1972 *Present :* **H. N, G. Fernando, C.J., G. P. A. Silva, S.P.J., and Alles, J.**

Mrs. SITA GUNASEKERA, Petitioner, *and* A. T. DE FONSEKA (Assistant Superintendent of Police) and 2 others, Respondents

S. C. 411 of 1971—In the matter of an Application for a Mandate in the nature of a Writ of Habeas Corpus under Section 45 of the Courts Ordinance

***Public** Security Ordinance—Emergency Regulations No. 6 of 1971 made thereunder—Regulations 18, 19, 20, 21 (2), 55—Power of arrest, without warrant, under Regulation 19—Meaning and effect of the words "whom he has reasonable ground for suspecting"—Criminal Procedure Code, ss. 32 (1) (b), 53—Penal Code, ss. 5, 92—Courts Ordinance, s. 45*—Habeas corpus.

Although Regulation 19 of the Emergency Regulations No. 6 of 1971 (published in *Gazette* of 15th November 1971) empowers any officer mentioned therein to arrest without warrant a person whom he has reasonable ground for suspecting to be concerned in an offence punishable under any Emergency Regulation, a condition precedent for such arrest is that the officer who arrests should himself reasonably suspect that the person arrested had been concerned in some offence under the Emergency Regulations. Accordingly, where an Assistant Superintendent of Police has purported to arrest a person under Regulation 19 merely because he had orders to do so from his superior officer, the Superintendent of Police, and was not personally aware of the actual offence of which the person arrested was suspected by the Superintendent of Police, such arrest is liable to be declared in *habeas corpus* proceedings to have been unlawful.

APPLICATION for a writ of *habeas corpus*.

P. B. Tampoe, with *Prins Rajasooriya* and *Lakshman Guruswamy*, for the petitioner.

V. S. A. Pullenayegum, Deputy Solicitor-General, with *Ian Wikramanayake*, Senior Crown Counsel, and *S. Sivarasa*, Crown Counsel, for the respondents.

Cur. adv. vult.

January 21, 1972. H. N. G. FERNANDO, C.J.—

This was an application for a Writ of Habeas Corpus in respect of one P. C. Gunasekera, who was arrested by the Assistant Superintendent of Police, Galle, at about midnight on 4th December 1971. The Petitioner, who is the wife of Gunasekera, averred in an affidavit that the arrest and consequent detention were illegal and wrongful, and in addition that the arrest was made mala fide and in revenge for certain actions and statements regarding the policies of the Government and the actions of the Police which had been made by a Member of Parliament Mr. Prins Gunasekera, who is the brother of the corpus Gunasekera.

Notice of the application to this Court was issued on the Assistant Superintendent who arrested him and also on the Superintendent of Prisons, Mahara, and the Commissioner of Prisons. There were then filed in this Court affidavits of the Assistant Superintendent of Police and the Commissioner of Prisons, and also an affidavit from A. Navaratnam, Superintendent of Police, Southern Division.

The affidavit of the Superintendent of Police (hereinafter referred to as " the S. P. ") contained averments—

(*a*) that the corpus Gunasekera had been arrested on 18th March 1971 on suspicion of being concerned in a conspiracy to overthrow the Government, and that he then had in his possession certain documents indicative of his involvement in such a conspiracy but that he was released as the evidence appeared to be insufficient;

(*b*) that in the course of further investigations into the conspiracy referred to above, statements of various persons were recorded on certain dates in June, July and December 1971;

(c) that the documents and statements referred to above gave to the Superintendent of Police reasonable ground for suspecting that the corpus had been concerned in committing an offence punishable under Regulation 22 (*sic.* 21) of the Emergency Regulations.

The Superintendent further stated that on the night of 4th December 1971 he instructed the Assistant Superintendent of Police from Colombo to arrest the corpus and to produce him at the Galle Police Station for interrogation. The affidavit of the A. S. P. averred that the instruction

to him was to take Gunasekera into custody " under the Emergency Regulations ", and the position for the Crown at the hearing of this application has been that the corpus was duly arrested under Regulation 19 of the Emergency Regulations. The corpus was held in custody at the Galle Police Station until 18th December 1971, when he was produced before the Magistrate, Galle, who then made an order that he be detained in Prison. It was conceded for the Crown during the hearing that the Order for detention made by the Magistrate under Regulation 20 was purely administrative, and that such an Order cannot validly authorize the detention of a person, unless the person had been validly arrested under the powers conferred by Regulation 19.

I must here mention that the learned Deputy Solicitor-General did propose to argue that Regulation 55 of the Emergency Regulations had ousted the jurisdiction of this Court to inquire into the validity of an arrest purporting to have been made under Regulation 19. We however indicated to him that there is no possibility of our doubting the correctness of the opinion to the contrary which was held unanimously by the Bench which decided the case of *Hirdaramani* (Application No. 354/71—S. C. Minutes of 30.12.71) [1].

