action against the justices constituting the juvenile court claiming damages for, inter alia, false imprisonment, trespass to the person and breach of a statutory duty.

The Court of Appeal in Northern Ireland held that the justices had acted "without jurisdiction or in excess of jurisdiction" within the meaning of section 15 of the Magistrate's Courts (Northern Ireland) Act 1964 and allowed the defendant's appeal.

Section 15 of the Northern Ireland Act of 1964 provides as follows :-

"No action shall succeed against any person by reason of any matter arising in the execution or purported execution of his office of resident magistrate or justice of the peace, unless the court before which the action is brought is satisfied that he acted without jurisdiction or in excess of jurisdiction."

The House of Lords, dismissing the appeal of the justices held that Article 15 (1) of the Treatment of Offenders (Northern Ireland) Order 1976 was intended to ensure that a custodial sentence was not imposed for the first time on a defendant who was not legally represented unless such lack of representation was through his own choice ; that although the justices had jurisdiction to try and convict the defendant of the offence charged and to order his detention, the omission to inform him of his right to legal aid amounted to a failure to fulfil a statutory condition precedent to the making of the training school order ; and that, accordingly, the justices acted "without jurisdiction or in excess of jurisdiction" within the meaning of section 15 of the Act of 1964, thus rendering them liable in a civil action for damages.

Lord Bridge in his judgment in *In re Mc. C. (supra)* referring to the judgment of Lord Denning in *Sirros v. Moore (supra)* expressed the view that the distinction between the immunity of superior courts and justices still exists. This view was expressed obiter as this aspect of the subject was not argued by counsel. The judgment in *Sirros v. Moore (supra)* was considered but not overruled.

In Sri Lanka there is no enactment corresponding to section 15 of the Northern Ireland Act of 1964. In our country the immunity of a judge from actions in tort or delict is governed by the common law. Furthermore, in England justices consist of stipendiary magistrates and lay benches. There is no such distinction in Sri Lanka.

It is necessary now to examine the interpretation of the expression "executive or administrative action" given by the Supreme Court. *In A. K. Velmurugu v. A. G. and Others.* (7), Sharvananda, J. stated :

"It is to be noted that the claim for redress under Article 126 for what has been done by on executive officer of the State is a claim against the State for what has been done in the exercise of the executive power of the State. This is not vicarious liability ; it is the liability of the state itself ; it is not a liability in tort at all ; it is a liability in the public law of the State – vide : *Maharaj v. A. G. of Trinidad* (1978) 2 A.E.R. 670 at 679 (P.C.)."

In *Perera v. University Grants Commission* (8) the question arose whether the action of the U.G.C. in determining the criterion for admission to the University in 1980 constituted "executive or administrative action." Sharvananda, J. stated :

"The expression 'executive or administrative action' embraces executive action of the State or its agencies or instrumentalities exercising governmental functions."

Thereafter, Sharvananda, J. examined the nature of the functions of the U.G.C. and the degree of control exercised by the Government and concluded as follows :–

"The University Act has assigned the execution of a very important Governmental function to the respondent. In the circumstances, it is idle to contend that the respondent is not an organ or delegate of the Government and that its action in the matter of admission of students to the Universities under it does not have the character of executive or administrative action within the meaning of Article 126 of the Constitution."

In *Wijetunga v. Insurance Corporation and Another* (9) the question arose whether disciplinary action taken by the Insurance Corporation against one of its employees constituted "executive or administrative action". Sharvananda, A.C.J. observed that "The term 'executive action' comprehends official actions of all Government Officers". He also stated that "The question whether the Insurance Corporation of Sri Lanka is or is not virtually a department of the State or a servant of the Government would be dependant on the provisions of the Insurance Corporation Act No. 2 of 1961. Hence we have to analyse them to determine the nature of its functions, the precise degree of

control exercised by the Government over it and whether the amount of control establishes the identity of the Corporation as part of the Government." The principle emerging from this judgment is that the test is the nature of the function and the degree of control. See also *Wijeratne v. People's Bank* (10).

H. W. R. Wade in *Administrative Law* 5th edition at p. 70, says this :-

> "Judges may be regarded as servants of the Crown in the sense they are 'Her Majesty's Judges' holding offices granted by the Crown and bound by oath well and truly to serve the sovereign in those offices. On the other hand it is axiomatic that judges are independent : the Crown has no legal right to give them instructions, and one of the strongest constitutional conventions makes it improper for any sort of influence to be brought to bear upon them by the executive."

