IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

S.C. APPLICATION 600/95

Gamini Perera, Attorney-at-Law 103/1, Shanthi Mawatha, Himbutana, Mulleriyawa.(For and on behalf of Saman Srimal Bandara Madakumbura, Officer in Charge of the Intelligence Unit, of the Special Task Force, presently detained at the Criminal Investigation Department, 4th Floor, Police Headquarters, Colombo 1)

Petitioner

Vs

1. W. B. Rajaguru Inspector-General of Police Police Headquarters, Colombo 1

2. Y. Sumanasekera, Deputy Inspector General of Police, Police Headquarters, Colombo 1.

3. O.P. Hemachandra, Senior Superintendent of Police, Director Criminal Investigations Department, Police Headquarters, Colombo 1

4. Bandula Wickramasinghe, Senior Superintendent of Police, Criminal Investigations Department, Police Headquarters, Colombo 1

5. Ashoka Wijeyathilake, Superintendent of Police, Criminal Investigations Department, Police Headquarters, Colombo 1

6. Uduwellage, Sub Inspector of Police, Criminal Investigations Department, Police Headquarters, Colombo 1

7. The Hon Attorney General, Atorney General's Department, Colombo 12

Respondents

BEFORE: FERNANDO, J., WADUGODAPITIYA, J. WIJETUNGA, J. ANANDACOOMARASWAMY, J.AND GUNAWARDENA, J.

COUNSEL: Tilak Marapana, P.C. with Nalin Ladduwahetty, Jayantha Fernando, Shanil Kularatne and Dammika Jayanetti for the petitioner.

Nihal Jayasinghe, D.S.G. with Palitha Fernando, S.S.C. and N. Pulle S.C. for the respondents.

ARGUED ON: June 26, 1997.

DECIDED ON: August 29, 1997

Fundamental Rights - Detention Order under Emergency Regulation 17(1) - Detention for an unspecified period - Validity of detention - Article 13(2) of the Constitution.

Regulation 17(1) of the Emergency Regulations provides inter alia, that where the Secretary is satisfied that any of the preconditions

set out therein exists, the Secretary may make order that a person be taken into custody and detained for a period not exceeding three months. The Secretary may extend such order from time to time, for a period not exceeding three months at a time. Provided however, that no person shall be so detained for a period exceeding one year. However, the detention order which was challenged by the petitioner did not specify the period of detention.

Held: (Anandacoomaraswamy, J.dissenting)

1. The necessity for detention and the period of detention are interwoven in ER 17(1). The Secretary must therefore necessarily consider what length of detention is appropriate, and the detention order must state that period, subject to the limit of three months imposed on the Secretary's power.

2. In the context, "for a period not exceeding three months" means "for a period therein specified, which period shall not exceed three months"; and that a detention order which

purports to authorise detention simpliciter, or detention "for a period not exceeding three months" is not in conformity with ER 17(1).

3. Since the impugned detention order merely ordered detention simpliciter, it was not "according to procedure established by law" and infringed the detenu's rights under Article 13(2) of the Constitution.'

Cases referred to:

1.*Ansalin Fernando v. Perera* (1992) 1 Sri L.R. 411.

2.*Leelaratne v. Herath S.C.* Application 145/86 S.C. Minutes 9 March 1987.

3.*Mallows v. CIT* (1962) 66 N. L. R. 321, 323.

APPLICATION for relief for infringement of fundamental rights.

August 29, 1997

FERNANDO, J.

Leave to proceed was granted in respect of the alleged infringement of the Fundamental rights of the detainee (whom I will refer to as the petitioner) under Articles 11, 13(1) and 13(2), consequent upon his arrest on 23.8.93.

According to the respondents, between 31.5.95 and 15.8.95, 21 dead bodies were found at various places, and:

"... the available material including the manner in which the dead bodies had been left exposed to the public gaze there [gave] grounds to reasonably suspect that the deaths of the persons whose dead bodies were found at the Bolgoda Lake, the Diyawanna Oya, and at Alawwa had been caused with the intention of instilling terror among the inhabitants of that area and that the [petitioner] had committed or had been concerned in the commission of the said acts and therefore had committed or had been concerned in the commission of offences in terms of Emergency Regulation 25(1) (a)."