It was averred by the petitioner that at the time of the arrest of Gunasekera, the A. S. P. merely stated that he had orders from Colombo to arrest Gunasekera, and that he was not able to furnish any information other than that he was acting on orders from Colombo. These averments of the petitioner were not contradicted in the affidavit of the A. S. P., but we accepted as correct his averment that he had informed Gunasekera that he was arresting him " under the Emergency Regulations ". In the result it was clear from the affidavits of the S. P. and the A. S. P. that the corpus was arrested because the S.P. suspected that he had been concerned in some offence, and that the A. S. P. who arrested him had no such suspicion and could not and did not inform the corpus of the particulars of the alleged offence.

The S.P. in his affidavit denied that he had ordered the arrest of the corpus in bad faith. It was not however necessary for us to make any inquiry into the petitioner's allegation of bad faith, since her application for the writ had to succeed on a ground of law.

Regulation 19 (1) of the Emergency Regulations confers powers on any police officers, any member of the Ceylon Army, Royal Ceylon Navy or Royal Ceylon Air Force, or the Commissioner of Prisons or any Superintendent, Assistant Superintendent or Probationary Superintendent of a Prison, or any Jailor or Deputy Jailor, or any Prison Guard, or Prison Officer, or any other person authorized by the Prime Minister to act under this regulation. It provides that any one of these numerous persons mentioned therein may search, detain for purposes of such search, or arrest without warrant, any person :—

(*a*) who is committing an offence under any Emergency Regulation ; or

[1] *(1971) 75 N. L. R. 67.*

(*b*) who has committed an offence under any Emergency Regulation ; or

(*c*) whom he has reasonable ground for suspecting to be concerned in or to be committing or to have committed an offence under any Emergency Regulation.

Any of these numerous officers will of course know that he has a power of arrest under Regulation 19 ; but there is something else as important, or even much more important, which such an officer must know, namely, whom can he lawfully arrest ? It is clear that he can arrest *a person who is committing* an offence under any Emergency Regulation, and that he can also arrest *a person who has committed* such an offence. If an Army Private does arrest a person and is subsequently called upon to justify the arrest, whether in a Court of Law or before some military superior, he can justify the arrest by establishing a fact, namely, that the person was committing an offence at the time of the arrest or had committed such an offence before his arrest. In both these instances an individual becomes liable to arrest because of something he is doing or something he has done. It is not however the case for the Crown that the ground for the arrest in the present case was that Gunasekera was committing or had committed an offence under any Emergency Regulation.

Regulation 19 also expressly contemplates a third instance in which an officer empowered by the Regulation may make a lawful arrest, namely the arrest of a person " whom he has reasonable ground for suspecting..... ". The case for the Crown was that the arrest in the present case was lawfully made on this ground.

The language of Regulation 19 has the plain meaning that the third instance in which the Regulation empowers an officer to arrest is where HE reasonably suspects something concerning an individual. On the facts of the present case therefore, Regulation 19, according to its plain meaning, did not authorize the A. S. P. to arrest Gunasekera, because on the averments in the affidavits it was the Superintendent, and not the A.S.P. himself, who suspected that Gunasekera had been concerned in some offence under the Emergency Regulations. Indeed there are also extrinsic reasons for adhering to this plain meaning.

In *Muttusamy v. Kannangara*[1] 52 N. L. R. 324 and in *Corea v. The Queen*[2] 55 N. L. R. 457, this Court held that when a Police Officer arrests a person without a warrant, he should, save in certain exceptional cases, inform the suspect of the true ground of arrest. This duty to inform a person of the grounds for his arrest is no mere arbitrary requirement. A citizen has a right to resist an unlawful arrest ; but he can only exercise that right if he is informed of the grounds upon which he is being arrested. In the case of *Christie v. Leachinsky*[3] (1947) A. C. 583, Lord Simon said " Is citizen A bound to submit unresistingly to arrest by citizen B in ignorance of the charge against him ? I think that cannot be the law of England ". Recognition in Ceylon of the

[1] *(1951) 52 N. L. R. 324.* [2] *(1954) 55 N. L. R. 457.*
[3] *(1947) A. C. 583.*

English Law on this matter is found in s. 53 of the Criminal Procedure Code. Even when a person is arrested under the authority of the warrant of a Court of law, s. 53 requires the arresting officer to inform the person of the substance of the warrant, which of course includes reference to the offence which the person is alleged to have committed. I am entirely in agreement with the observation of Gratiaen J. in *Muttusamy v. Kannangara* that this requirement applies *a fortiori* where a person is arrested without a warrant.

There is every justification, in common sense, for this requirement. It is only if a person is informed of the ground for his arrest, or (in other words) of the offence of which he is suspected, that he will have an opportunity to rebut the suspicion or to show that there is some mistake as to identity. If, for instance, he is told that he is suspected of having committed some offence in Colombo on a particular day, he may be able immediately to produce perfect proof that he was not in Colombo on that day; if he is told that the person wanted on suspicion is XYZ Perera, he may be able to establish by production of his driving licence that he is not that person. In such circumstances, the officer might well desist from taking the person into custody.

