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. (Spl.) 6/90

Dissanayaka Mudiyanselage Athula Dissanayake, Udawenigaldeniya, Thalathuoya, presently detained at Mahara Prison.

Petitioner

Vs.

1. Superintendent, Mahara Prison, Ragama

2. Hon Attorney General, Attorney General's Department, Colombo 12

3. Hon Ranjan Wijayaratne, Ministry of State for Defence, Ministry of Defence, Colombo

4. Officer in Charge, Police Station, Galnawa.

Respondents

BEFORE: BANDARANAYAKE, J. FERNANDO, J. AND KULATUNGA, J.

COUNSEL: A.A. de Silva with K. Thiranagama for the petitioner,

Nihal Jayasinghe SSC with J. C. Jayasuriya S.C. for the State

ARGUED ON: November 26, 1990, December 13, 1990 and February 05, 1991.

DECIDED ON: March 28, 1991.

Fundamental Rights - Detention under S. 9 of Prevention of Terrorism Act - Application of objective test - Illegal arrest - Unlawful detention -Compensation - Article 13 (1) and (2) of the Constitution - Section 6(1), 9(1) and 31 of the Prevention of Terrorism Act.

The Petitioner was arrested on 08.03.1989 and kept at Galnewa Police Station initially for 72 hours and thereafter on 06.04.89 order was made to send him to the Boossa Detention Camp in terms of S. 9 (1) of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (PTA).

However he was kept at Galnewa Police Station until 23.05.1989 on which date he was sent to Boossa. The detention order was extended from time to time. On 12.02.1990 the petitioner was produced before the High Court on a charge of possessing a gun and a cartridge only while the original allegations against him were involvement in the robbery of a roneo machine and a typewriter from the Galnewa Provincial Council Office, a triple murder on 15.02.89, intending to cause violence to one Jayawardena and possession of a gun and a cartridge. On 12.02.1989 the petitioner was remanded to Fiscal's custody but even thereafter the Minister made two further extensions to his detention at Boossa by orders dated 02.04.90 and 01.07.90.

This was a period of insurgent activity and the petitioner who was riding a bicycle in the company of another tried to escape on seeing the Police. The petitioner's companion had a document which indicated a plan to murder one Jayawardena.

Though the detention order issued on 06.04.89 specified the place of detention as Boossa it was only on 23.05.89 that the petitioner was taken there -the excuse being security problems attending transport to Boossa.

Held:—-

1. The petitioner's arrest when he was trying to make a getaway was lawful and not violative of Article 13(1) of the Constitution.

2. There can be no objection to the initial detention for 72 hours at the Police Station in terms of s. 6(1) of the PTA.

3. After his arrest on 08.03.1989 the petitioner was kept in unlawful custody at the Galnewa Police Station for nearly a month before application was made for a detention order on 04.04.89.

4. The detention order made on 06.04.89 on the basis of the initial application of the Police was lawful.

5. The detention at Galnewa Police Station from 06.04.1989 to 23.05.89 was unlawful for failure to comply with the requirement regarding place of detention namely, Boossa.

Per. Kulatunga, J:

"I am of the view that the entire order covering the detention, the place of detention and conditions thereof is mandatory and non-compliance cannot be excused save on exceptional grounds such as impossibility in giving effect to it".

6. The Police themselves applied for the detention order on 04.04.89. If two days later, the situation had deteriorated, a variation as to the place of detention could have been obtained. This was not done.

7. The first detention order was made by the Minister on 06.04.89 valid for the maximum period of three months. Extensions were made on 06.07.89, 25.09.89 and 28.12.89. In the absence of averments to the contrary by the State, the detention of the petitioner under the Prevention of Terrorism Act after 25.09.89 cannot be upheld. The objective test is the correct test to apply. The detention from 25.09.89 to 12.02.90 when the petitioner was remanded by order of Court, was unlawful.

8. The petitioner's detention from 08.03.89 to 25.05.89 and thereafter from 25.09.89 to 12.02.90 constitutes an infringement of his fundamental rights enshrined in Article 13(2) of the Constitution.