In the instant case applying the function and control test to the 2nd respondent he was clearly not subject to Government or Ministerial control. Our Constitution accords to judicial officers independence from other organs of Government. Articles 107 and 117 under the sub-title "Independence of the Judiciary" are clearly aimed at this objective. The 2nd respondent had improperly and unlawfully detained the petitioner in this case. A judicial order does not become converted into an administrative or executive act merely because it is unlawful. In *Sirros v. Moore (supra)* and *Maharaj v. A. G. of Trinidad and Tobago (No. 2) (supra)* the unlawful orders of the Judge detaining the respective appellants were held to be judicial acts. In S. C. 54/82 (minutes of 6.9.82) (20) and S.C. 97/82 (minutes of 20.1.83) (19) it was held that remand orders made by the Magistrate in the wrongful exercise of judicial discretion as a result of misleading Police reports would not be subject to review under article 126.

Within the framework of our Constitution there is a fundamental reason for excluding judicial action from review under the procedure provided for in Article 126. Articles 138 and 139 invest the Court of Appeal with an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance, tribunal or other institution. Under Article 128 an appeal shall lie to the Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal which involves a substantial question of law. In the

circumstances there is no basis for a collateral jurisdiction in respect of such action under Article 126. In the case of *Naresh S. Murajikar v. State of Maharashtra* (11) heard by a Bench of nine Judges, it was held by a majority of eight to one, that the remedy in respect of judicial action is by way of appeal and not by way of writ-petition for a violation of fundamental rights Similar reasoning was adopted in the decision of the Privy Council in *Chokalinge v A. G. of Trinidad and Tobago*(12).

For the reasons stated in this judgment I hold that the impugned order of the 2nd respondent detaining the petitionar was neither executive nor administrative action. The application for relief against all three respondents under Article 126 of the Constitution is dismissed but without costs

ATUKORALE, J. – I agree.
TAMBIAH, J. – I agree.
L. H. DE ALWIS, J. – I agree.
RANASINGHE, J.

On the 26th February 1985 the petitioner proceeded to the Magistrate's Court of Attanagalla. He occupied a seat in the well of the court-house The 2nd respondent was the Magistrate of that Court. Case No 27902, in which a person named T. K. Banda had instituted proceedings relating to a dispute in respect of a land called Bebilapitiyawatta against a respondent named Dr. F. R. Senanayake, was taken up for hearing by the 2nd respondent. The petitioner was the Superintendent of that land An attorney-at-law, named Wijaya Gooneratne, appeared for T. K. Banda referred to above and Ashley Herath, also an attorney-at-law, represented Dr. Senanayake. During the course of his submissions, the attorney-at-law, Wijaya Gooneratne, informed the 2nd respondent that the petitioner had, armed with a gun, proceeded along with two others to the compound of the house of the wife of the aforesaid Banda and had threatened to shoot her. Saying so, Wijaya Gooneratne pointed out to the 2nd respondent the petitioner who was then seated in Court. This allegation brought the opposing attorney-at-law, Ashley Herath, to his feet. Challenging Banda and his attorney-at-law to produce any such complaint, Ashley Herath pointedly told the 2nd respondent that there has been no complaint of any such threat. The 3rd respondent thereupon directed the officers of the Police Station Mirigama, who were present, to "fetch the aforesaid complaint immediately". The 2nd respondent also directed the 3rd respondent, a jail-guard of the Mahara Prison who had come to court on duty, "to detain the

petitioner immediately". The petitioner was thereupon detained in the court cell. The time then was 10.45 in the forenoon. About four hours later, around 2.45 p.m. in the afternoon, the Mirigama Police officers produced the alleged complaint, marked P1. After a perusal of the said complaint the 2nd respondent decided to release the petitioner upon an undertaking given by the petitioner not to conduct himself in a manner which would constitute a breach of the peace.

The matter would ordinarily have ended there. The petitioner, however, was not content to let it rest there. He decided otherwise. He has now come before this Court, complaining that what the 2nd respondent said and did that day, in the Magistrate's Court at Attanangalla, constituted a violation of his, the petitioner's fundamental rights guaranteed under Atricles 11 (freedom from torture), 13 (freedom from arbitrary arrest and detention) and 14 (freedom of movement).

The 2nd respondent, on the other hand, contends that what was done by him on the day in question in the Attanagalla Magistrate's Court was done by him "in the exercise of judicial authority" and constituted "a judicial act done in good faith", with no malice.

In his submissions made to this Court, learned Counsel for the petitioner quite clearly and categorically stated that the petitioner does not allege any malice on the part of the 2nd respondent towards the petitioner, and does not challenge the bona fides of the 2nd respondent. He, however, contended that, in directing that the petitioner be taken into custody and be detained, the 2nd respondent was – in the words of learned Counsel – "acting as a policeman exercising the coercive power of the State".