The petitioner was then the Officer-in-charge of the Intelligence Unit of the Special Task Force of the Police.

Immediately after his arrest a Detention Order ("DO") under Emergency Regulation ("ER") 19(2) was issued, authorising his detention "for a period of 07 days with effect from 23.8.95". Thereafter, on 30.8.95, arising under ER 17(1), the Additional Secretary, Ministry of Defence, issued the impugned DO, stating his opinion that it was necessary

to take the petitioner into custody and to keep him in detention in order to prevent him from acting in a manner prejudicial to national security, and the maintenance of public order, and ordering that he be taken into custody and detained at the fourth floor of the C.I.D., Colombo.

What is relevant to the present application is that the Additional Secretary did not specify in that DO the period for which he authorised the petitioner's detention. Further, in the affidavit dated 7.12.95 which he filed in these proceedings he neither stated nor indicated that he had addressed his mind to the question of the period for which he thought it necessary to detain the petitioner and, if he had, what that period was. All he said was:

"I, having considered the material submitted to me was satisfied that the [petitioner] was a person whose detention was necessary to prevent him from acting in a manner prejudicial [to] national security and the maintenance of public order, and I acting in terms of the powers vested in me by [ER 17(1)) issued [DO] dated 30th August 1995 authorising the detention of the said [petitioner] in terms of the said Regulations."

Thereafter the petitioner was detained at the fourth floor of the C.I.D. until 14.11.95. he alleged that he had been subjected to torture and ill-treatment during part of that period, and had been compelled to sign several statements. He filed this application on 25.10.95, and on 27.10.95 when granting leave to proceed this Court directed the JMO, Colombo, to examine him. The JMO submitted a very detailed and comprehensive report in respect of medical examinations carried out by him on 14.9.95, 30.10.95, 9.11.95 and 20.11..95.

On 14.11.95 - before the expiry of three months after the issue of the DO of 30.8.95 - the Police produced the petitioner in the Magistrate's Court, and the learned Magistrate remanded him to the custody of the Fiscal, from Which the petitioner was released on bail on 15.2.96. We were informed at the hearing that up to date no criminal proceedings have been instituted against him.

This application was first argued before a bench consisting of my brothers Wadugodapitiya, Gunawardena and myself, and was referred by the Chief Justice to this bench of five Judges when we informed him that two questions of law of public and, general importance arose, namely:

1. Must the Secretary who makes an order under ER 17(1) consider for what period detention is necessary?

2. Must the detention order specify the period for which detention is considered necessary?

At the hearing before this bench, Mr. Marapana, PC, on behalf of the petitioner said, first, that the petitioner was not pursuing his claim under Article 11, but only because the

available medical evidence was insufficient to establish his allegations; and, second, that although his position was that the petitioner's arrest was upon suspicion of murder, and since that was an offence under the Penal Code his arrest and detention should have been under the ordinary law (see Ansalin Fernando v Pereral(1), and not under the Emergency Regulations, nevertheless he was not pursuing his claim under Article 13(1) in respect of the initial arrest. (Mr. Jayasinghe for the respondents maintained, however, that the arrest was for an offence under ER 25(1).)

I must also mention that the respondents had tendered to the Court a thick file of statements recorded by the Police, which according to them constituted the material which the 3rd respondent had considered before issuing the DO; as they considered it desirable that this should be perused only by the Judges, it was tendered under confidential cover (in terms of the procedure indicated in Leelaratne v. Herath(2). Although he said that he was unaware of its contents, Mr. Marapana did not object to this material being examined only by the Judges, and raised no question of noncompliance with the audi alteram partem rule. We pointed out, however, that, after we had studied that material without the benefit of submissions by Counsel on both sides, there might arise some doubt or difficulty requiring clarification: it would not seem right to seek such clarification in the absence of the petitioner, but if, on the other hand, clarification was sought inter partes some loss of confidentiality was inevitable. Mr. Marapana then stated that he was no longer pursuing his contention that the 3rd respondent could not have been "satisfied" on the material available to him.

It therefore became unnecessary for us to deal with any of the questions of fact and law involved in the petitioner's claims, other than the two questions of law referred to us.