According to the decisions which I have cited there are exceptional cases in which the requirement will not apply, particularly cases in which it is obvious in the circumstances that a person must necessarily know why he is being arrested. Examples of such cases are found in paragraphs (*a*), (*c*), (*e*) and (*f*) of s. 32 (1) of the Criminal Procedure Code. So also if a person is arrested under Regulation 19 of the Emergency Regulations *when he is committing an offence*, then the requirement that he be informed of the ground for his arrest may not apply. But the present case does not fall within these exceptions.

This requirement obviously cannot be complied with unless the arresting officer himself knows the grounds for arresting a particular person. Since the A. S. P. in the present case did not have that knowledge, he was clearly unable to comply with this requirement.

The learned Deputy Solicitor-General submitted that the decisions reported in *Muttusamy v. Kannangara* [1] 52 N. L. R. 324, and in *Corea v. The Queen*[2] 55 N. L. R. 457, have wrongly applied the English law and should therefore be reconsidered. In support of this submission Counsel could only refer to s. 92 of the Penal Code which provides that there is no right of private defence against an act done by a public servant acting in good faith under colour of his office. This only means however that a person cannot use force to resist what appears to be a lawful arrest; but s. 92 surely does not deprive a person of his right to avoid arrest if he can do so without resort to force or violence. In any event, apart from Counsel's bare pronouncement that our section 92 is different from the English Law, he made no attempt to show either by argument or by reference to case law or text books, that the English Law on the

[1] *(1957) 52 N. L. R. 324.* [2] *(1954) 55 N. L. R. 457.*

point is different from that contained in s. 92. Counsel failed to adduce any good reason for his suggestion that the two cited cases were wrongly decided.

I do not say that the omission to inform a person of the grounds for his arrest will necessarily render an arrest unlawful. But the existence of the requirement that in a case such as the present one a person must be informed of the grounds for his arrest confirms the plain meaning of the relevant language in Regulation 19, namely that the officer who arrests a person suspected of an offence must himself entertain the suspicion.

The circumstances of the Indian case of *Deshpande*[1] (1945) A. I. R. Nagpur 8, are important and relevant in the present context. Rule 129 of the Defence of India Rules provided that—

> " Any Police Officer.....may arrest without warrant any person whom he reasonably suspects of having acted.....
>
> (*a*) .....in a manner prejudicial to the public safety or to the efficient prosecution of the war."

The High Court of Nagpur held that it was for the Police Officer making an arrest under this Rule to show that he had reasonable ground for supicion. It was not enough for some other authority (in that case the Provincial Government) to furnish by affidavit the grounds for the arrest. The Court observed as follows :—" The only affidavit we have on the side of the Crown is one which tells us about the suspicions entertained by the Provincial Government, not by the police officer making the arrest. But what we have to determine here is what were his suspicions, and were they reasonable, and not what the Provincial Government's suspicions are ". The decision was affirmed by the Privy Council in *King Emperor v. Deshpande*[2] (47 Criminal Law Journal of India (1946) p. 831).

Thus in the instant case the fact that the Superintendent of Police entertained some suspicion regarding the corpus Gunasekera did not justify the arrest. The A. S. P. had no power to make the arrest unless he himself suspected that the corpus had been concerned in some offence.

The Deputy Solicitor-General repeatedly submitted that the language of Regulation 19 has the meaning that because the S. P. suspected the corpus of some offence the Regulation empowered him not merely to arrest the corpus but also *to cause him to be arrested*. In my understanding, the principal ground on which he supported this construction of the Regulation was that if a person is in fact committing an offence he may lawfully be arrested under Regulation 19 even by an officer who does not actually see him committing the offence. He suggested as an example a case where a Military Officer seated in the front of a vehicle sees persons laying explosives under a bridge with the object of destroying it ; he submitted that if the officer then ordered other personnel in the vehicle

[1] *(1945) A. I. R. Nagpur 8.* [2] *47 Criminal Law Journal of India (1946), p. 831.*

to arrest those persons, such an arrest would be lawful even though the other personnel do not themselves see the persons laying the explosives. I agree that arrests by the other personnel would be lawful; but the liability to arrest arises in this example not because a person is seeing laying the explosives but because in fact *he is commiting an offence.* Regulation 19 does not in such a case require that the officer who makes the arrest should himself have seen the commission of the offence. The ground for the arrest in such a case is not the same as the ground relied on in the instant case.

I have pointed out in the judgment in the case of *Hirdaramani* that Regulation 19 confers powers of arrest on literally thousands of members of the Police, Prisons or the Armed Services. But the Deputy Solicitor-General's construction means that, in addition, any person whosoever can lawfully make an arrest if any of the thousands of the members of those Services orders or requests the arrest to be made. I am quite unable to agree that Regulation 19 was enacted with any such drastic intention.

