

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

In the matter of an application under Article 126 of the Constitution.

**S. C. APPLICATION No. 156/95.**

Mohamed Thoufeek Ameerul Farook, No. 25  
Pamankada Lane, Colombo 6.

**Petitioner**

**Vs**

1. Quintus R. Raymond, Chief Inspector of Police,  
Officer in Charge, Police Station, Minuwangoda.

2. Sub Inspector Silva, Police Station, Minuwangoda.

3. The Attorney General, Attorney General's  
Department, Colombo 12.

**Respondents**

**BEFORE:** **G. P S. DE SILVA C.J.,  
AMERASINGHE J. AND  
RAMANATHAN J.**

**COUNSEL:** R. K. W. Goonesekera with N. M. Saheed for Petitioner.  
Kolitha Dharmawardena D.S.G. for Respondents.

**ARGUED ON:** 20 JUNE, 1996.

**DECIDED ON:** August 02, 1996.

*Fundamental Rights - Constitution, Article 13 (1) & (2) - Has the Court jurisdiction to entertain a petition alleging violation of fundamental rights arising from the order of a judicial officer? Can Magistrate order detention under the Customs Ordinance? Customs Ordinance, sections 126, 127 -Confiscation of passport - Arrest and detention other than as authorized by law.*

Five matters arose for consideration:

(1) Were the 1st and 2nd respondents - Police Officers - acting in accordance with procedure prescribed by law?

(2) Was the detention of the petitioner, after he was produced before the Magistrate, "upon and in terms of the order of such judge made in accordance with procedure established by law?"

(3) If the petitioner was held in custody upon and in terms of the order of a judge that was not made in accordance with procedure established by law, is there a violation of any fundamental right recognized and declared by the Constitution?

(4) If there was a violation, what may the Court legitimately do?

(5) What is the appropriate order to be made?

The 2nd Respondent stopped a motor vehicle at a road block and suspecting that the goods in the car were stolen or smuggled took the driver of the car and its two passengers to the Minuwangoda Police Station. When it transpired that the goods belonged to the petitioner, the 1st respondent requested him to report at the Police Station and when he did, treated him roughly, put him in the cell and after two hours directed Inspector Pathirana to record his statement. When the petitioner tried to explain matters to the 1st Respondent he abused him. The 1st Respondent also took into his custody the Petitioner's passport. After the Petitioner's statement was recorded he was put back into the cell. The 1st Respondent's allegation against the Petitioner was that an offence against the Customs Ordinance had been committed.

The 2nd Respondent produced the Petitioner and the two passengers of the vehicle who were Petitioner's employees and the driver of the vehicle which had been hired before the Magistrate of Minuwangoda at his residence alleging that the Petitioner and his employees had committed an offence under the Customs Ordinance and requesting that the Petitioner and his two employees be detained at the Minuwangoda Police Station pending further investigations. The driver of the vehicle was released on bail, but the petitioner and his two employees who were the passengers in the vehicle, were ordered by the Magistrate to be detained at the Minuwangoda Police Station.

They were released on 17 April and the goods were ordered to be handed to the District Secretary.

**Held:**

1. The actions of the Police can be referable only to section 126(1) of the Customs Ordinance. The subsequent steps to be taken are prescribed in section 127. Imprisoning the Petitioner and confiscating his passport, and bringing the Petitioner before a Magistrate and requesting the Magistrate to order the further detention of the Petitioner in police custody, were things the 1st Respondent was neither required nor authorized by law to do. And by not producing the petitioner 'with all convenient

despatch' before the nearest Director-General of Customs or other Customs officer, he failed to act according to procedure established by law viz. section 127 of the Customs Ordinance. The 1st Respondent acted in contravention of the petitioner's fundamental right guaranteed by Article 13(1) of the Constitution of freedom from arrest except according to procedure established by law.

2. The learned Magistrate had in his order of detention, stated that he is acting under the provisions of the Customs Ordinance and section 124 of the Code of Criminal Procedure Act. The provisions of the Customs Ordinance do not authorize a Magistrate to order the detention of suspects in police custody.

Section 124 of the Code of Criminal Procedure Act require the Magistrate to assist an investigation by making appropriate orders etc. but the provisions do not enable the Magistrate to make an order of detention.

The detention of the Petitioner after he was produced before the Magistrate was not "upon and in terms of the order of such judge made in accordance with procedure established by law".