The 3rd respondent, in repudiating liability, maintained that he had nothing to do with what happened within the court house that day, and that what actually happened was that : "the petitioner came into the 'cell' on a direction of the 2nd respondent and he remained in the cell' till about 2.45 p.m." The allegation made by the petitioner that it was the 3rd respondent who carried out the direction of the 2nd respondent finds support in the affidavit of the 2nd respondent. The liability of the 3rd respondent will, therefore, be considered on the footing that he did, in the execution of a direction given to him by the 2nd respondent, detain the petitioner in the court cell on that day from 10 45 a.m. to 2.45 p.m.

The issues which arise for determination in this case call for a consideration of the question of judicial immunity against civil liability for acts done by judges in their judicial capacity – a matter which is of the utmost importance not only to the judiciary but also to all citizens alike, whatever be their station in life.

That persons exercising judicial functions in a court are exempt from all civil liability whatsoever for anything done or said by them in their judicial capacity is a rule of the highest antiquity – (*Halsbury – 4th Ed – Vol. 1. para 206*). The object of such judicial privilege is not to protect malicious or corrupt judges but to protect the public from the danger to which the administration of justice would be exposed if the persons concerned therein were subject to inquiry as to malice, or to litigation with those whom their decisions might offend, and to ensure that such persons administer the law not only independently and freely and without favour but also without fear – (*Halsbury : para 207*). Wade in his book on *Administrative Law (4th Ed.)*, sets out the object as being "to strengthen their (judges') independence, so that their decision may not be warped by fear of personal liability. The reason for such judicial immunity was also explicitly set down by Lord Denning, M. R. in the year 1974 in the Court of Appeal in the case of *Sirros v. Moore (supra)* which will be referred to later on in this judgment".

Towards the end of the nineteenth century, in the year 1895 the Court of Appeal in England had occasion to consider the question of the immunity of judges in the case of *Anderson v. Gorrie* (13) where three judges of the Supreme Court of Trinidad and Tobago were sued in damages for acts though done by them in their judicial capacity but nevertheless alleged to have been done by them maliciously, without jurisdiction and with the knowledge of absence of jurisdiction. Lord Esher, speaking on behalf of the Bench, stated that by the common law of England no action will lie against a judge of a Court of Record for doing something within his jurisdiction but doing it maliciously and contrary to good faith, and that such rule has, from earliest times, rested on the ground that if such an action would lie the judges would loose their independence, and that the absolute freedom and independence of the judges is necessary for the administration of justice, and then proceeded to re-affirm the principle, which had been laid down earlier in the case of *Fray v. Blackburn* (14) :

"It is a principle of our law that no action will lie against a judge of one of the Superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly . . . . .The public are deeply interested in this rule, which indeed exists for their benefit, and was established in order to secure the independence of the judges, and prevent their being harassed by vexatious actions . . . . .To my mind there is no doubt that the proposition is true to its fullest extent that no action lies for acts done or words spoken by a judge in the exercise of his judicial office although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office. If a judge goes beyond his jurisdiction a different set of considerations arise".

Sirros v. Moore (supra) came up before the Court of Appeal in England in July 1974. Sirros, a Turk, had been permitted to enter England on condition of a limited stay. He overstayed such period, and a Deportation Order was made by the Home Secretary. On being convicted by the Magistrate, *S* was fined and ordered to be deported. *S* appealed, but only against the fine. The Circuit Judge, who heard the appeal, dismissed the appeal. When the order dismissing the appeal was made, *S* got up and left court. When the judge saw *S* leaving court he told the Police "stop him". The Police followed *S* and took him into custody. *S* was then brought back to court and put into the cell. In the afternoon *S* was produced before the judge who refused bail. On the following day, the High Court directed that *S* be released on bail ; and *S* was released after being in custody for 1 1/2 days. *S* thereupon sued the judge and the Police claiming damages for assault and false imprisonment. The Court of Appeal held that the judge was entitled to immunity from liability in a civil action for damages, because the act complained of was done by him acting in his capacity as a judge in good faith, albeit mistakenly. Dealing with the nature and the extent of such privilege, Lord Denning, M. R., observed, at page 132 :

"Ever since 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of the jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice and all uncharitableness,

he is not liable to an action. The remedy of the party aggrieved is to appeal to a Court of Appeal . . . . or to take some such steps to reverse his ruling. Of course, if the judge has accepted bribes or been in the least degree corrupt, or has prevented the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages".

In regard to the reason for such privilege, Lord Denning continued :

"The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear" ;

and further quoted with approval the words of Lord Tenderden, C J. in the case of *Garnett v. Ferrand (15)*:

"This freedom from action and question at the suit of an individual is given by the law to the judges not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgement, as all who are to administer justice ought to be."

At the early stages of the development of this principle in England a distinction was drawn as between the superior courts and the inferior courts, as was recognized by De Gray, C.J. in the year 1777 in the case of *Miller v. Seare* (16).

"In all cases when the protection is given to the judge giving an erroneous judgment he must be acting as a judge. The protection, in regard to the superior courts, is absolute and universal ; with respect to the inferior, it is only while they act within their jurisdiction."