Section 32 (1) (*b*) of the Criminal Procedure Code provides that a Peace Officer may without a warrant arrest any person " against whom a reasonable suspicion exists of his having been concerned in any cognizable offence." Let me assume that under that section it is lawful for a subordinate Police Officer to effect an arrest upon an order given by a superior officer, although the subordinate officer does not himself entertain a suspicion. But when Regulation 19 is compared with s. 32 (1) (*b*), it is apparent that there has been a deliberate departure from the language of s. 32 (1) (*b*). Regulation 19 does not refer to the existence of a suspicion; it clearly provides for an arrest by an officer who himself has reasonable grounds for suspecting..... In the face of this deliberate departure from the language of s. 32 (1) (*b*), it would be in my opinion quite unjustifiable for a Court to give to Regulation 19 the same wide meaning as can be probably be given to s. 32 (1) (*b*).

Consequent upon certain observations of my brother Silva, there was suggested from the Bench this possible construction of Regulation 19 : If a senior Police Officer reasonably suspects that some person has been concerned in an offence and communicates that suspicion to a subordinate officer, can it be said that the subordinate then " reasonably suspects " the same thing within the meaning of Regulation 19 ? The learned Deputy Solicitor-General did not however adduce any argument in support of this construction; we accordingly had at the least to assume that, on the facts of the instant case, the arrest of the corpus could not have been justified on the suggested construction of Regulation 19.

In construing Regulation 19, I have referred to the English text of the Emergency Regulations as published in the *Government Gazette* of August 15, 1971. But reference was made during the hearing to the Sinhala text of Regulation 19 as published in the same *Gazette*, because

of some suggestion that its language might support the construction contended for by the Crown. It was found however that, according to the Sinhala text, there is power to arrest a person only for the limited purpose of searching him. The Deputy Solicitor-General had to admit that, if the Sinhala text of an enactment has to be accepted as authentic by reason of the provisions of the Official Language Act, then the arrest in the instant case was manifestly unlawful.

I was satisfied for the reasons which have now been stated that the arrest of the corpus was unlawful because the officer who arrested him did not reasonably suspect that he had been concerned in some offence under the Emergency Regulations.

G. P. A. SILVA, S.P.J.—

The circumstances of the complaint which gave rise to this application are set out in detail in the judgment of My Lord the Chief Justice with which I agree. I should, however, wish to add a few words myself on certain aspects that have come up for consideration in this application.

In the recent application for a writ of Habeas Corpus for the production of B. P. Hirdaramani [1] before this Court, while there was a difference of opinion as to the justiciability of a detention order under Regulation 18 of the Emergency Regulations, the full Court expressed the view that the detention of a person under the powers conferred by Regulation 19 was justiciable and that the test to be applied under that Regulation was an objective test. I see no reason to deviate from that view in regard to Regulation 19 which we are concerned with in the present application.

Two questions arise for consideration in this application, namely, whether the officer who took the detainee, P. C. Gunasekera, into custody had reasonable grounds for suspecting him to be concerned in or to be committing or to have committed an offence under any Emergency Regulations, and, if so, what material constituted such reasonable grounds. The affidavit of the Superintendent of Police, Southern Division, Mr. Navaratnam, was to the effect that he ordered the Assistant Superintendent of Police, Mr. Fonseka, from Colombo, to take P. C. Gunasekera into custody. The latter proceeded to a house at Ahangama and complied with the order of his superior officer. The affidavit indicates that so far as the person arresting was concerned he did not have any material before him on which he could base any reasonable grounds of suspicion nor was he aware of any such grounds. Once this admission is made, it seems to me that the condition precedent to the arrest and detention of the corpus under Regulation 19 ceases to exist.

[1] *(1971) 75 N. L. R. 67.*

I shall now examine the legal position which compels this conclusion. The section of the Criminal Procedure Code which relates to arrests without warrant is section 32 the relevant portion of which reads :—

" 32. (1) any peace officer may without an order from a Magistrate and without a warrant arrest—

.....

(*b*) any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned ;"

(The underlining is mine.)

It is not unreasonable to think that whoever was responsible for promulgating the Emergency Regulations modelled Regulation 19 on Section 32 of the Criminal Procedure Code. The construction of the relevant portion of this section which strikes one at first sight is that any person making an arrest under this section need not himself have reasonable grounds of suspicion, the words being " a reasonable suspicion exists ". If it was necessary for a person arresting to have such reasonable grounds the legislature may well have used different language to convey that requirement. This power may have been expressed in this way partly because such power was exercisable by a limited class, namely, the peace officers as defined in the Criminal Procedure Code, the number being comparatively small at the time of the introduction of the Criminal Procedure Code, and there was little risk of the few officers acting outside the law. Even with the use of these words it is of course possible to contend that a person making an arrest must himself entertain a reasonable suspicion. This is for the reason that it is a generally accepted principle supported by judicial interpretation that a police officer who would otherwise be justified in arresting a man without a warrant under Section 32 of the Criminal Procedure Code nevertheless acts illegally if he does so without informing the suspect of the nature of the charge upon which he is arrested. The exceptions to this rule are that the arrest should be made in such circumstances that the man arrested must know the general nature of the offence for which he is arrested or that the man himself produces the situation which makes it practically impossible for the officer arresting to inform him—vide *Muttusamy v. Kannangara*[1], 52 N. L. R. 324, and *Corea v. The Queen*[2], 55 N. L. R. 457. The person arresting will not be able to inform the person arrested of the reasons for the arrest unless he is himself aware of the facts leading up to the arrest which produced in his own mind reasonable grounds for suspicion that the person arrested had committed an offence which would warrant the latter's arrest without a warrant.