Per Kulatunga, J.:

"The expression "unlawful activity" as defined in S. 31 of the (Prevention of Terrorism) Act is of wide import and encompasses any person whose acts "by any means whatsoever" are connected with "the commission of any offence under this Act". This would include a person who has committed an offence under the Act".

"Where the power to arrest without a warrant is couched in the language of s. 6(1) of the PTA it is well settled that the validity of the arrest is determined by applying the objective test. This is so whether the arrest is under the normal law....., under the Emergency Regulations..... or under the P.T.A However, it is not the duty of the Court to determine whether on the available material the arrest should have been made or not. The question for the Court is whether there was material for a reasonable officer to cause the arrest.... Proof of the commission of the offence is ndt required; a reasonable suspicion or a reasonable complaint of the commission of the offence suffices..... There is also the consideration that during a period of emergency a wider discretion is vested in the police in the matter of arrest ..... Nevertheless it is for the Court to determine the validity of the arrest objectively. The Court will not surrender its judgement to the executive for if it did so, the fundamental right to freedom from arbitrary arrest secured by Article 13(1) of the Constitution will be defeated. The executive must place sufficient material before the Court to enable the Court to make a decision, such as the notes of investigation, including the statements of witnesses, observations etc. without relying on bare statements in affidavits".

Cases referred to:

1. *Senthilnayagam v. Seneviratne* [1981] 2 Sri LR 187, 208
2. *Muttusamy v. Kannangara* 52 NLR 324, 327
3. *Gunasekera v. de Fonseka* 75 NLR 246
4. *Joseph Perera v. Attorney-General* SC Nos 107-109/86
   SC Minutes of 25.05.1987
5. *Somasiri v. Sub-Inspector Jayasena* SC Application No. 147/88
   SC Minutes of 01.03.1991
6. *Withanachchi v. Cyril Herat Leelaratne v. Cyril Herat*
   SC Nos. 144-145/86 SC Minutes of 01.07.1988
7. *Wickremabandu v. Cyril Herat* SC Application. No. 27/88
   SC Minutes of 06.04.1990
8. *Sudath Silva v. Kodituwakku* [1987] 2 Sri LR 119, 127

APPLICATION for infringement of Fundamental Rights under Article 13(1) and (2) of the Constitution.

March 28, 1991.

KULATUNGA, J.:

Pursuant to a complaint dated 26.12.89 addressed to His Lordship The Chief Justice by the petitioner complaining about the conditions of his detention at the Boossa Detention Camp, this Court afforded to him the opportunity of preferring a formal application for relief against the alleged infringement of his fundamental rights by reason of his arrest and detention in early 1989. In view of the fact that his freedom to

seek redress had been hampered for some time by the conditions of his detention, this Court is able to entertain his application.

At the time of his arrest the petitioner was an undergraduate in the Faculty of Agriculture of the Peradeniya University. After his arrest, he was kept at the Galnewa Police Station and thereafter sent to the Boossa Detention Camp in terms of an order under S.9(1) of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (P5) which was extended from time to time by further orders (X7, X8 and X9). On 12.02.90 he was brought before the High Court of Colombo, in case No. 4068/89 charged with certain offences and was remanded to Fiscal Custody at the Mahara Prison where he is presently detained pending his trial.

The petitioner alleges that he was arrested by a party of police officers on 08.03.89, at Kalankuttiya and was taken to the Galnewa Police Station with his hands tied. He was not informed of the reason for his arrest. He was then blindfolded and assaulted. Thereafter, he was put into a room which was damp and which he later found to be a lavatory. On occasions he was taken out and assaulted and then returned to the room. On 26.03.89 there was a visitor whom he could not see as he was blindfolded; later he learnt that it was his father. On 28.03.89 and 03.04.89 his mother visited him when he was taken to the Inspector's room and was shown to her. On 04.04.89 he was locked up in the Police cell. An order dated 06.04.89 under S.9(1) of the P.T.A. was then issued authorising his detention at the Boossa Detention Camp (P5). However, he was not transferred to Boossa. Instead, he was kept at the Galnewa Police Station until 23.05.89 on which date he was sent to Boossa.