This distinction, however, is not now recognised and is no longer valid. In disposing of such distinction, Lord Denning stated, in *Sirros v Moore (supra)* at page 136, as follows :

"In the old days, as I have said, there was a sharp distinction between the inferior courts and the superior courts. Whatever may have been the reason for this distinction, it is no longer valid . . . . . . Every judge of the courts of this land – from the highest to the lowest – should be protected to the same degree,

and liable to the same degree. If the reason underlying this immunity is to ensure 'that they may be free in thought and independent in judgment', it applies to every judge, whatever his rank. Each should be able to do his work in complete independence and free from fear . . . . . so long as he does his work in the honest belief that it is within his jurisdiction, than 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 so long as he honestly believes it to be within his jurisdiction, he should not be liable. Once he honestly entertains this belief, nothing else will make him liable. He is not to be plagued with allegations of malice or ill-will or bias or anything of the kind. Actions based on such allegations have been struck out, and will continue to be struck out. Nothing will make him liable except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it."

Ormerod, L.J., expressed the principle, at page 149, that a judge should be protected :

"where he gives judgment, or makes an order, in the bona fide exercise of his office, and under the belief of his having jurisdiction, though he may not have any . . . . . . With a fully developed appellate structure, supplemented by habeas corpus and other prerogative writs and made accessible to all, or nearly all, by the legal aid scheme, there is no longer any necessity to preserve, in its old form, the remedy by way of personal action against judges."

The principle set forth in *Sirros's case (supra)* was considered by the Privy Council in 1978 in the case of *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2) (supra)* where a member of the Bar of Trinidad and Tobago, who had earlier succeeded before the Privy Council in having an order committing him to prison for seven days for contempt of court set aside on the ground that the committing judge had failed to specify sufficiently the specific nature of the contempt, with which he was being charged, claimed redress for contravention of his constitutional rights. Although the Attorney-General and Maharaj, J., – the judge who made the order of committal – were both made respondents only the Attorney-General was served with notice and the action was proceeded with against the Attorney-General alone. Although the Judicial Committee by a majority, held that the failure, referred to above, on the part of

Maharaj, J., did constitute a contravention of the appellant-barrister's constitutional right, and the appellant-barrister was therefore entitled to redress against the State. Lord Diplock, delivering the judgment of the majority did however affirm : the principle set out in *Sirros's case (supra)* that no action would have lain against the judge himself for anything he had done unlawfully while purporting to discharge his judicial functions : that no action in tort would have been available against the police or prison officers who have acted in execution of judicial process that was valid on the face of it : that the State was not vicariously liable in tort for anything done either by a judge while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or by a police or prison officer in connection with the execution of judicial process. The majority decision was based on the ground : that the order of Maharaj, J., committing the appellant-barrister to prison was made by him in the exercise of the judicial power of the State and the arrest and detention pursuant to the judge's order were effected by the executive arm of the State ; that, if such detention amounted to a contravention of a constitutional right of the appellant-barrister, than it was a contravention by the State : that the claim for redress against something done by a judge is a claim against the State for what has been done in the exercise of the judicial power of the State, that such liability of the State is not a vicarious liability, but is a liability of the state itself : that it is a liability in the public law of the state and not of the judge himself. Even though the majority affixed liability on the state, yet, the immunity of the judge himself was upheld. It must in this connection be noted that the Constitution of Trinidad and Tobago does not contain any provision comparable to the provision of Articles 17 and 126 of our Constitution, which, as will be referred to later, restricts the right to relief, as set out therein, only as against "executive or administrative action".

Lord Hailsham, however, dissenting from the majority judgment, took the view : that the majority views amounts to a change in the existing law which conferred immunity on the judges, on the servants of the executive acting on a judge's warrant and on the State and providing that the State should pay damages in respect of judicial misconduct even though the judge himself remains immune : that it is difficult to accommodate within the concepts of the law a type of liability for damages for the wrong of another when the wrongdoer himself is under no liability at all and the wrong itself is not a tort or delict. Said Lord Hailsham :

"A judge, of course, is not in the ordinary sense a servant. But he had a further immunity of his own. Judges, particularly High Court Judges, were not, and are not, liable to civil actions in respect of their judicial acts, although, of course, in cases of corruption or criminal misconduct, they have never been immune from criminal process or impeachment. This is trite law, and I need do no more than refer to the very full and interesting discussion on the subject in the Court of Appeal in *Sirros v. Moore*".