While these are the two possible interpretations of Section 32 of the Criminal Procedure Code, the wording of Regulation 19 to my mind permits only one construction, namely, that the person taking another

[1] *(1951) 52 N. L. R. 324.* *(1954) 55 N. L. R. 457.*

into custody must himself have reasonable grounds for suspecting the person arrested to be concerned in or to be committing or to have committed an offence under any Emergency Regulation. In the first place this is the plain meaning that a Court would have to give to the words "*he* has reasonable grounds for suspecting to be concerned . . . . . ", if the Regulation stood alone without any historical background. It has to be remembered however that arrest without a warrant and subsequent detention was not unknown to our law as would appear from Section 32 of the Criminal Procedure Code which I have cited above and which dates back to 1898. The departure therefore in Regulation 19 of the Emergency Regulations which says ". . . . . whom he has reasonable grounds for suspecting to be concerned in . . . . . " in place of the words of the earlier section 32 ". . . if a reasonable suspicion exists . . . " compels the inference that the change has been deliberate. A court is therefore obliged to give to the words of the regulation a meaning different from that which is given to the earlier section, namely, that while the earlier section contains no requirement that the officer arresting must be personally satisfied that there are reasonable grounds for suspecting, Regulation 19 must be given the construction that such satisfaction is an essential condition precedent. If of course one gives the second meaning to the provision in section 32, which I have referred to above, supported as it is by judicial pronouncements, *a fortiori* there is no escape from construing Regulation 19 to mean that the person arresting must personally have reasonable grounds of suspicion.

The departure from section 32 of the Criminal Procedure Code in Regulation 19 is not without a good reason therefor. Under the regulation, the number of persons who are vested with the power of arrest would be numerically very large. It includes the entire Police Force, the Army, Navy and Air Force, all Prison Officers and others specially authorized under the regulation. It is reasonable to think that when such a large number is vested with the power of arresting or detaining a person, the law would provide the additional safeguard that the person arresting should be personally satisfied that he has reasonable grounds of suspicion and that he should not merely be guided by the satisfaction of a third party with whose judgment in the matter the person who actually arrests may not agree if he is apprised of the facts.

There is one view of the matter on which it is possible to argue that the reasonable grounds of suspicion can be based either on information of which he is himself aware or on information available to another officer. This would be the situation where, for instance, a superior officer makes inquiries himself or examines the available material placed before him and is satisfied that there are reasonable grounds for suspecting the person whose arrest is desired to be concerned in or to be committing or to have committed an offence under the Emergency Regulations; and merely communicated his suspicion to a subordinate officer and that subordinate officer, on the faith of the suspicion of the superior officer, himself forms his own suspicion of the person concerned. In

such a case, the subordinate officer, if he is detailed to arrest the person concerned, will even be able to communicate to him the reason for such arrest and to comply with the principle laid down in the cases referred to earlier. Even though this possible argument was indicated by me to the learned Deputy Solicitor-General, he did not appear to be enthusiastic to pursue the argument presumably because the facts in this case did not enable him to do so, or he had some other good reason not to adopt that argument. The affidavit of the Superintendent of Police however showed that, so far as he was concerned, he had sufficient material to base a suspicion that the corpus was concerned in some way in an offence contemplated in the Emergency Regulations. Had he himself made the arrest therefore, or communicated even briefly to the Assistant Superintendent the reasons for the proposed arrest, it would not have been difficult to see the justification for the arrest of the corpus by any one of them.

The argument advanced by the learned Deputy Solicitor-General, which did not find favour with the court, has been dealt with by my Lord the Chief Justice and there is nothing further which I can usefully add.

ALLES, J.—

The petitioner, who was the wife of the corpus made an application for a mandate in the nature of a Writ of Habeas Corpus for an order praying that the respondents produce before this Court the body of her husband P. C. Gunasekera, the brother of Prins Gunasekera, the Member of Parliament for Habaraduwa, to be dealt with according to law. At the close of the argument we made order directing the 2nd and 3rd respondents to have the corpus released from custody and this was done accordingly.