The detention order against the petitioner was made on the ground that the Minister had reason to suspect that the petitioner is connected with or concerned in unlawful activity to wit —

l. Robbery of the property of the government via. Roneo machine from Galnewa Provincial Council office.
2. Being in possession of leaflets..... intended to cause the commission of acts of violence.
The petitioner is presently indicted for possession of a gun and a cartridge said to have been found with him at the time of his arrest. However, he states that the police have not at any stage questioned him about the allegations contained in the detention order and that there is no evidence whatsoever to connect him with the alleged offences. He also denies that he was in possession of any weapon or other offensive article at the time of his arrest.

In a supporting affidavit (P1) his father, Abeyratne Banda (a Grama Sevaka) states that the petitioner left home on the morning of 06.03.89. On 12.03.89 he learnt that the petitioner had been arrested by the Galnewa Police, whereupon he obtained leave for 12th and 13th and visited the Police Station but did not see his son in the Police Station. The police officers advised him to make search in other areas. On 13.03.89 he sought the assistance of Mr. Mahinda Abeykoon, Member of Parliament, Kandy District who promised to telephone the Galnewa Police and Mahendra Adikari, Member of Parliament, Anuradhapura District. He then visited the Galnewa Police on 21.03.89 but the officers again denied that the petitioner

was there; whereupon once again he contacted the two Members of Parliament. Thereafter, he obtained leave from 25th to 27th and visited the Galnewa Police on 26.03.89. On that occasion the Officer-in-Charge of the Police Station took him behind the station remarking that some influence had been used and showed him the petitioner and another boy both of whom were blindfolded.

The petitioner's mother Yaso Manike's affidavit (P2) also supports him. The petitioner has also produced an extract from the "Divaina" newspaper of 11.04.89 (P3) containing particulars of detained students, being representations made to Hon. Hameed, Minister of Higher Education by the Students' Organisation. In P3 the petitioner is described as having been arrested on 12.03.89 and in detention at the Galnewa Police Station. Mahinda Abeykoon M.P. in his affidavit (P4) says that on information supplied by the petitioner's father on 13.03.89 about the detention of his son, he telephoned Mr. Mahendra Adikari M.P. and the O.I.C., Galnewa Police. Later the petitioner's father met him to say that the police had shown the petitioner to him and to thank him for it.

In an affidavit filed on behalf of the respondents, SubInspector of Police Senapathi who was a member of the Police party which arrested the petitioner, states that he was arrested on 04.04.89 and not on 08.03.89 as alleged by him; and that he was arrested along with another person after they had taken to their heels on seeing the police. The petitioner had with him a gun and a cartridge. The other person also had a gun and a cartridge and a document relating to the planned murder of one Jayawardena for giving information against and contrary to the interests of "Deshapremi". This document (X) which is hand written and is in Sinhala contains on one side two revolutionary verses, intera alia exhorting the taking up of arms. On the other side it contains certain information which reads thus when translated —

"C. D. Jayawardena,
Kurakappitiyawa,
Viyaluwa.
* giving information to the police against "Deshapremis";
* getting his henchmen to assault Deshapremis;
* arrest and handing over of a Deshapremi to the Superintendent on false charges;
* plying a vehicle without authority during the strike;
* unreasonable criticism;
* failure to deliver the things ordered by way of punishment.

S.I. Senapathi has also produced marked X1 a copy of the application dated 04.04.89 made to the Senior Superintendent of Police, Anuradhapura by the O.I.C. Galnewa Police Station requesting the authorisation of the detention of the petitioner and the other suspect at the Galnewa Police Station for 72 hours from 04.04.89 in terms of S.7(1) of the P.T.A. and their detention at Boossa for 90 days in terms of S.9(1) of the P.T.A., pending the completion of investigations into the following allegations.

1. Planned murder of Jayawardena. This allegation is based on the document X'.
2. Possession of two guns and cartridges.
3. A triple murder by shooting at Pattinigama which occurred on 15.02.89.
4. Robbery of a Roneo machine and a type-writer from the Galnewa Provincial Council Office on 12.12.88.