ER 17(1) provides:

Where the Secretary is satisfied upon the material submitted to him, or upon such further additional material as may be called for by him, with respect to any person, that, with a view to preventing such person

(a) from acting in any manner prejudicial to the national security or to the maintenance of public order or to the maintenance of essential services, or

(b) from acting in any manner contrary to any of the provisions of sub-paragraph (b) of paragraph (2) of Regulation 32, or

(c) from committing, aiding or abetting the commission of any offence set out in Regulation 25 or Regulation 26.

It is necessary so to do, the Secretary may make order that such person be taken into custody and detained in custody for a period not exceeding three months and any such

order may be extended from time to time for a period not exceeding three months at a time.

Provided however that no person shall be so detained under this regulation for a period exceeding one year. The period of detention of such person may be extended if such person is produced before a Magistrate prior to the expiration of his period of detention accompanied by a report from the Secretary setting out the facts upon which the person is detained and the reasons which necessitate extension of the period of detention. Where the Magistrate is satisfied that there are reasonable grounds for extending the period of detention of such person, he may make order that such person be detained for a further period of time as specified in such order, which period should not exceed three months and may be extended by the Magistrate from "time to time." (emphasis added)

At first glance this formulation appears somewhat cumbersome and ambiguous. Does the phrase "necessary so to do" mean necessary to prevent a person acting in a manner set out in paragraphs (a), (b) and (c), OR necessary to make an order that such person be detained? Must the Secretary be "satisfied" only of the need to prevent a person acting in that manner, OR also of the need to make an order that he be detained? And if the latter, must he be "satisfied" only about the need for detention OR also about the period of such detention?

However, closer scrutiny reveals that on a proper grammatical interpretation, ER 17(1) is clear and unambiguous, and that it supplies the answers to four questions. What ORDER can the Secretary properly make? What OBJECT would justify such an order? WHEN can the Secretary make such an order? And on what MATERIAL can he do so? ER 17(1) means that:

1.The order which the Secretary may make is "an order that such person be (taken into custody and) detained for a period not exceeding three months";

2.The object justifying such an order would be that of ("with a view to") "preventing a person from acting in a manner prejudicial to the national security or to the maintenance of public order... etc.";

3. The Secretary may make such an order only when he "is satisfied that it is necessary so to do", i.e. that it is necessary to make such an order to achieve the aforesaid object;

4. The material on which the Secretary can be satisfied is "the material submitted to him, or upon such further additional material as may be called for by him";

And, further, "any such order may be extended from time to time for a period not exceeding three months at a time", subject to a maximum of one year.

This becomes clear if ER 17(1) is re-phrased - and that can be done without any change or loss of meaning - to follow the structure of the Sinhala text:

With a view to preventing a person

(a) from acting in any manner prejudicial to the national security or to the maintenance of public order or to the maintenance of essential services, or

(b) from acting in any manner contrary to any of the provisions of sub-paragraph (b) of paragraph (2) of Regulation 32, or

(c) from committing, aiding or abetting the commission of any offence set out in Regulation 25 or Regulation 26, if the Secretary is satisfied with respect to that person (upon the material submitted to him, or upon such further additional material as may be called for by him), that it is necessary to make an order that such person be taken into custody and detained in custody for a period not exceeding three months, he may make such order, and such order may be extended from time to time for a period not exceeding three months at a time.

Mr. Marapana contended that the Secretary must not only consider for what period detention is necessary, but also specify that period in the DO - because, he said, in the Secretary's decision-making process in terms of the current text of ER 17(1), whether to detain a person was a question inextricably linked with how long he should be detained. If, for instance, the Secretary was satisfied that a person was likely to act in a manner prejudicial to national security or detrimental to public order during a limited period (e.g. while a foreign dignitary was visiting Sri Lanka), the Secretary could not order his detention for a period which would extend beyond that limited period (e.g. after that dignitary's departure from Sri Lanka). Every decision to detain required some consideration of the appropriate period of detention. Whether he considered detention to be necessary for the maximum period, or any lesser period, the Secretary was bound to specify that period, no less than a Judge passing sentence or making a remand order. He also referred us to the previous texts of ER 17(1). I n Gazette 771/16 of 17.6.93, ER 17(1) is identical, except that there was no proviso. In the Gazette of 20.6.89, ER s17(1) reads:

