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. 150/93

Dharmalingam Selvakumar, No. 18, Ramakrishna Place, Wellawatta, Colombo 6

Petitioner

Vs

1. Douglas Devanantha alias Deva, alias Douglas, Elam People's Democratic Party, No. 121, Park Road, Colombo 6

2. Rohana Jayawardena, Officer in Charge, Police Station, Kotahena

3. A.S.P. Amarasekera, Police Station, Kotahena

4. Inspector General of Police, Police Headquarters' Colombo

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

Respondents

BEFORE: Fernando J, Amaresinghe J and Wijetunga J

COUNSEL: R.K.W. Gunasekera with J.C. Weliamuna for the petitioner

L.C. Seneviratne PC with Roland Perera S.S. Jayasinghe for the 1st respondent

D.P. Kumarasinghe Deputy Solicitor General, for the 2nd to 5th respondents

ARGUED ON: 2nd and 3rd June 1994

DECIDED ON: 13the July 1994

Fernando J.

The petitioner alleges that his fundamental rights under Article 13(1) and 13(2) have been violated by reason of his arrest on 6.1.93 by the 2nd respondent (the Officer in Charge of the Kotahena Police) and by his subsequent detention until 28.1.93 upon a detention order issued by the 3rd respondent (the Assistant Superintendent of Police, Kotahena) upon the representation of the 2nd respondent. He also seeks relief against the 1st respondent – the leader of the Elam People's Democratic Party (EPDP) – who he claims instigated such arrest and detention.

The EPDP is a recognized Political Party. According to the petitioner, the EPDP was actively engaged in military operations against the LTTE in the North-East in collaboration with Government Forces. The 2nd respondent in his affidavit pleads unawareness of this, while the 3rd respondent and the 4th respondent (the Inspector General of Police) have not filed any affidavits. The 1st respondent states that the EPDP was actively complaining against the LTTE and was assisting the Government in various ways including the maintenance of the administration of the area liberated from LTTE. It will become necessary to decide whether acts of the 1st respondent or of the EPDP constitute executive or administrative action only if the petitioner succeed in proving that the 1st respondent committed acts relevantly connected (by way of instigation, connivance, complicity etc) with his arrest or detention.

The petitioner had been for sometimes a member of the EPDP. His mother was living in Madras where she owned a house, which the petitioner made available for the use of the EPDP. According to the petitioner, later in 1992 his mother wished to sell this house but the EPDP was against this, further at about the same time, the EPDP began to engage in illegal or questionable activities, and this made the petitioner leave the EPDP. The 1st respondent totally denies displeasure in regard to the sale of the house, he also claims that he had previously taken disciplinary action against the petitioner particularly for intemperate habits and inability to get on with other members of the EPDP and had dismissed the petitioner in November 1992. **Whichever version is true; there is no doubt that in January 1993 the petitioner and the 1st respondent were far from being on the best of terms.**

The petitioner was living in Wellawatte with his sister. On 1.1.93 he went with two friends, Wickremasinghe and Anandakumar, to a club at Kotahena to celebrate the new year. This they were doing, together with 50 to 100 others, on the upper floor of that club. **The petitioner says that at about 9.45 or 10.00 pm five or six men armed with automatic weapons arrived and after mercilessly assaulting him dragged the**

petitioner down the stairs and the one Kiruban, personal bodyguard of the 1st respondent fired into the ground, presumably to overcome any remaining resistance, he then surrendered and was taken away in vehicle No. 52-5775 which he alleges was driven by the 1st respondent. He does not states the make or colour or give any other particulars which would have helped to identify this vehicle. At about 10.30 pm Anandakumar telephoned the petitioner's sister, who suspected the 1st respondent (because of the displeasure concerning the Madras house) but this suspicion does not appear to have been communicated to Anandakumar. Shortely after that Anandakumar went (together with Wickremasinghe and the owner of the club) to the Kotehena Police where he made a complaint regarding the abduction of the petitioner by unidentified armed men, he did not mention any assault, while he stated that he did not see any firing, and did not know the number of the vehicle, he did say that people at the club had told him that it was 52-5775. While Anandakumar and Wickramasinghe aver in their affidavit that the petitioner had been assaulted and abducted by armed persons unknown to them, they say nothing whatever that would assist in identifying the culprit or the vehicle. A little later, the Kotehena Police visited the scene and recovered a spent 9mm cartridge. **Between then and 28.1.93 when the petitioner was released or even thereafter, the police made absolutely no effort to trace the vehicle, or to make any other investigations into the abduction**.