S.I. Senapathi admits that the petitioner is presently indicted in H.C. Colombo case No. 4068/89 for possession of a gun and a cartridge on 04.04.89. He has also produced marked X2 a copy of the authorisation to detain the petitioner at the Galnewa Police dated 05.04.89 by the Superintendent of the Police Station for 72 hours and a copy of the detention order dated 08.04.89 for his detention at Boossa marked X3 (same as P5).

On 25.04.89 Assistant Superintendent of Police, Wijesekera recorded a statement of the petitioner in terms of S.16 of the P.T.A. The A.S.P.'s record as well as S.I. Senapathi describe this statement as a confession. This statement has been produced marked X4. Therein the petitioner gives personal particulars about himself and proceeds to state that in March 1988 the University was closed; that he is a student activist who campaigned on issues such as the arrest of University students and school children and the nationalisation of the Private Medical College; that they worked for the establishment of a united front of all political groups opposed to the government including the Janatha Vimukthi Peramuna to put forward Mrs. Bandaranayake as their common candidate at the Presidential Election; that they were disappointed when she submitted her nomination on her own, otherwise than as a common candidate; that in November 1988 there was an all Island general strike for which too he campaigned; that in December 1988 he decided to join the J.V.P. and engage in political activities in Galnewa along with one Jayaweera; that at the instance of Trishantha an area leader of the military wing of the Deshapremi movement he engaged in political activities in Kalankuttiya; but he did not participate in the activities of the military wing; nor did he use any weapons against anybody; that he knew nothing about the document which the police recovered from the other person (one Sunil Dissanayake) at the time of the arrest; and that at that time he did not have anything in his possession.
Mr. Kumarasiri, S.S.P. Anuradhapura states that on the application of the O.I.C. Galnewa Police he ordered the detention of the petitioner at the Galnewa Police Station for 72 hours and submitted the material sent to him by the Galnewa Police to the Deputy Inspector General of Police (Ranges), by letter (X6); subsequently he received the detention order from the Minister which he handed over to the O.I.C., Galnewa. The Minister states that on the material submitted by the police he made the detention order against the petitioner and extended it from time to time by subsequent orders.

From the fact that the petitioner was detained in terms of S.7(1) of the P.T.A. it has to be presumed that he was arrested without a warrant under powers contained in S.6(1) of the P.T.A. According to S.I. Senapathi the arrest was effected by late S.I. Ratnapriya who led the police party. S.6(1) empowers the arrest by that officer if he had been authorised in writing in that behalf by a Superintendent. In the absence of any challenge, I shall assume the existence of such authority. Such an officer may arrest any person "connected with or concerned in or reasonably suspected of being connected with or concerned in any unlawful activity". The expression "unlawful activity" as defined in S.31 of the Act is of wide import and encompasses any person whose acts "by any means whatsoever" are connected with "the commission of any offence under this Act". This would include a person who has committed an offence under the Act. *Senthilnayagam v. Seneviratne* [(1)].

S.I. Senapathi has alleged four offences against the petitioner.
These are —

1. the robbery of roneo machine and a type-writer being the property of the government on 12.12.88;

2. a triple murder on 15.02.89;
3. intending to cause violence to one Jayawardena shown by the possession of document X'; and
4. possession of a gun and a cartridge.

These would constitute offences under S.2(1)(d), (a), (h) and (g) respectively of the Prevention of Terrorism Act.

Where the power to arrest without a warrant is couched in the language of S.6(1) of the P.T.A. it is well settled that the validity of the arrest is determined by applying the objective test. This is so whether the arrest is under the normal law *Muttusamy v. Kannangara* [(2)], under the Emergency Regulations *Gunasekera v. de Fonseka* [(3)], *Joseph Perera v. Attorney-General* [(4)] or under the *P.T.A. Somasiri v. SubInspector Jayasena*, [(5)]. However, it is not the duty of the Court to determine whether on the available material the arrest should have been made or not. The question for the Court is whether there was material for a reasonable officer to cause the arrest. *Withanachchi v. Cyril Herat, Leelaratne v. Cyril Herat* [(6)]. Proof of the commission of the offence is not required; a reasonable suspicion or a reasonable complaint of the commission of the offence suffices. *Joseph Perera v. Attorney-General* (supra).