**Quaere: *per Amerasinghe J:***

The order of the Magistrate appears immediately below the second page (the first page is missing) of a report filed by the 1st Respondent in which the 1st Respondent requests the detention of the Petitioner and his two employees for four days at the Minuwangoda Police Station. Where is the first page? How authentic is the record submitted by the Magistrate?"

**3. *Per Amerasinghe J:***

"The object of Article 13(2) of the Constitution is to afford a person who has been deprived of his personal liberty by executive action, to have the benefit of placing his case before a neutral person - a judge - so that a judicial mind may be applied to the circumstances and an impartial determination made in accordance with the applicable law. The provision is designed to eliminate arbitrariness in depriving a person of his liberty, and this extends to the exclusion of arbitrariness on the part of a judge who orders that a person brought before him be further held in custody, detained or deprived of personal liberty. If in depriving a person of his liberty a judge does not act according to procedure established by law, there is a contravention of the guarantee enshrined in Article 13(2) of the Constitution".

4. The Judiciary is one of the three limbs of the state and a judicial officer may be involved in the violation of a fundamental right in the exercise of his duties. The present case is an example. However judicial power can only be exercised if the Court, tribunal or institution has jurisdiction. Article 126 (1) however limits the jurisdiction of the Supreme Court to an infringement or imminent infringement by executive or administrative action.

**Semble: Per Amerasinghe J:**

"..... Where a judge has abdicated his authority, for example by complying with or acceding to or acquiescing in proposals made by police officers and acting in concert with them, consenting rather than assenting, he would not, in my opinion, be acting judicially: it may be the act of an officer appointed to perform judicial duties and functions, but it would not be a judicial act.

5. Although it has been contended that the learned Magistrate had acted 'mechanically' and complied with the proposal made by the police, there is insufficient evidence adduced to arrive at such a conclusion.

6. The 1st Respondent has violated the fundamental rights of the Petitioner guaranteed by Article 13(1) of the Constitution.

**Cases referred to:**

1. *Naresh Mirajkar v. Maharashtra* A1 R 1967 SC 1
2. *Budan Choudhary v. Bihar* AIR 1955 SC 191.
3. *Snowden v. Hughes* (1944) 321 US1.
4. *Perera v. University Grants Commission* 1 FRD 103.
5. *velmurugu v. A. G.* 1 FRD 180, 223.
6. *Goonewardena v. Perera* 2 FRD 246.
7. *Saman v. Leeladasa* [1989] 1 Sri LR 1.
8. *Huddart, Parker Pty, Ltd. v. Moorehead* (1908 - 1909) 8 CLR 330, 357.
9. *Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation* (1931) AC 275, 295.
10. *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.* (1949) AC 134, 149.
11. *Kumarasinghe v. A. G. S. C. Application 52/82* S.C. Minutes of 06 September, 1982.
- 12 *Siriwardena v. Liyanage* (1983) 2 FRD 310, 342 - 343.
13. *Dayananda v. Weerasinghe* (1983) 2 FRD 292, 297.
14. *Leo Fernando v. A. G.* [1985] 2 Sri LR 341.

15. *Jayasinghe v. Mahendran and Others* [1987] 1 Sri LR 206.

16. *Dharmatileke v. Abeynaike S. C. Application* 156/86 S. C. Minutes of 15 February, 1988.

17. *Cannosa Investments Ltd. v. Ernest Perera and Others* (1991) 2 Sri L. R. 214.

18. *Siriyawathie v. Pasupathi and Jansz S. C. Application* 112/86 S. C. Minutes of 28 April, 1987.

**APPLICATION** for relief for infringement of fundamental rights.

August 02, 1996.

**AMERASINGHE, J.**

The Petitioner complains that his rights guaranteed by Article 13 of the Constitution were violated. The submissions of learned counsel on the 20th of June, 1996 were principally concerned with the circumstances in which the Petitioner was taken into custody by the Respondents and detained by them on the order of a Magistrate. The Court took time to consider the submissions of learned counsel, and during that time it was felt that the assistance of learned counsel should be sought on the question whether the Court had jurisdiction to entertain a petition alleging the violation of fundamental rights arising from the order of a judicial officer. The Court therefore called for written submissions on that matter to be filed by the 25th of July 1996. The Court acknowledges its indebtedness to learned counsel for their assistance.