"Where the Secretary to the Ministry of Defence is of opinion with respect to any person that, with a view to preventing such person

(a) from acting in any manner prejudicial to the national security or to the maintenance of public order or to the maintenance of essential services, or

(b) from acting in any manner contrary to any of the provisions of sub-paragraph (a) or sub-paragraph (b) of paragraph (2) of Regulation 41 or Regulation 26 of these Regulations,

it is necessary so to do, the Secretary may make order that such person be taken into custody and detained in custody."

He submitted that under the 1989 Regulations, it was permissible for the Secretary to consider only whether a person should be detained, without concerning himself about how long he should be detained.

He contended that the purpose of the 1993 amendment was both to restrict the period of detention (singly and cumulatively) and to require the Secretary to consider what length of detention was necessary and set it down in the DO.

Another matter which Mr. Marapana dwelt on was the curious situation which resulted from the Magistrate's order of 14.11.95. During the period 14.11.95 to 30.11.95 there was, on the one hand, an **executive** DO which, according to the respondents, was valid, unrevoked, and operative, and in terms of which the petitioner should have continued to remain in the custody of the C.I.D. On the other hand, there was a conflicting **judicial** order for fiscal custody. He contended that the Court order was valid, and that the DO was a nullity.

In written submissions filed on 24.7.97 after judgment was reserved, it was conceded on behalf of the respondents that ER 17 requires the Secretary when issuing a DO to give his mind to the necessity of the detention and the period for which such detention was necessary. I must note that in his affidavit the Additional Secretary did not state that he had considered for what period detention was necessary.

As for the need to specify the period of detention in the DO, the respondents sought to draw a distinction between the date of expiry of a DO, and the date of release of a detainee. ER 17 for the period of validity of a DO, namely three months. If a date prior to the expiry of three months appears on the DO, that would be "the date on which the detainee could be released as decided by the Secretary". That date of release cannot in certain circumstances be decided at the time the DO is issued. A person held in preventive detention till the conclusion of an event can be released on the conclusion of that event, because the date on which the need for such detention would cease could be stated with certainty at the time the DO is made. In such a situation the Secretary must mention the date of release in the DO, and if he does not it would be reasonable to infer that he had not given his mind to that matter. But where it is not possible for him to state the date of release, no date of release need be stated in the DO. The DO refers to ER 17, and the detainee would know that on the expiry of three months the Secretary would review the need for further detention."

Mr. Jayasinghe repeatedly stressed the seriousness of the situation, arising from the sudden discovery of a large number of dead bodies, in which the impugned DO had

been issued; and that the order was in the public interest. He also contended that the statements made by the petitioner after his arrest were suggestive, to put it at the lowest, of his complicity. But the two questions which we have now to decide do not depend on whether there was a reasonable suspicion of guilt, or other such questions. All we have to decide is whether, as a matter of law, the Secretary is required to consider the appropriate period of detention, and to state it in his DO; and, if so, whether this DO is invalid for want of due compliance with those requirements. The answers to those questions remain the same, whether initially the case against a detainee seems damning (or otherwise), or whether later he proves to be guilty (or innocent).

As for the conflicting orders in force between 14.11.95 and 30.11.95, it was not Mr. Jayasinghe's contention that the petitioner was produced before the Magistrate under and in terms of the proviso to ER 17(1), i.e. "prior to the expiration of his period of detention accompanied by a report from the Secretary setting out the facts upon which the person is detained and the reasons which necessitate extension of the period of detention". Presumably, he must have been produced under the Code of Criminal Procedure Act. If Mr. Jayasinghe was correct in submitting that the DO issued by the 3rd respondent was valid for three months, then it would follow that the Magistrate's order had been made without jurisdiction; and consequently that the petitioner's detention in fiscal custody after 14.11.95 was illegal.