The judgment in *Maharaj's case (supra)* was followed in the year 1980, in another appeal from Trinidad and Tobago, by the Privy Council in the case of *Chokalinge v. Attorney-General of Trinidad and Tobago (supra)* where : In 1972, the appellant was convicted, on his own plea, of contempt of court for having written an article which was held to constitute the offence of "scandalising the court" : the appellant filed no appeal and served his sentence : In 1975 the appellant applied for a declaration under the Constitution of Trinidad and Tobago that his committal was unconstitutional and void because it contravened his right under Sec. 1(a) of the Constitution not to be deprived of his liberty "except by due process of law", as the offence of scandalising the Court was obsolete and was not in force when the Constitution came into operation and, therefore, he had not been imprisoned according to "due process of law". The Privy Council affirmed the order dismissing the appellant's application made by the Court of Appeal of Trinidad and Tobago. Lord Diplock, who once again delivered the judgment of the Privy Council, expanding the statement, which had been previously made by him in *Maharaj's case (supra)* that :

". . . . . .no human right or fundamental freedom recognised by Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher Court. Where there is no higher Court of Appeal to appeal to then none can say that there was error",

proceeded to observe : that the "law" that is referred to in Chapter 1 of the Trinidad Constitution is the law of Trinidad and Tobago as interpreted and declared by the judges in the exercise of the judicial power of the state : the fundamental human right guaranteed by the

relevant sections of the Trinidad and Tobago Constitution is not to a legal system which is infallible but to one which is fair : that, even if the judge had made a mistake, it was only an error of substantive law ; that the acceptance of the appellant's submission would amount to the appellant being entitled to parallel remedies, an appeal to a higher court and if the appeal be unsuccessful, a collateral attack by way of an application, even years later, for redress under the Constitution to a court of co-ordinate jurisdiction : that the acceptance of such an interpretation would be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine.

The majority judgment in *Maharaj's case (supra)* – and expanded on by the subsequent judgment in *Chokalinge's case (supra)* – drew a distinction between judicial errors which were errors of substantive law and those which related to procedure amounting to a violation of the "due process" clause. It was in regard to the drawing of such a distinction and the resultant consequences which such distinction was said to entail in respect of the liability of the State for such judicial acts, that Lord Hailsham differed from the majority view in *Maharaj's case (supra)*. Although Lord Hailsham's approach seems to commend itself to me, yet, it does not make any difference for the purpose of the immediate question under consideration ; for, both views did unreservedly accept the position that the impugned act, whatever be the nature of the error it resulted in, did constitute a judicial act in respect of which the judge himself was completely immune from liability.

A Bench of nine judges of the Supreme Court of India has, in the case of *Naresh S. Murajikar v. State of Maharashtra (supra)* decided, by a majority, that judicial decisions and orders of courts of competent jurisdiction do not infringe fundamental rights set out in the Indian Constitution, and that the remedy is by way of appeal and not writ-petition.

The corresponding position under the Roman-Dutch Law is that, in the performance of his judicial functions, a judge does not render himself liable to actions for damages provided the judge has acted bona fide and in the honest discharge of his duties – *Matthews et al. vs. Young* (17) : *Voct 5.1.58 : Meckerron : Law of Delict (6th edt.) sec. 5, p. 78-9, Penrice v. Dickinson* (18).

In re Mc C. (a minor) (supra) is a judgment delivered on 22.11.84 by the House of Lords in an appeal by three justices of the Belfast Juvenile Court, from the decision of the Court of Appeal in Northern Ireland. In that case : the respondent, a minor 14 years of age, pleaded guilty before the three appellants who were the three justices – the resident Magistrate and two lay justices – of the Belfast Court, to a motoring offence : the respondent was then ordered to attend an attendance centre : several months later the respondent appeared before the same court charged with failing to attend the attendance centre on certain dates when he had been required to do so : respondent was then ordered to be sent to a Training School : the respondent had not been previously sent to a Training School : the respondent was not represented in court : the respondent was not informed, after the making of the attendance-centre order and before the making of the Training School order, of his right to apply for legal aid : the respondent was detained in pursuance of such order : the Training School order was thereafter quashed by the Divisional Court for non-compliance with Article 15 (1) Treatment of Offenders (Northern Ireland) Order 1976 which provided that no custodial sentence should be imposed for the first time on a defendant who is not represented unless such lack of representation was through his own choice : the respondent then commenced a civil action against the three appellants for damages, for, inter alia, false imprisonment, trespass to the person and breach of statutory duty. A preliminary issue of law, as to whether on the facts pleaded any action would lie against the appellants in view of the provisions of sec. 15 Magistrate's Court Act (Northern Ireland) of 1964 which provided that no action shall succeed against any resident magistrate or justice of the peace by reason of any matter arising in the execution or purported execution of such office unless such magistrate or justice of the peace had "acted without jurisdiction or in excess of jurisdiction", was raised. This preliminary point was upheld by the original court but was reversed by the Court of Appeal in Northern Ireland. On appeal to the House of Lords, the decision of the said Court of Appeal was affirmed and the appeal of the three justices was dismissed. The liability of the justices in that case was founded entirely upon a statutory provision – sec. 15 of the Magistrates' Court Act (Northern Ireland) of 1964. Although there seemed to be a difference of opinion as to whether the liability of justices for acts done within jurisdiction but with malice and without probable cause has fallen into desuetude in Northern Ireland and in England, Lord Bridge of Warwicks, who