There are five matters for consideration: (1) Were the first and second Respondents - the police officers - acting in accordance with procedure prescribed by law? (2) Was the detention of the Petitioner, after he was produced before the Magistrate, "upon and in terms of the order of such judge made in accordance with procedure established by law"? (3) If the Petitioner was held in custody upon and in terms of the order of a judge that was not made in accordance with procedure established by law, is there a violation of any fundamental right recognized and declared by the Constitution? : (4) If there was a violation, what may the Court legitimately do?: (5) What is the appropriate order to be made?

*Were the first and second Respondents -the police officers - acting in accordance with procedure prescribed by law?*

According to an entry made by the 2nd Respondent in the Grave Crimes record of the Minuwangoda Police Station, dated 12th April 1995, upon information received that smuggled goods were being transported in a Morris Minor bearing registration No. 23 Sri 2044, a road block was set up, and the vehicle was stopped by the 2nd Respondent and a police constable. 75 dozen ties, ladies' handbags, children's shoes, school bags and baby napkins were found in two bags. Under the front seats were two boxes, each

containing 1000 wristwatch 'circuits'. One of the passengers had a Customs receipt issued to M. T. A. Farook dated 11.4.1995 (1 R2) which stated that a sum of Rs. 21571/-had been paid as duty, made up as follows:

"Duty 9725  
TT.10080  
D. L. 7771 "

The receipt did not contain any other information.

The 2nd Respondent in his affidavit states that since he found it difficult to decipher the contents of the receipt - he states that it was "illegible" - and since the receipt "did not bear an immediate explanation to the goods in the car", and since the receipt was in the name of a person who was not in the car, he "entertained a reasonable suspicion that the goods found in the vehicle were either stolen or smuggled goods", and therefore arrested the driver and the two passengers and took them to the Minuwangoda police station for further investigation. When it transpired that the goods belonged to M.T.A. Farook, the Petitioner in these proceedings, the 1st Respondent on the 13th of April 1995 requested the Petitioner to report to the Police Station at Minuwangoda. The Petitioner went to the police station.

In paragraph 7 (a) of his affidavit, the 1st Respondent states that "on the material which was then available as a result of the investigations, (he) questioned the Petitioner and thereafter explained to the Petitioner that he had committed an offence under the Customs Ordinance and arrested him" In paragraph 7 (b) of his affidavit the 1st Respondent states that he "took charge of the passport of the petitioner for the purpose of investigating whether there was any truth in the assertion made by the Petitioner. Thereafter the Petitioner made a statement to the police:'

What was the "assertion made by the Petitioner" before his statement was recorded that made it necessary for the 1st Respondent to take over the Petitioner's passport? The passport was not returned until the Supreme Court on the 22nd of March 1996 ordered its return. Under what provision of law was the petitioner deprived of his passport? Even if a law enforcement officer is empowered to deprive a person of his personal liberty, he must do so strictly in accordance with procedures prescribed by law: on the one hand if there are provisions of law regulating matters that are incidental to the arrest and detention of a person, those provisions must be strictly complied with: On the other hand a law enforcement officer cannot arrogate to himself powers that the law does not expressly confer on him.

In his first statement to the police (1 R4) on 13th April 1995, the Petitioner said that he was a trader who frequently travels abroad to purchase various goods. After one such journey to Hong Kong, he arrived at the airport at Katunayake on the night of the 11th of April 1995. He stated that he had on that occasion brought 75 dozen ties, 2000 "watch machines" and various other goods.

Mr. Dharmawardene drew our attention to the fact that when the Petitioner was questioned on the 17th of April 1995 about the document 1R12 - the Customs Declaration form he had filled on the night of 11th April in which the items declared were

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"Personal clothing  
Tie (s) 80 doz.  
Batteries 30 pkts.  
Children's wear (sic.) 10 pcs.",

- the Petitioner in a second statement to the police (which has been filed of record in these proceedings) stated that he had sold the batteries on the 12th morning and that he had purchased 2000 watch machines in Colombo which he entrusted to his employees for delivery to a customer.

According to the 1st Respondent, the Petitioner arrived at the police station at 1.30 p.m. According to the police record (1R4) the Petitioner's statement was recorded at 2.10 p.m.; and according to the 1st Respondent in paragraph 7 (c) of his affidavit and paragraph 8 of the affidavit of the 2nd Respondent, the Petitioner was produced before the Magistrate of Minuwangoda at 3.50 p.m.