The principal matter I have to consider is what precise order the Secretary can make and issue in respect of detention (leaving aside, for the moment, the arrest itself) - i.e. what must the DO actually state: is it enough to say "that X be detained", without more; OR must it say "that X be detained [for a period)" (specifying, for example, "for sixty days from today", or "until 30.11.95); OR can it even be said "that X be detained for a period not exceeding three months"?

In interpreting ER 17(1), the paramount consideration is that it is a provision conferring on an executive - and not a judicial - officer the power of depriving a citizen of his liberty for three months (quite apart from further extensions up to one year), and that, too, despite the absence of a conviction, a charge, and a pending trial. If a citizen is deprived of his liberty by the order of a competent Court, upon his conviction for, say, using criminal force (which is punishable with imprisonment for a term which may extend to three months) - and that, too, after a trial at which all the safeguards which the law provides have been observed - the Judge cannot simply sentence him to "imprisonment" (or to "imprisonment for a term not exceeding three months"); the Judge must first consider what period of deprivation of liberty is appropriate, and must go on to specify that period in his order without any uncertainty, for the information of the accused (and of those responsible for his custody). If he decides upon the maximum sentence, he must say so, and cannot leave it to be inferred. The Law gives even a convicted criminal that right, because he must know the consequences of the decision: what impact the loss of liberty would have on himself, his employment, and his family. In the absence of compelling language, I cannot presume that the Law intended to allow executive deprivation of liberty with less respect and concern for the liberty of the

citizen, when effected without conviction, charge, or pending trial, and without the safeguards (natural justice, legal representation, confrontation with one's accusers, and the like) of a judicial proceeding. That strongly suggests that the Secretary must consider and specify the necessary period of detention.

I need not speculate what the position might be if ER 17(1) had refereed not to three months, but to three years or three days. Whether it is for three years or for "only" three days, it is a deprivation of liberty. But we have to interpret ER 17(1) as it stands now; while deprivation of liberty for three years would undoubtedly be very serious, deprivation for three months is sufficiently significant as to require basic safeguards - whether or not the position might be different if there were a less significant deprivation of liberty, for 24 hours, or three days.Further, as Mr. Marapana submitted, the question of detention, the necessity for detention, and the period of detention, are interwoven in ER 17(1). There cannot be an abstract decision to detain a person. The power to detain has been conferred on the Secretary in the public interest and to be used for the public benefit; detention can only be ordered in fulfilment of the purpose for which that power was given; detention must therefore be for one of the specified reasons; and that reason will almost always control or affect the required length of detention. ER 17(1) is clear that the Secretary must be satisfied that it is necessary to order detention "with a view to preventing" prejudicial conduct. The period during which the "objectionable" activity is anticipated and the period of detention must coincide - subject to the limit of three months imposed on the Secretary's power. He must therefore necessarily consider what length of detention is appropriate, and the DO must state that period, because now ER 17(1) authorises an order of detention "for a period", and not just "detention".

I must deal with the proviso to ER 17(1), which enables the Magistrate, if satisfied that there are reasonable ground for extending the period of detention, to order detention "or a further period of time as specified in such order, which period should not exceed three months". The Magistrate must therefore specify the period. Does the fact that different language has been used in relation to the Secretary mean that he need not specify the period? There is certainly a difference in phraseology, but I do not think that is of any significance in the context. The Secretary "may make order that [a] person be **detained for a period not exceeding three months"**. To ascertain the effect of that phrase, let me consider it in three stages.

If the provision had authorised the Secretary simply to "order that [a] person be **detained",** it would probably not have been imperative for him to consider or specify the period of detention. If it had authorised an "order that [a] person be **detained for a period**", then it would have been mandatory to consider and specify the necessary period; and, what is more, there would have been no limit on the period of detention which the Secretary could order (although, of course, there could be judicial review). It was the addition of the words **"not exceeding three months"** which imposed a limitation on the period: consequently, even if the Secretary justifiably considers that six months detention is necessary, nevertheless he can only order three months. The purpose and the effect of those words was therefore to restrict the Secretary's power,

and not to dispense with the need either to consider or to specify the period of detention which he considered necessary in order to attain one or more of the prescribed objects.