There is also the consideration that during a period of emergency a wider discretion is vested in the police in the matter of arrest *Joseph Perera v. Attorney-General* (supra). Nevertheless it is for the Court to determine the validity of the arrest objectively. The Court will not surrender its judgement to the executive for if it did so, the fundamental right to freedom from arbitrary arrest secured by Article 13(1) of the Constitution will be defeated. The executive Must place sufficient material before the Court to enable the Court to make a decision, such as the notes of investigations, including the statements of witnesses, observations etc. without relying solely on bare statements in affidavits. In the instant case, no such material has been produced; and the best evidence consists of a mere statement of allegations contained in the report to Senior S.P. (X1) and the document X' which was found not with the petitioner but with the other suspect. No notes of investigations relating to the alleged offences of murder or robbery or the recovery of offensive articles from the petitioner have been produced. The need to furnish such material was emphasised by Gratiaen J. in Muttusamy's case (supra) when he said —

> "Inspector Kannangara has nowhere in the course of his evidence referred to any complaint or information or suspicion **the reasonableness of which could have been tested by the learned Magistrate,** whose function it was to inquire into the officer's state of mind at the time that he ordered the arrest".

Even though no material of this sort was forthcoming, I am not inclined to declare the arrest to be unlawful having regard to the admitted circumstances of the arrest. This was a period of insurgent activity; at the time of the arrest the police party were going about investigating subversive activity when they sighted the petitioner and another on bicycles. (In his petition the petitioner admits that he was riding his bicycle); on seeing the police they took to their heels; one of them had the document X'; as it is evident from his statement X4, the police had later questioned the petitioner about this document; even though it was not in the petitioner's possession, the fact of their running away could give sufficient justification to the police to have arrested them. I therefore hold that the petitioner's arrest is lawful and not violative of Article 13(1) of the Constitution.

As regards the petitioner's detention, I see no objection to his initial detention for 72 hours at the Police Station in terms of S.6 (1) of the P.T.A. What really requires scrutiny is the

detention which followed commencing on 06.04.89 followed by the order of the Minister under S.9(1); but before I consider that question, I must make a decision on the allegation that the petitioner was arrested on 08.03.89. If that is proved, his detention which is not covered by the detention order will be per se unlawful.

In his complaint to His Lordship The Chief Justice and there after the petitioner has consistently maintained that he was arrested on 08.03.89. This is well supported by the affidavits of his parents, the extract from the "Divaina" newspaper and the affidavit of Mr. Mahinda Abeykoon, M.P. (P1, P2, P3 and P4). The learned Senior State Counsel for the respondents submitted that the alleged arrest on 08.03.89 has not been proved; that the visits by the petitioner's father to the Galnewa Police Station were in April '89; and that the M.P. cannot possibly recall the events in March '89. I cannot agree. To my mind the contents of the affidavits relied upon by the petitioner appear to be intrinsically true. The petitioner's father, a Grama Sevaka speaks to having obtained leave on several days to search for the petitioner. The State could have verified whether such leave has been taken. If no such leave was taken, the petitioner's version could have been impeached on that ground. The State has not checked the matter. It was submitted that the M.P.'s affidavit should not be acted upon because he did not explain therein how or why he remembers the date on which the petitioner's father contacted him. There is no requirement that such particulars be set out, and I am therefore not prepared to reject the M.P.'s affidavit. The detention order dated 06.04.89 is subject to strict conditions inter alia prohibiting access to the petitioner by visitors without the permission of the Secretary, Ministry of Defence. It would be naive to assume that the police would have allowed anybody to visit the petitioner or to see him in April '89. Accordingly, I am satisfied that the petitioner was arrested on 08.03.89 and kept in unlawful custody at the Galnewa Police Station for nearly a month before applying for a detention order.