The petitioner says that he was then taken to the 1st respondent's house, at 121, Park Road, Colombo 5 where he was kept in a cell, cash and personal possessions to the value of Rs. 45,000/- were taken from him, and the 1st respondent and his 'agents (none of whom were identified) repeatedly assaulted him on 1st and 2nd January in consequence of which he suffered severe injuries and was bleeding for a few days through the nose and forehead. At about 9.30pm on 6.1.93 the 1st respondent handed over the petitioner to the Kotehena Police and in the presence of the 3rd respondent. The 3rd respondent then asked him to make a statement to the effect that he had gone to Kandy where he had had a fall causing those injuries and treated that otherwise the EPDP would plant a pistol on him for the unlawful possession of which he could be convicted and sentenced to two years imprisonment. The petitioner stoutly refused to do so saying that even if such a statement was recorded he would challenge it in the Court, with the help of witnesses. The 1st respondent went away, and the petitioner was thereafter arrested detained at the Kotehena Police Station, without being told why. The 3rd respondent produced a certified copy of a statement, alleged to have been made at 11.25 pm on 6.1.93 and signed by the petitioner to the effect that on 1.1.93 he had got thoroughly drunk and left the club, that he did not know what happened thereafter, that at 8.00 am the next morning he found himself at Thimbrigasyaya, that he thereafter stayed at a friend's house that he then learned that the police were looking for him and so before returning home he came to the Kotehena

Police. As it was too late to go home he asked the police for shelter. The petitioner filed another affidavit in reply, denying that he had made or signed this statement. As the certified copy produced was not a photocopy, in the course of the hearing we called for the original and we found that the signature closely resembled that of the petitioner appearing in his affidavit filed in the Court. **Learned Counsel who appeared for him did not challenge this signature and urged that the petitioner's recollection of the events of that day was naturally faulty on account of the treatment he had received during the preceding six days.**

The petitioner was released only on 28.1.93 after the police had produced him in the Magistrate's Court and had conceded that there was no evidence against him. Soon thereafter he says he received telephone calls from persons whom he recognized as being the 1st respondent and the political secretary of the EPDP threatening to abduct him again, although he says he made a complaint to the Wellawatte police on 1.2.93 a copy of this has not been produced.

In the meantime, according to the affidavit of the petitioner's sister, she learnt the number of the vehicle and thereafter that it belonged to the 1st respondent. She made a complaint to the Wellawatte police on 2.1.93 but the petitioner has not produced a copy of this. She also met Mr. S.Thondaman MP, Minister of Tourism and President of the Ceylon Workers Congress who wrote on 4.1.93 to the Presidential Commission dealing with the Involuntary Removal of Persons with copies to the Secretary, Ministry of Defence, the IGP and the Wellawatte and Kotehena Police. In the letter Mr. Thondaman said that representations had been made to him that the petitioner had been abducted by persons whose identity had been furnished to the Kotehena Police. Although she does not say this in her own affidavit, the petitioner says she also wrote to the Secretary, Ministry of Defence, the same day with a copy, to the DIG Colombo. It is only this letter contains the specified allegation that the 1st respondent had abducted the petitioner. **Yet the police made no inquiries**. However the petitioner, claims that it was all this agitation by his sister which induced the 1st respondent to hand him over to the Kotehen Police on 6.1.93. Although on 11.1.93 the Presidential Commission acknowledged Mr. Thondaman's letter with a copy to the IGP by letter dated 26.1.93 the Commission informed Mr. Thondaman that it would take no further action because 'the Police Department has confirmed that (the petitioner) is being held in custody ….. under a detention order issued under the Emergency Regulations'.