I must now turn to the alleged distinction between the date of expiry of the DO and the date of release of the detainee. That is not a distinction warranted by ER 17. ER 17 requires the Secretary to consider what period of detention is needed. That automatically determines the period of validity of the DO and the date of release: no further detention is possible under that DO - unless action is taken to extend it. The opinion which the Secretary forms cannot remain unrecorded; it must certainly be the subject of an official record (Mallows v. C. L T.(3) and being a matter which concerns the liberty of the citizen it must also be communicated to the detainee, unless there are plain words which dispense with such communication.

I hold that, in the context, "for a period not exceeding three months" means "for a period therein specified, which period shall not exceed three months"; and that a DO which purports to authorise detention **simpliciter**, or detention **"for a period not exceeding three months",** is not in conformity with ER 17(1). I answer both questions referred to us in the affirmative. Since the impugned DO merely authorised detention **simpliciter**, it was not in compliance with ER 17(1), and was therefore not "according to procedure established by law". **I hold that the petitioner's fundamental right under Article 13(2) has been infringed, and direct the State to pay him a sum of Rs. 25,000 as compensation and a sum of Rs. 15,000 as costs**.

WADUGODAPITIYA, J. - I agree.

WIJETUNGA, J. - I agree.

GUNAWARDENA, J. - I agree.

Relief granted.

ANANDACOOMARASWAMY, J. (Dissenting)

I have read the judgment of my brother Fernando, J. and I regret that I am unable to agree with him for the reasons given below.

This is an application for relief for the alleged infringement of the Fundamental Rights of the petitioner under Articles 11, 13(1) and 13(2), consequent upon his arrest on 23.08.1995. Leave to proceed was granted and the matter was fixed for argument before a Bench consisting of my brothers Fernando, J., Wadugodapitiya, J. and Gunawardene, J. and was thereafter referred by the Chief Justice to this Bench of Five Judges on the following questions of law, namely:

1. Must the Secretary who makes an order under ER 17(1) consider for what period detention is necessary?

2. Must the detention order specify the period for which detention is considered necessary?

At the hearing before this Bench Mr. Marapana P.C., Counsel for the petitioner said that the petitioner was not pursuing his claim under Articles 11, 13(1) and 13(2). This alone is sufficient to dismiss the petitioner's application.

It is therefore unnecessary to deal with any of the questions of fact and law involved in the petitioner's application except the two. questions of law referred to this Bench. According to those two questions of law, the question is whether the Detention Order under the Emergency Regulation 17(1) is invalid for want of due compliance if any with those requirements.

It is the petitioner's contention that the Detention Order should specify the period of detention. The fact that the Secretary did not specify the period makes that order invalid.

A parallel was drawn stating that if a Judge in his order has to specify the period of remand or the period of jail term, how can an executive officer have the privilege of not mentioning the period of detention. In the case of judicial order the command is addressed to the executive to keep a suspect in remand for a specified period and to bring before him at the end of the period for further orders from time to time, until either he is charged or discharged. In the case of convicts sent to jail the period of imprisonment is specified as the executive has to release the convict after the specified period. The Detention Order is issued by the executive to keep the suspect in his custody in an authorised place of detention. Therefore if the executive decides to detain a suspect he can do so without specifying the period so long as he does not exceed the maximum period. If he exceeds the period only there arises a need for a judicial review of that order provided the detention is otherwise lawful. In the instant case the Secretary did not exceed the maximum period of three months and within that period he caused the suspect to be produced before the Magistrate who remanded the suspect. The Detention Order was effective from 30th August, 1995 which would have expired on 30th November, 1995, but before that, the suspect was produced before the Magistrate on 14th November, 1995 and remanded. Therefore the judicial order superseded the Detention Order, as rightly pointed out by the Learned Counsel for the respondents.

It is therefore quite clear that the Secretary is not bound in law to specify the period of detention when the law provides the maximum period of detention and the Detention Order issued by the Secretary is valid in law.

Even if the Detention Order is invalid for the reason that the period of detention is not specified, it is not a fatal error and has not in anyway caused prejudice to the petitioner.

For these reasons I am of opinion that the Detention Order issued by the Secretary is valid in law and therefore the petitioner's application has to be dismissed. Accordingly I dismiss the petitioner's application.

Application dismissed.

By majority decision relief granted.