The next allegation of the petitioner is that although the order P5 dated 06.04.89 directed his detention at Boossa, he was kept in continued detention at the Galnewa Police Station until 23.05.89. S.I. Senapathi admits this and explains that this was because in the situation that prevailed it was impossible to transfer him to Boossa with adequate security until 23.05.89.

The learned Senior State Counsel submitted that what is mandatory under the detention order is the detention; that the place of detention is directory only and in view of difficulties for transportation, the continued detention of the petitioner at Galnewa is not unlawful. I am of the view that the entire order covering the detention, the place of detention and conditions thereof is mandatory and non-compliance cannot be excused save on exceptional grounds such as impossibility in giving effect to it. The police themselves applied for the petitioner's detention at Boossa by an application dated 04.04.89 (X1). If two days thereafter the situation deteriorated this could have been reported to the Minister with a view to obtaining a variation of the place of detention. This was not done. There is also no evidence as to the situation which prevailed subsequent to the detention order and up to 23.05.89. Hence the excuse given by S.I. Senapathi for keeping the petitioner at Galnewa is untenable. Accordingly, I hold that the petitioner has been unlawfully detained at the Galnewa Police Station until 23.05.89.

I now turn to the validity of the petitioner's detention since 23.05.89. The impugned order was made under S.9(1) of the P.T.A. which empowers the Minister to do so where he has "reason to believe or suspect that any person is connected with or concerned in unlawful activity". The expression "unlawful activity" though defined in wide terms has been held to

include the commission of an offence under the Act and is not limited to acts "on the outskirts of criminal liability"; it has also been held having regard to the language of S.9(1) that there must be objective grounds and a rational basis for the Minister's belief or suspicion for making the order; that this view is also correct having regard to the fact that —

> "The primary purpose of detention under S.9 is to facilitate further investigation and interrogation .... "of suspects".... in order to achieve the object of irradicating terrorism. S.9 is not intended merely as a negative form of preventive detention nor is it intended to be a punishment".

Vide *Senthilnayagam's case (supra)* (1) at 208 and 205 and the decision of this Court in *Somasiri v. Sub-Inspector Jayasena* (5). This Court observed

> "In other words detention under S.9 is an aid to investigation and its validity will be strictly adjudged by the application of the objective test as opposed to the subjective test applicable to a preventive detention order which may be made in circumstances in which no charge is preferred and no investigations are pending".

This Court also observed

> "Even in respect of a detention order under Regulation 17 of the Emergency Regulations which is made upon the subjective satisfaction of the Secretary/Defence, a Bench of five Judges of this Court held in *Wickremabandu v.Cyril Herat* (7)..... that the power to make the order is not unfettered and that the test of reasonableness in the wide sense applies".

Viewed in the light of the above principles, I see no objection to the order P5 which was made on the basis of the initial application of the police and was effective for 3 months from 06.04.89. That order was lawfully made but as already determined the petitioner was unlawfully detained at Galnewa until he was transferred to Boossa on 23.05.89 where he remained in lawful detention until the expiry of the period of his detention on 06.07.89. His detention was then extended from time to time by successive orders each of which granted an extension of 3 months (being the maximum period permitted by S.9 at a time). These were X7 dated 06.07.89, X8 dated 25.09.89 and X9 dated 28.12.89. Thereafter the petitioner was produced before the High Court on 12.02.90 on which date he was remanded to Fiscal Custody (see 1R1). The question which I

have to consider is whether the entire period of his detention on extensions up to 12.02.90 can be justified by the application of the objective test. In this connection it would also be relevant to ask how much of this extended detention was necessary to facilitate further investigation.

The following matters are relevant in determining the validity of the extended detention

(a) Although the detention order was sought on the ground of four allegations, it was made only on the basis of two of them viz. the alleged robbery of a roneo machine and the possession of the document X';

(b) The police recorded the petitioner's statement (X4) on 25.04.89. According to that statement the police had not questioned him about the alleged robbery but only about the document X' recovered from the other suspect; and the petitioner has denied any knowledge thereof;

(c) The State has not produced any material as to the nature of the investigations which were pending thereafter. However, I can assume that the indictment against the petitioner was under consideration. The indictment which was

eventually framed charged him with the possession of a gun and a cartridge which is not an offence disclosed by the allegations contained in the detention order. This would show that those allegations had been abandoned; but the Court has not been informed as to when and in what circumstances such abandonment occurred;

(d) The State has also not pleaded that the impugned detention was being extended pending indictment. Yet having regard to the unsettled conditions in the country during this period it would not be correct to weigh this in fine scales. If so, a reasonable time should be given to the State to consider the charges against the petitioner.