Indisputably, the petitioner was in the custody of the Kotahena Police from 6.1.93. On receipt of a message to that effect the petitioner's sister came to the Kotahena Police before midnight. According to her two affidavits filed in this Court the petitioner then told her that he had been abducted by the 1st respondent detained and tortured by the EPDP group, and handed over to the police by the 1st respondent. Although she was told by the police that he would be released the next day this was not done. She went

again at 10.00 am on 7.1.93 and found that the petitioner had been taken to hospital, she waited till he was brought back and told the police that she wanted to take him to a specialist. The police reassured her that they would look after him well and asked her to sign a book representing that this was something to the effect that the petitioner was safe at the police station. Not being able to read Sinhala but acting in what she believed to be the interests of her brother's security she signed the book. The 2nd respondent has produced this statement (recorded at 11.30 am) which is to the effect, that the petitioner had been taken away on 1.1.93 by some friends and had returned on 6.1.93 and that she had no problem in that connection, she denies that she made such a statement. She also says that she frequently visited the petitioner thereafter and on every occasion and asked for his release.

According to this account, the sister's suspicions as to the 1st respondent's involvement had been fully confirmed by the petitioner on 6.1.93 and the police had not honored their undertaking to release him on the 7th. It is surprising that she did not at any time during the next two or three weeks (or even after the petitioner's release) inform Mr. Thondaman or the Presidential Commission or anyone else in authority, that it was the 1st respondent who was responsible for the abduction, and that, seemingly, his influence was preventing the police from releasing the petitioner.

INVOLVEMENT OF THE FIRST RESPONDENT

I will first consider whether the petitioner has succeeded in establishing the 1st respondent's involvement in this transaction. Learned President's Counsel submitted that this has to be established beyond reasonable doubt because abduction was a criminal offence. I cannot accept this for two reasons. Firstly, in regard to the arrest on 6.1.93 and two subsequent detention the case against the 1st respondent does not rest upon any criminal charge. Secondly, these are not criminal proceedings involving a criminal sanction. Accordingly, the burden of proof is on a balance of probability but **naturally the graver the allegation the higher the degree of proof.**

The 1st respondent denied all the allegation against him. While admitting that a vehicle purchased by the EPDP in October 1992 bore the registration No. 52-5775 he said that the petitioner was aware of the registration number of EPDP vehicles because he was then engaged in driving vehicles for the EPDP. Even assuming that the petitioner was not only truthful but made no mistake in regard to the registration number of the vehicle in which he was abducted, there is the possibility that false number plates had been used. That possibility might have been considered too had the petitioner or his friends given other details regarding the vehicle to enable the Court to consider on a balance of probability that it was the EPDP vehicle bearing that number. It is difficult to accept that no one in the crowd of persons at the club was able to give the make, model or colour of the vehicle or any other relevant particulars. It has been described merely as a vehicle

and we have not even been told what type of vehicle, car, van, jeep, or otherwise. This was evidence, which the petitioner could reasonably have been expected to furnish. What is more, without such particulars, it is not reasonable to expect from the 1st respondent, by way of defence, anything more than a bare denial, of course he might have produced running chart or an affidavit from a employer to the effect that the vehicle was elsewhere that day but all that would have been inconclusive and open challenge as proceeding from partisan sources. Had the petitioner asserted, for instance, that the vehicle was a van of a specified make, model and colour whether that was true could have been tested by independent evidence (e.g. from the Registrar of Motor Vehicle or the Agents). It is the petitioner's failure to produce evidence which he could have produced which has made the identity of the vehicle **a matter of word against word.** I am therefore constrained to hold that the petitioner has not proved that the vehicle used for the abduction was an EPDP vehicle.