wrote the main judgment, did, with the concurrence of two of the others, Lord Elwyn-Jones and Lord Templeman, accept the principle that a judge of a court of record is protected from harassment by civil suits alleging malice. Even though he realised that what he says would be obiter and that aspect of the case had not been argued, Lord Bridge nevertheless found the occasion, which he thought was the first occasion when the House was called upon to consider the subject matter of the liability of justices in damages for acts done in execution or purported execution of their office, irresistible and proceeded to make certain observations, inter alia, in regard to the decision of the Court of Appeal in *Sirros' case (supra)* : that, in view of the statutory provisions applicable to Northern Ireland – sec. 15 of the 1964 Act referred to earlier, – the "sweeping judgment" of Lord Denning in favour of abolishing the distinction between superior and inferior courts cannot be supported in relation to the justices : that, in regard to whether the immunity from suits, granted to the judge of the superior court should be granted to judges of courts of limited jurisdiction, the distinction is so deeply rooted that it cannot be eradicated by even the House and could be changed only by appropriate legislation. *Maharaj's case (supra)*, it may, however, be noted, was decided in February 1978, and that too by the Privy Council. The decision in this case from Northern Ireland does not, in my opinion, in any way detract from the principle set out earlier by me in regard to the civil liability of a judge in respect of an act done by him in his judicial capacity.

Sec. 70 of the Penal Code protects a judge from criminal liability in respect of acts done by him in good faith when acting judicially.

On a consideration of the foregoing, I am of opinion that, under our law, a judge is immune from claims for damages in respect of anything said or done by him bona fide in his capacity as a judge in the discharge of his judicial functions.

Judges of the Courts of First Instance, whose orders always have a direct and an immediate impact upon both the parties, who come before them, and the members of the public who follow the proceedings in court, must always be conscious of, and deeply appreciate the immunity referred to earlier, so conferred upon them by law in regard to all acts done by them in the discharge of their judicial functions. It is a privilege which has been bestowed upon them not in

order to pander to their vanity, or to enable them to make mistakes and to do wrong, or to act without a very high sense of responsibility. It is a protection extended to them solely for the sake of the public, and for the advancement of justice ; so that, the knowledge that they will not be troubled by any actions against them, would make them totally free in thought and absolutely independent in judgment, and also enable them to discharge their functions not only freely and without favour, but also without fear. The very thought that such immunity is granted to them for the sake of the public, should inspire the judges to exercise their powers and discharge their functions with the highest possible sense of responsibility and with such a high degree of dignity and decorum as will continue to command and retain undiminished the confidence of the public in an institution which has hitherto enjoyed such confidence in full measure.

The question which now arises is 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 guaranteed under the Constitution.

The provisions of the Crown (Liability in Delict) Act, No. 22 of 1969, now govern the liability of the State in delict under our law. Under and by virtue of the provisions of sec. 2 (5) of the said Act, the State is not liable in respect of : anything done by a judge in the discharge or purported discharge of his functions as a judge : anything done by any person in connection with the execution of judicial process.

The petitioner has, however, instituted these proceedings for relief in terms of the provisions of Articles 17 and 126 of the Constitution. Article 17 empowers a person, who is entitled to any fundamental right set out in Chapter III of the Constitution, to apply as provided in Article 126 to the Supreme Court, which is vested with sole and exclusive jurisdiction in that behalf, in respect of an infringement or imminent infringement of any such fundamental right by "executive or administrative action".

Article 4 (*d*) ordains that all organs of government should respect, secure and advance all the fundamental rights, which are declared and recognized by the Constitution, and should not abridge, restrict or deny any one of them save as set out in the Constitution itself. The Judiciary exercising the judicial power of the People would be one

such organ of government. Even so, the provisions of Articles 17 and 126 refer to infringements or imminent infringements by only "executive or administrative action". Infringements or imminent infringements by judicial action is not brought within their purview, and made justiciable. Relief by way of Articles 17 and 126 of the Constitution, could, therefore, be obtained only if the infringement, or imminent infringement, is one caused by an "executive or administrative" act. If the act, which is said to cause such infringement or imminent infringement, is a judicial act done by a judge acting in his judicial capacity, then no relief is available to the aggrieved party under and by virtue of the provisions of the said Articles 17 and 126.