Having made every allowance to the State I find it difficult, in the absence of any averment by the State to the contrary, to uphold the detention of the petitioner under the P.T.A. after 25.09.89 by the application of the objective test. This means that the Minister has exercised his power under S.9 of the P.T.A. merely to impose "a negative form of preventive detention" or as a mere matter of expediency. This is an unwarranted exercise of statutory power which is ultra vires the enabling provisions of the law. As observed by Wade "Administrative Law" 5th Ed. p. 748

> "Acts of Parliament have sovereign force, but legislation made under delegated power can be valid only if it conforms exactly to the powers granted".

Accordingly, I hold that the petitioner's detention under the impugned order after 25.09.89 is unlawful.

It is also relevant to note that even after the High Court remanded the petitioner to Fiscal Custody on 12.02.90 the Minister has made two further extentions to his detention at Boossa by orders dated 02.04.90 (X10) and 01.07.90 (X11) each for three months which period finally expired on 30.09.90. I do not think that the Minister has thereby intended to countermand the Court order remanding the petitioner to Fiscal Custody. In my view, it merely indicates that these orders were being made mechanically without the Minister giving his mind to the necessity for making them.

For the foregoing reasons, I determine that the petitioner's detention from 08.03.89 to 25.05.89 and thereafter from 25.09.89 to 12.02.90 constitutes an infringement of his fundamental rights enshrined in Article 13(2) of the Constitution by executive or administrative action which entitles him to compensation against the State.

Before I proceed to consider the relief to be granted to the petitioner, I wish to record the fact that in a number of cases in which this Court has determined fundamental rights to have been infringed it is observed that such infringements have been the result of lapses on the part of the officials who are required to advise the higher authorities or to scrutinise the necessity for exercising extraordinary powers. The State becomes answerable for all such defaults and pays compensation out of public funds. Unless there is adequate provision for identifying the officers who are actually responsible for such lapses in cases where blatant infringements have occurred and for restricting the use of extraordinary powers as a matter of expediency, the drain on public funds will keep on increasing in proportion to the growth of public awareness of their constitutional rights. It would be ironical if the public themselves have to pay for the infringement of their rights on such a scale.

Despite the situation referred to above this Court must assess what relief may be just and equitable whenever an infringement of fundamental rights is established regardless of the personal antecedents of the petitioner but in the light of the facts and circumstances of each case. As Colin Thome J. said in *Senthilnayagam's* case (supra) at 208

"The Courts have been jealous of any infringement of personal liberty and care is not to be exercised less vigilantly, because the subject whose liberty is in question may not be particularly meritorious".

In *Sudath Silva v. Kodituwakku* [(8)] Atukorale J. said

"The petitioner may be a hard-core criminal whose tribe deserve no sympathy. But if constitutional guarantees are to have any meaning or value in our democratic setup, it is essential that he be not denied the protection guaranteed by our Constitution".

The petitioner is a University student whose involvement with student politics was perhaps the beginning of the process which led to his incarceration. In his statement X4 he has referred to his association with the "Deshapremi" movement and the J.V.P. The authorities have not preferred any criminal proceedings against him on that account. Hence it would seem that there is no material to prosecute him; and if it is intended to merely detain him, that must be done without transgressing the Law. Under no circumstances, can this Court condone any detention which is not permitted by law. The petitioner has been unlawfully detained for 7 months 4 days. In all the circumstances, I direct the State to pay him a sum of Rs. 14,000/- (Rupees Fourteen Thousand) as compensation. I order no costs in his favour as Counsel supported his application as amicus curiae.

Bandaranayake, J. — I agree.
Fernando, J. — I agree.
Application allowed.

Compensation ordered.