The Petitioner's version is different. According to paragraph 14 of his affidavit, on the 13th of April 1995 certain police officers had visited his residence in Colombo and left a message for him to report at the Minuwangoda Police Station. He went there at about 10.30 a.m. The 1st Respondent arrived at the station at about noon and questioned him as to how he came to possess the goods. Before he could explain, the 1st Respondent directed a police officer to put him in a cell. After about two hours the 1st Respondent called the Petitioner to his office and handed him over to Inspector Pathirana to have his statement recorded. The Petitioner states that when he tried to explain to the 1st Respondent how he had brought the neck-ties from Hong Kong and to produce the receipt issued by Customs for the payment of duty, the 1st Respondent abused him and directed the Sub-Inspector to record his statement and hand him over thereafter to the Customs authorities. After his statement was recorded, the 2nd Respondent put him back in the police cell. In paragraph 17 of his affidavit the Petitioner states that the 2nd Respondent produced the Petitioner, the two passengers of the vehicle, who were his employees, and the driver of the hired vehicle, before the Magistrate of Minuwangoda at his residence alleging that the Petitioner and his employees had committed an offence under the Customs Ordinance and requesting that the Petitioner and his two employees be detained at the Minuwangoda Police Station pending further investigations. The driver of the vehicle was released on bail, but the Petitioner and his two employees who were the passengers in the vehicle, were ordered by the Magistrate to be detained at the Minuwangoda police station.

There is no specific denial by the 1st or 2nd Respondents that the Petitioner was placed in a cell. The statement of the Petitioner according to the police records was made at 2.10 p.m. This was, as the Petitioner states, about two hours after the arrival of the 1st

Respondent. The Magistrate's order indicates that it was made at his residence at 6 p.m. On a consideration of the evidence, I am inclined to believe the Petitioner's narration of the events of the 13th of April 1995.

Unlike the 2nd Respondent who states that he had supposed the goods might have been stolen or smuggled, the 1st Respondent had no doubt in his mind: the goods were brought into the country in contravention of the Customs Ordinance. In paragraph 7 (a) of his affidavit the 1st Respondent states that he "explained to the Petitioner that he had committed an offence under the Customs Ordinance and arrested him:'

That being the case, did the 1st Respondent who took over matters after the 2nd Respondent had made the arrest, act in accordance with procedure established by law? Mr. Goonesekere submitted that, assuming the police were acting within their lawful powers, their actions can be referable only to section 126 (1) of the Customs Ordinance. The subsequent steps to be taken are prescribed in section 127. Imprisoning the Petitioner and confiscating his passport, and bringing the petitioner before a Magistrate and requesting the magistrate to order the further detention of the Petitioner in police custody, were things the 1st Respondent was neither required nor authorized by law to do. And by not producing the Petitioner' with all convenient despatch' before the nearest Director-General of Customs or other Customs officer, he failed to act according to procedure established by law, viz. section 127 of the Customs Ordinance. I find myself in agreement with Mr. Goonesekere's submissions. I have no hesitation in declaring that the 1st Respondent acted in contravention of the Petitioner's fundamental right guaranteed by Article 13 (1) of the Constitution of freedom from arrest except according to procedure established by law.

**Was the detention of the petitioner after he was produced before the magistrate, "upon and in terms of the order of such judge made in accordance with procedure established by law?**

The order of the magistrate appears immediately below the second page (the first page is missing) of a report filed by the 1st respondent in which the 1st respondent requests the detention of the Petitioner and his two employees for four days at the Minuwangoda police station. Where is the first page? How authentic is the record submitted by the magistrate? (See the observations of the Court comprising G.P.S. de Silva, C.J., Kulatunga and Ramanathan, JJ. dated 04.08.95 and the observations of Kulatunga, J. on 23.08.95 and 24.08.95 in the record of this case). The learned magistrate acceded to the request of the 1st respondent and ordered that the petitioner and his two employees be kept in the custody of the police at the Minuwangoda police station. They were released on bail on the 17th of April and the magistrate made order that the goods be handed over to the District Secretary for further action to be taken under the Customs Ordinance.

The learned Deputy Solicitor-General in his further written submissions made at the request of the Court states as follows:



"1. It is respectfully submitted that the learned magistrate has in his order of detention, stated that he is acting under the provisions of the Customs Ordinance and section 124 of the Code of Criminal Procedure Act. It is respectfully submitted that the provisions of the Customs Ordinance do not authorize a magistrate to order the detention of suspects in police custody. It is further submitted that even though the provisions of section 124 of the Code of Criminal Procedure Act require the magistrate to assist an investigation by making appropriate orders etc., the provisions do not enable the magistrate to make an order of detention. Therefore, it is submitted that the order of detention made by the learned magistrate is not in accordance with procedures established by law."