The corpus (hereinafter referred to as the detainee) was arrested by the 1st respondent, the Assistant Superintendent at Galle, about midnight on 4th December 1971 at his parental home at Ahangama. At the time several members of the family of P. C. Gunasekera, including Prins Gunasekera, had come to the parental home for a family reunion in connection with an intended marriage for another brother of P. C. Gunasekera. According to the petitioner, the 1st respondent did not show any order or warrant but only stated that he "had orders from Colombo to arrest and remove the said P. C. Gunasekera to the Galle Police Station". The 1st respondent in his affidavit stated that he received instructions from his immediate superior, the Superintendent of Police, Galle, to take the detainee into custody under the Emergency Regulations made under the Public Security Ordinance and that, acting on these instructions, he arrested him and explained to him that he was being so taken into custody. The detainee was detained at the Galle Police Station until 18th December 1971, when he was produced before the Magistrate, Galle, who directed his detention at the Galle Prison and thereafter at the Mahara Prison. The Superintendent of Police, Galle, has sworn an affidavit in which he states that the detainee had previously

been arrested on 18th March 1971 on suspicion of being concerned in a conspiracy to overthrow, other than by lawful means, the Government established by law; that he was subsequently released and that he directed further investigations to be made into the detainee's activities. It is now a matter of common knowledge that early in April last year there were widespread acts of insurgency all over the Island in an attempt to overthrow the lawfully constituted Government of this country and that this insurrection had to be suppressed with considerable loss of life. The affidavit of the Superintendent of Police, Galle, further revealed that as a result of investigations conducted by him, *he* had reasonable grounds for suspecting that the detainee was concerned in these insurgent activities, details of which he has set out in his affidavit, and that the detainee became liable for a contravention of Regulation 21 (2) of the Emergency Regulations published in Ceylon Government Gazette 14,984/7 of 15th November 1971.

The main question that arose for consideration in this application was the legality of the arrest and the subsequent detention of the detainee. This is an issue which raises questions of considerable importance affecting the liberty of the subject and the right of the Executive to arrest persons without a warrant in times of Emergency. The Emergency Regulations No. 6 of 1971 made under the Public Security Act in Part 4 gives wide powers to the Executive to supervise, search, arrest and detain persons, and under Regulation 55 the writ of habeas corpus available to the subject under Section 45 of the Courts Ordinance has been suspended in respect of any person detained or held in custody under the Emergency Regulations. The scope of Regulation 55 was recently considered by this Court in *Hirdaramani's* case[1] and I have had the advantage of reading the judgment of My Lord the Chief Justice where he has drawn the distinction between Regulation 18 and Regulation 19. I am in agreement with the view of the learned Chief Justice that when a Detention Order, valid on the face of it, is produced before the Courts, it can only be challenged if it can be established that it was made with an ulterior motive or it can be proved that the stated reason was incorrect or untrue or if the Detention Order itself is manifestly absurd or perverse. In the case of a valid Detention Order it would be immaterial, even if the Permanent Secretary was mistaken in his opinion, provided it cannot be established that he acted in bad faith. Section 45 of the Courts Ordinance enshrines the valuable right of the citizen to invoke the assistance of the Court " when any person is illegally or improperly detained ". It is however not necessary to consider in this application the effect of a valid Detention Order in relation to the writ of habeas corpus. This is a matter which has been fully dealt with by the Judges who heard *Hirdaramani's* case.

The Court which delivered the order in *Hirdaramani's* case agreed—a view with which I respectfully concur—that the language used in Regulation 19 was intended to enable the Courts to review the validity of an arrest under Regulation 19. If the arrest was illegal it necessarily

[1] *(1971) 75 N. L. R. 67.*

followed that the subsequent detention was unlawful. The language used in Regulation 19 indicates clearly, *inter alia*, that the " reasonable suspicion of the person arresting " is a matter for review by the Courts. An examination of the facts in the present case reveal that the 1st respondent did not arrest the detainee because " *he* had reasonable ground for suspecting the detainee to be concerned in or to be committing or to have committed an offence under any emergency regulation".

Any such reasonable ground was within the knowledge of the Superintendent of Police who directed the 1st respondent to arrest the detainee but who apparently did not communicate this knowledge to the 1st respondent. The 1st respondent only informed the detainee that he was being arrested under the Emergency Regulations. Offences under the Emergency Regulations are of a wide and varied character. It may extend from a breach of a curfew order to the sale of a price controlled article above the controlled price. The 1st respondent, not being aware of the actual offence under the Emergency Regulations for which he was arresting the detainee, the learned Deputy Solicitor-General was constrained to argue that knowledge need not be personal to the officer effecting the arrest, provided the superior officer was aware of the grounds of suspicion, even though such grounds were not conveyed to his subordinate. The language used in Regulation 19 makes it abundantly clear that it is the " objective " test that has to be applied in deciding whether the arrest was valid or not. It might have been possible for Counsel to found an argument on the basis, that if the knowledge of the superior officer was conveyed to his subordinate, that knowledge might be ascribed to the subordinate officer as well, but no submission of such a kind was made and there was no evidence to support it. The submission of the learned Deputy Solicitor-General that the knowledge need not be personal to the person effecting the arrest is subject to two infirmities. Firstly, such a view is completely at variance with the plain language contained in the Regulation. Secondly, it must be borne in mind that we are here dealing with a penal provision of the law which has the effect of depriving the subject of his liberty, and therefore the general principle of law stated in numerous decisions of the Court, both here and in England, should be adopted that such a Regulation must be strictly construed.