Learned Counsel for the petitioner has, as set out earlier, sought to get over this impediment, insofar as the 2nd respondent is concerned, by contending that the impugned act was not an act committed by the 2nd respondent in his capacity as a judge, for the reason that : the 2nd respondent had no power or authority as a judge to do what he did and was therefore acting outside his jurisdiction, and that the 2nd respondent was at that time acting as an officer of the State exercising the coercive power of the State.

The term "executive or administrative action" has been considered by this Court on several previous occasions : *Velmurugu v Attorney-General (supra)* ; *Perera v. University Grants Commission (supra)* ; *Wijetunga v. Insurance Corporation (supra)* ; *Wijeratne v. People's Bank (supra)*. These judgments have considered in depth not only the nature and the scope of these words and the type of acts which fall within the purview of the words, but also the character and the category of persons whose acts would constitute such "executive or administrative action" These judgments also spell out the principles upon which persons, who, even though they would not fall directly within the category of executive or administrative officers, as described in the Constitution, would, yet, be considered persons, who function as organs of government and, as such, be agents of the State whose acts could be ascribed to the State.

The contention that the 2nd respondent was at the time in question acting in a capacity other than that of a judge is based on the ground that the 2nd respondent had no authority or power to do what he did. The position taken up by the 2nd respondent to justify what he did, based upon the provisions of Sec. 136 (1) (*a*) Code of Criminal Procedure Act, No. 15 of 1979, does not, in my opinion, bear close

scrutiny. The information placed before the 2nd respondent was not by way of any material under oath. Nor was it from one who could give direct evidence. It was only a statement made from the Bar table. This statement was promptly challenged, also from the Bar. The 2nd respondent himself had desired to be satisfied by perusing the alleged complaint itself. The complaint was stated to contain allegations of, *inter alia*, criminal intimidation, which is an offence for the commission of which the 2nd respondent had the power, under and by virtue of sec. 41 of the Code of Criminal Procedure Act No. 15 of 1979, to direct the arrest of the offender. There is no question but that at the time the impugned act was done by him, the 2nd respondent did intend to exercise powers which he thought were vested in him, and which he considered should be exercised by him at that time. Mistaken though he may have been, yet, his bona fides has not been challenged. As Magistrate of the division of Attanagalla, the 2nd respondent did undoubtedly have the power to make, upon proper material, an order remanding the petitioner pending further investigation into an offence set out in the Penal Code.

In the cases cited at the hearing, and referred to earlier, the acts, which were held to bring about liability, were all acts which the persons, who were held to be so liable, had, in truth and in fact done in the discharge or purported discharge of the functions of the respective offices so held by such persons. No instance has been cited where the alleged wrongful act done by an officer, falling into one of the three categories of persons referred to in sub-articles (*a*), (*b*), (*c*) of Article 4 of the Constitution, in the discharge or purported discharge of the functions of the office which he so held, had been held to have been, in truth and in fact, done by him in the discharge or purported discharge of an office falling within one of the other two categories. Nor an instance where the character – legislative, executive or judicial – of the alleged wrongful act had been held to be, in truth and in fact, different from the character which it was being made out to be. Furthermore, no good ground has been shown why, in such a situation, the alleged wrongful act could not and should not be treated as an act done by the officer concerned not in the performance of "his official duty but in the course of his personal pursuits", and as one where "the officer had taken advantage of the occasion but not his office for the satisfaction of a personal vagary", and "totally unconnected with any manner of performance of his official functions".

In *Anderson v. Corrie (supra)* and *Sirros v. Moore (supra)* referred to earlier, the actions were personal actions for damages instituted against the judges for civil wrongs committed under the common law. In *Maharaj's case (supra)*, and also the Indian case of *Murajikar v. State of Maharastra (supra)*, the claims put forward are similar to the claim put forward in these proceedings – a claim against the State for an infringement, by the judicial arm of the State, of a Constitutional right guaranteed by the Constitution of the State. *Maharaj's case (supra)*, as indicated earlier, would have to be considered by our courts subject to the provisions of Articles 17 and 126 of our own Constitution. In *Murajikar's case (supra)* the Indian Supreme Court did decide that judicial acts do not amount to an infringement of the fundamental rights guaranteed by the Constitution.

In *Anderson's case (supra)* the allegation was that the impugned acts were done maliciously without jurisdiction and also with the knowledge of absence of jurisdiction. In *Sirros's case (supra)* the judge was held not to have had jurisdiction to detain S in custody and to have acted mistakenly. In *Murajikar's case (supra)* the impugned order was declared to be bad on the ground of a fundamental failure of natural justice. Even so, in every one of these cases the act in question was accepted as a judicial act.

Relief under the provisions of Articles 17 and 126 of the Constitution was refused by this Court in two cases in each of which the alleged violations by the respondents of the Fundamental Rights under Article 13 (1) and (2) of the Contitution had been based upon orders which, though indefensible, had nevertheless been made by a judge – *Dayananda v. Weeratunga, S.I. Police, et al.* (19), *Kumarasinghe v. A.G. et al.* (20).