I find myself in agreement with the submissions of Mr. Dharmawardene and commend his exemplary fairness.

I am of the view that the detention of the Petitioner after he was produced before the magistrate was not "upon and in terms of the order of such judge made in accordance with procedure established by law".

**If the petitioner was held in custody upon and in terms of the order of a judge that was not made in accordance with procedure established by law, is there a violation of any fundamental right recognized and declared by the Constitution?**

Article 13 (2) provides as follows: "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge **made in accordance with procedure established by law.** (The emphasis is mine). The object of Article 13 (2) of the Constitution is to afford a person who has been deprived of his personal liberty by executive action, to have the benefit of placing his case before a neutral person - a judge - so that a judicial mind may be applied to the circumstances and an impartial determination made in accordance with the applicable law. The provision is designed to eliminate arbitrariness in depriving a person of his liberty, and this extends to the exclusion of arbitrariness on the part of a judge who orders that a person brought before him be further held in custody, detained or deprived of personal liberty. If in depriving a person of his liberty a judge does not act according to procedure established by law, there is a contravention of the guarantee enshrined in Article 13 (2) of the Constitution.

*If there was a violation what may the Court legitimately do?*

Mr. Goonesekere in his further written submissions, referring to H. M. Seervai, Constitutional Law of India, 3rd Ed. (1983) Vol. 1 pp. 225236; *Naresh Mirajkar v. Maharashtra*,<sup>(1)</sup> per *Das, J. in Budan Choudhry v. Bihar* (2) following Frankfurter, J. in *Snowden v. Hughes*, (3) maintained that in India and in the United States, it had been held that, judges could be involved in the violation of fundamental rights. The liability for violations of fundamental rights was the liability of the State: *Perera v. University Grants Commission*,<sup>(4)</sup> *Velmurugu v. A.-G.*,<sup>(5)</sup> *Goonewardene v. Perera*, (6) *Saman v.*

*Leeladasa*(7). The judiciary was one of the three 'limbs' of the 'State', the other two being the legislature and the executive. A transgression by a judge made the State liable.

I have no hesitation in accepting the position that the judiciary is one of the three limbs of the State and that a judicial officer may be involved in the violation of a fundamental right in the exercise of his duties. The case before us is an example. However, when we consider the decisions in other jurisdictions, it is important to consider the relevant Constitutional provisions under which they have been made. Although our Constitution has many provisions that are based on the Constitution of India, there are others that significantly differ. Unlike the American and Indian Constitutions, the Constitution of Sri Lanka expressly confines the justiciability of fundamental rights. Article 17 provides that "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". (The emphasis is mine). "This Chapter" refers to the Chapter on Fundamental Rights. Article 126(1) provides that 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 ..... declared and recognized by Chapter III . . .". (The emphasis is mine). Article 126 (2) provides that "Where any person alleges that any such fundamental right ..... relating to such person has been infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf... apply to the Supreme Court..... praying for relief or redress in respect of such infringement." (The emphasis is mine).

Article 3 of the Constitution states that Sovereignty is in the People. Article 4 prescribes the manner in which the Sovereignty of the People shall be exercised. Article 4 (c) states that "the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established or recognized, by the Constitution..... " The exercise of judicial power does not begin until some court, tribunal or institution created and established or recognized by the Constitution which has capacity to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action: Cf. per Griffith, C.J. in *Huddart, Parker Pty. Ltd. v. Moorehead*,<sup>(8)</sup> approved by the *Privy Council in Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation*,<sup>(9)</sup> and in *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*,<sup>(10)</sup>. Judicial power can only be exercised if the court, tribunal or institution has jurisdiction. Jurisdiction is the authority which a court, tribunal or institution has "to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision: The limits of this authority are imposed by the statute under which the court, tribunal or institution is constituted, and may be extended or restricted by the like means: Cf. Halsbury, 3rd Ed. Vol. 9 pp. 350-351. The Supreme Court was created by Article 105 of the Constitution. Article 126 (1) of the Constitution provides that the Supreme Court has sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement of any fundamental right declared and recognized by the Constitution, but

it expressly limits the jurisdiction of the Court to an infringement or imminent infringement by executive or administrative action.