It is pertinent in this connection to examine the language found in Section 32 (1) (*b*) of the Criminal Procedure Code. That subsection empowers a police officer to arrest any person, *inter alia*, against whom a reasonable suspicion exists of his having been concerned in the commission of a cognizable offence. It does not necessarily predicate that the police officer arresting the offender must act on his own personal knowledge. He may obtain the information on which he bases his reasonable suspicion on information given to him by a third party. The objective test being the proper one that is applicable in effecting an arrest under Regulation 19, I think the observations of Lord Atkin in his dissenting judgment in *Liversidge v. Anderson* [1] (1942) A.C. 206 are

[1] *(1942) A. C. 206.*

relevant in the context of an arrest effected under Regulation 19. Although Lord Atkin thought that the "objective" test may properly be applied to a Detention Order under Regulation 18B of the Defence Regulations—a view that was not shared by the other distinguished Law Lords who were in the majority—he made the following observations at p. 228 in regard to the powers of arrest :—

> "The power of arrest is confided by the common law both to constables and to private individuals. The constable has power within his district to arrest a person on reasonable suspicion of his having committed a felony. The private individual has power on two conditions: (1) that a felony has actually been committed; (2) that there is reasonable and probable cause of suspecting the person arrested. In these cases *the grounds for suspicion must be brought before the court, the onus is on the person who arrested to prove the reasonable grounds*, and the issue whether the cause is reasonable or not is to be determined by the judge."

and again at p. 231 :—

> "Can any person doubt that in respect of these powers given by statute to arrest for suspicion or belief of offences or intentions to commit offences other than felonies the constable is in exactly the same position as in respect of his common law power to arrest on reasonable suspicion of felony, and that there is an 'objective' issue in case of dispute to be determined by the court ? No other meaning has ever been suggested."

Learned Counsel for the petitioner relied on two judgments of the Supreme Court in support of the proposition that when a police officer arrests without a warrant on reasonable suspicion the facts disclosed must be matters within the police officer's own knowledge or on statements by other persons in a way which justify him in giving them credit.— *Muttusamy v. Kannangara*[1] 52 N. L. R 324 and *Corea v. The Queen*[2] 55 N.L.R. 457. In *Muttusamy v. Kannangara* Gratiaen J. held that it had not been affirmatively proved that the police officer "reasonably suspected" that the line rooms, he claimed the right to search without a warrant, did contain stolen property. Therefore the charge of obstructing the police officer in the lawful discharge of his duties had not been proved. In *Corea v. The Queen* at p. 463 Gratiaen J. observed that—

> "A police officer acts illegally in Ceylon (as in England) if he arrests a man without a warrant on a mere 'unexpressed suspicion' that a particular cognizable offence has been committed—unless, of course, 'the circumstances are such that the man must know the general nature of the offence for which he is detained' or unless the man 'himself produces the situation which makes it practically impossible to inform him'."

[1] *(1951) 52 N. L. R. 324.* [2] *(1954) 55 N. L. R. 457.*

It will be noted that in both *Muttusamy v. Kannangara* and *Corea v. The Queen* it was open to the police officer to arrest on reasonable suspicion if the police officer had knowledge of "statements by other person in a way which justify him in giving them credit" or "circumstances were such that the man must know the general nature of the offence for which he is detained" or the arrested person "produce the situation which makes it practically impossible to inform him".

These observations might postulate that it does not necessarily follow that in the case of an arrest by a police officer under the common law, the police officer must act on his own personal observations in acting on reasonable suspicion but is entitled to act on information received from a third party.

The language however, used in Regulation 19 is narrower and leaves no room for any test other than the strictly "objective" test. The two cases decided by Gratiaen J. also lay down another fundamental principle which has not been followed in this case and which could not have been followed having regard to the admitted facts, namely," that a police officer who arrests private citizens with or without a warrant is equally obliged to notify the arrested person of the reason for interfering with his personal freedom. A recognition of this fundamental rule (which owes its origin to the English common law) is demonstrably implicit in the scheme of the Code".—per Gratiaen J. in *Corea v. The Queen* at page 462. In both these cases Gratiaen J. followed the decision of the House of Lords in *Christie v. Leachinsky* (1947) A.C. 573.

I am unable to agree with the learned Deputy Solicitor-General that the principles of the English law have no application to the law of Ceylon. In my view the principles laid down in *Muttusamy v. Kannangara* and *Corea v. The Queen* do no more than affirm the principle stated in Section 53 of the Criminal Procedure Code. On the facts in the present case there was no evidence that the detainee had committed or was committing an offence under the Emergency Regulations and the only ground on which he could have been lawfully arrested was the personal knowledge of the 1st respondent based on reasonable suspicion (which might include information conveyed to him by the Superintendent of Police) that he had committed or was committing an offence under the Regulations.