On a consideration of the foregoing I am of opinion that the act which the 2nd respondent is sought to be made liable for is not an "executive or administrative" act, but is a judicial act done by the 2nd respondent in his capacity as a judge. That being so, the petitioner is not entitled to relief as set out in Articles 17 and 126 of the Constitution.

The liability of the 3rd respondent now remains to be considered. As set out earlier, the position of the 3rd respondent is that he did not do the act, which the petitioner alleges he did, and that he is not liable in

any way for the detention of the petitioner in the court cell of the Magistrate's Court of Attanagalla on the day in question. In view, however, of the affidavit of the 2nd respondent, I shall, as already indicated, consider the case against the 3rd respondent on the basis that he did, in fact, detain the 3rd respondent in his custody in the Magistrate's Court of Attanagalla on the day in question, from 10.45 a.m. to 2.45 p.m. on the orders of the 2nd respondent.

It is fairly clear that whatever the 3rd respondent did that day was not done on his own initiative but was done solely in obedience to a direction given by the 2nd respondent whose orders, in regard to the detention of persons in court whilst the Court is sitting, he, the 3rd respondent, had to carry out. In *Sirros v. Moore (supra)*, Denning, M. R. having absolved the judge, even though he had acted mistakenly, from liability as he had acted judicially, proceeded to hold that no action would lie even against the Police officers who had carried out the orders of the judge, as they had done what they did only at the direction of the judge not knowing it was wrong. In *Maharaj's case (supra)* the executive officers had detained the appellant-barrister only upon the order made by the judge. Although the judge himself was held to be not liable personally, yet liability was affixed on the State only because of the violation by the judge of the "due process" clause. The reasoning of Lord Hailsham on this point in the dissenting judgment commends itself to me, more than the approach adopted by the majority. The majority view on this point, however, will not be relevant to us, as no such "due process" clause is found in our Constitution. Besides, as already set out, under our Constitution relief for violations of fundamental rights can be obtained by way of Articles 17 and 126 thereof only in respect of violations committed by "executive or administrative action". Such relief is not available against judicial action – whether the judicial error be one of substantive law, or of procedure. Even if the relief granted against violations of fundamental rights be on the basis of a liability of the State itself, yet, such liability must be founded upon an "executive or administrative" act done wrongly, without any justification for the doing of it by an agency of the State, or by an officer or agent through whom the State exercises its powers. Where, however, such act is itself protected by the law of the land, then such act cannot give rise to any form of liability on the part of the State. It has not been urged that, in doing what he did, the 3rd respondent was in any way influenced by improper motives. In the local case of *Kumarasinghe v. A.G. et. al*

(supra) no relief was granted by this Court to the petitioner in that case against the Police officers, when he sued for a violation of the Fundamental Right guaranteed by Article 13 (1) and (2) – arbitrary arrest and detention – even though the Court was of the view that there has been a violation of the Fundamental Right set out in Article 13 (2), because the Court held that such "violation has been more the consequence of the wrongful exercise of judicial discretion as a result of a misleading report". The position of an officer of the State, who, in the course of carrying out an order made by a judge in the exercise of his judicial functions, violates the Fundamental Right of a person, is that he would be free from liability, if, in doing so, he has acted in good faith, not knowing that the said order is invalid.

The complaints of "exposure to an infliction of degradation – Article 11", and "deprivation of freedom of movement – Article 14 (1) *(h)*", both arise from the aforesaid order for detention. Where such order of detention is held not to render the 2nd respondent liable in respect of the claim of arbitrary arrest and detention, such immunity would operate also in regard to the claims of violation of Articles 11 and 14 (1) *(h)*. The petitioner had been detained within the court building itself, in the cell where all persons who are detained upon the orders of the presiding Magistrate are ordinarily kept during the period the Court is in session. There is no express evidence in regard to the condition of the cell which was in existence in the Magistrate's Court of Attanagalla on the day in question. It may have been similar to such cells found in the other Magistrates' Court in the island. It may well be that they cannot be described as comfortable places even for a very short stay, and they leave much to be desired. However uncongenial, uncomfortable, undesirable and cramped such stay may have been, yet, it was the direct outcome of the aforesaid order for detention. Thus, even if any other rights were in fact affected, that would be the incidental and indirect outcome of the said order of detention. If such main order does not give rise to any relief, then complaints of such incidental and indirect violations will also not give rise to any relief – vide *Murajikar's case (supra) – paras, 43, 75, 138.*

In this view of the matter, I am of opinion that the petitioner's claim against the 3rd respondent too must fail.

The petitioner's application against all three respondents is accordingly dismissed, but without costs.

Application dismissed.