As Mr. Dharmawardene pointed out in his further written submissions, the Supreme Court has consistently taken the view that violations of fundamental rights by a judge acting judicially or by someone executing his orders, will not attract the provisions of Article 126 of the Constitution, although the judge's decision be erroneous or constitutes a wrong exercise of judicial discretion even if such decision or wrongful exercise of discretion is based on false or misleading material furnished to him maliciously: *Velmurugu v. A.-G.*(5) *Kumarasinghe v. A.-G.*,(11) *Siriwardene v Liyanage*(12) *Dayananda v. Weerasinghe*,(13) *Leo Fernando v. A.-G.*,(14) *Jayasinghe v. Mahendran and Others*,(15) *Dharmatilleke v. Abeynaike*,(16) *Saman v. Leeladasa*,(7) *Cannosa Investments Ltd. v. Ernest Perera and Others.* (17)

In *Siriyawathie v. Pasupathi and Jansz*,(18) the Court ordered the petitioner to be produced before the magistrate for release, and it ordered the payment of compensation by the State. The petitioner had been ordered to be detained *sine die* although the magistrate was empowered by law to detain the petitioner for 15 days. The petitioner had been in prison for seven years. There is no reference in the judgment to the effect of Article 126 read with Article 17. The Court expressed the view that there had been a failure on the part of the executive authorities to rectify the matter.

Mr. Goonesekere expressed the opinion that the decisions of the Supreme Court "far from securing and advancing fundamental rights as required by Article 4 (d) have allowed gross violations of fundamental rights to go unpunished owing to a misreading of the doctrine of judicial immunity in the context of a fundamental rights jurisdiction." As an 'organ of government', the judiciary is obliged to respect, secure and advance the fundamental rights which are declared and recognized by the Constitution. It does so every day. The numerous decisions of this Court upholding the fundamental rights of citizens, including this decision, demonstrates the unique and important role played by this Court in advancing fundamental rights. However, the Court acts in accordance with the law. Whatever the reasons may be that lead the framers of the Constitution so to do, the Constitution limits the jurisdiction of the Court to violations of fundamental rights by executive or administrative action.

In the cases that have come before the Court, the infringements resulted from acts of judges acting judicially, albeit erroneously. On the other hand if the person making the order was not fulfilling the functions and duties proper to an officer appointed to administer the law, viz. to form and pronounce an independent opinion on a matter placed before him, he cannot be said to be acting 'judicially'. If he has been deprived by the law of the power of deciding and acting according to his own judgment, he cannot act 'judicially': discretion is an attribute, an inherent and essential characteristic, of judicial office: where discretion is ousted by law, the duties, functions and powers appurtenant to judicial office are also taken away. (Cf. per de Alwis, J. in *Joseph Perera v. The Attorney-General*.(19) Similarly, where a judge has abdicated his authority, for example by complying with or acceding to or acquiescing in proposals made by police

officers and acting in concert with them, consenting rather than assenting, he would not, in my opinion, be acting judicially: it may be the act of an officer appointed to perform judicial duties and functions, but it would not be a 'judicial act'. Although learned counsel for the petitioner did submit that the learned magistrate had acted 'mechanically' and complied with the proposal made by the police, there is insufficient evidence adduced before us to arrive at such a conclusion.

However, I direct that a copy of this judgment together with the record in S. C. Application 156/95 be submitted by the Registrar of the Supreme Court to the Judicial Service Commission for such action as it may deem to be appropriate.

### **Order**

**For the reasons set out in my judgment, I declare that the 1st respondent violated the fundamental rights of the Petitioner guaranteed by Article 13 (1) of the Constitution.**

The 2nd Respondent had no part in the arrest or detention of the petitioner and I therefore hold that he is not guilty of any transgression.

**The Petitioner was imprisoned from 13th April 1995 to 17th April 1995 in violation of Article 13 (2) of the Constitution, but his deprivation of personal liberty during that period was, on the evidence placed before us, the consequence of a judicial as distinguished from an executive or administrative action and I therefore hold that this Court has no jurisdiction to entertain any complaint relating to that imprisonment.**

**The State shall pay the petitioner a sum of Rs. 7,500/- as costs.**

**G. P S. DE SILVA, C.J.** - I agree.

**RAMANATHAN, J.** - I agree.

***Relief granted.***