A case very much in point and similar to the facts of the present case is *Deshpande v. Emperor* [1] decided by the High Court of Nagpur and reported in A.I.R. (1945), p. 8. In that case Deshpande was arrested and detained under Section 129 of the Defence of India Rules by a police officer on reasonable grounds of suspicion. Dealing with the suspicions of the Police Officer who effected the arrest the High Court made the following observations at p. 26 :—

> "The only affidavit we have on the side of the Crown is one which tells us about the suspicions entertained by the Provincial Government, not by the police officer making the arrest. But what we have to

[1] *A. I. R. (1945) Nagpur 8.*

determine here is what were his suspicions, and were they reasonable, and not what the Provincial Government's suspicions are; moreover, under R. 129 the Court has to determine whether the suspicions were reasonable and not the Provincial Government."

The decision of the Nagpur High Court which held that Deshpande's arrest and detention was unlawful was upheld by the Privy Council [1]— (1946) A.I.R. Privy Council,p. 123. Adopting the principles in the above cases to the facts of the present case it is apparent that the arrest of the detainee and his subsequent detention were unlawful and that he was entitled to be released from custody.

Before I conclude I wish to make some reference to the case of *Wiltshire v. Barrett* [2] (1965) 2 A.E.R. 271 cited by the learned Deputy Solicitor-General, where the words " committing an offence " in Section 6 (4) of the Road Traffic Act 1961 was held to mean " apparently committing an offence ", with the result that if any police officer reasonably came to the conclusion by reason of the conduct and condition of the driver and of other evidence that the driver was unfit to drive through drink, his arrest was justified and accordingly the arrest was lawful notwithstanding that the suspected offence was not committed. The observations of the Court of Appeal would be apposite to the case under consideration because in order to make the provision of the law effective the police officer had necessarily to be given the power to arrest a driver whom he reasonably suspects of being under the influence of liquor. As Davies L.J. said in the course of his judgment at p. 278—

" If a policeman who arrests under that section is to be liable to an action for damages unless he can prove that the arrested person is actually guilty of the offence, the police might well be chary of exercising the power. Even if a policeman were to find a motorist hardly able to stand, smelling of drink and almost unconscious, his condition might subsequently prove to have been due to causes other than drink or drugs. If the police were to refrain from exercising this power, the results might be serious indeed. Drunken motorists might be permitted to continue on their way, with all the dire possibilities which that would entail; and the chances of a successful prosecution would be seriously diminished, for by the time that a warrant had been obtained, the man might well have disappeared or become sober. It is obviously essential in the public interest that in such circumstances the power of arrest should be exercisable forthwith without fear of a subsequent action for damages for assault or false imprisonment."

[1] *(1946) A. I. R. (P. C.) 123.* [2] *(1965) 2 A. E. R. 271.*

Similar observations were made by Lord Wright in the House of Lords in the other case cited by Counsel—*Barnard v. Gorman*[1] (1941) A.C. 378 where the Court held that an " offender " under Section 186 of the Customs Consolidation Act, 1876, includes a person who is suspected on reasonable grounds to have committed the offence and therefore a person so suspected, though in fact not guilty, may be detained. The reason for such an attitude on the part of the Court was stated by Viscount Simon at p. 387—

> " when the question arises whether a statute which authorizes arrest for a crime should be construed as authorizing arrest on reasonable suspicion, that question has to be answered by examining the contents of the particular statute concerned rather than by reference to any supposed general rule of construction."

and Lord Wright at p. 394 stated this :—

> " The legislature may well have thought that when they give the power to arrest without warrant for particular conduct, the powe should be limited to the case of particular categories of persons whose previous conduct or character or reputation renders them peculiarly open to suspicion . . . . . "

Such arrests have been held to be lawful in the case of a person suspected to be a " common prostitute or night watcher loitering or importuning persons for the purpose of prostitution "—*Bowditch v. Baldin*[2] 5 Ex. 378 or a person suspected to be an " offender " and to have contravened the provisions of the Customs Consolidation Act—*Barnard v. Gorman* or a person charged under Section 6 (4) of the Road Traffic Act who appeared to the police officer to be apparently committing an offence—*Wiltshire v. Barrett*. These decisions therefore cannot support the submissions of the learned Deputy Solicitor-General in a case where a person is arrested without a warrant in his parental home at a late hour of the night in the company of his near relatives on the ground that the police officer arresting reasonably suspects him of committing an offence under the Emergency Regulations, information of which is not known to the officer arresting and consequently cannot be communicated to the person arrested. Unlike the English cases here there is not even evidence that he was apparently committing an offence.

I therefore agree that the arrest was illegal and the subsequent detention of the corpus unlawful.

Application allowed.

[1] *(1941) A. C. 378.*

[2] *5 Ex. 378.*