It is only the petitioner who identified the 1st respondent as having been involved in the abduction and the subsequent events. In the circumstances, I cannot regard this as a defect in his case; however there is no explanation for his failure to produce a copy of the prompt complaint which he says he made to the Wellawatta Police about the threatening phone calls from the 1st respondent made after his release; he does not claim that he informed the police, or any one in authority that his personal possessions to the value of Rs. 45,000/- had been forcibly taken at the 1st respondent's home, thus the petitioner has failed to establish that he promptly disclosed the 1st respondent's name to the police. Further, although his sister claims that she suspected the 1st respondent from the outset, a copy of her statement to the Wellawatte police on 2.1.93 has not been produced. Although Mr. Thondaman's letter dated, 4.1.93 was written on her representation that does not mention the 1st respondent, and it incorrectly states that the identity of these responsible had been disclosed to the Kotahena Police. There is thus some doubt as to whether she did mention the 1st respondent's suspected involvement. The only document which mentions the 1st respondent is the letter dated 4.1.93 to the Secretary, Ministry of Defence but since she does not say in either of her affidavit that she wrote this letter it would not be safe to accept on the basis of the petitioner's affidavit alone, that she did write this letter implicating the 1st respondent. What is still more important is that even after the petitioner had confirmed to her on 6.1.93 that it was the 1st respondent who was responsible she did not put this down in writing anywhere, even after the police failed for over two weeks to honor their undertaking to release him. No explanation has been given for the failure to mention the 1st respondent's alleged involvement in the incident of 1.1.93 and 6.1.93.

Thus this crucial question too becomes a matter of the petitioner's words against the 1st respondent's. In support of his contention that the petitioner should be believed in preference to the 1st respondent, Mr. Gunasekera has correctly pointed out that there is

a serious infirmity in the 1st respondent's claim that he was away from Colombo during the entire period 1.1.93 to 6.1.93. In the affidavit, he averred that he has left Colombo on 28.12.92 to attend a seminar at Punkudutivu on 1.1.93 at 4.00 pm at which he was the guest of honor; according to the agenda this was followed by a tea party. He says that he left Punkudutivu 'on or about' 6.1.93 and returned to Colombo on or about 7.1.93. If this is true he was not in Colombo either on 1.1.93 when the abduction took place or on 6.1.93 when the petitioner was taken into the custody of the Kotahena police. Although the phrase 'on or about' suggested some uncertainty as to the date of his return to Colombo, this was shown to me a falsehood when the petitioner produced the 1st respondent's father's death certificate. This proved that on 4.1.93 the 1st respondent had been in Colombo and had given information of his father's death that day. The 1st respondent then filed another affidavit trying to explain that while he was at Punkudutivu he learned that his father's condition had become serious and that he traveled from Palaly to Anuradhapura on 3.1.93 on an Air Force aircraft and from there to Colombo by road arriving in the early hours of 4.1.93. Learned Counsel for the petitioner did not challenge the affidavit filed by three persons who averred that the 1st respondent had in fact attended the Punkudutivu seminar on 1.1.93. He submitted, however, that as the 1st respondent obviously had access to Government air transport facilities he could well have left Punkudutivu soon after the seminar and could have been at Kotahena by 9.30 pm while this is a possibility, there is no evidence as to the means of travel from Punkudutivu – whether it is possible to fly directly to Colombo or whether it was necessary to fly through Palaly and whether travel was by helicopter or fixed-wing aircraft; nor as to the delays occasioned by security measures. It is therefore not possible to estimate how much time the journey from Punkudutivu to Colombo would have taken. Since the 1st respondent was the guest of honor at the seminar, it is not unreasonable to assume that he did spend two or three hours at that function. There is thus no supporting evidence to convent the mere possibility that he was in Colombo at 9.30 pm into a probability.

In any event, the 1st respondent's proven lack of credibility as to the date of his return to Colombo cannot supply deficiencies in the petitioner's case. Firstly, the petitioner's own credibility is affected by his false denial of his signature on the statement recorded on 6.1.93. In the face of his assertion that he had vehemently resisted any attempt to get him to make an incorrect statement and that he would challenge in Court it is difficult to accept his counsel's contention that he had forgotten that he had signed this statement. Secondly if the 1st respondent had in fact been involved in the events of 1.1.93 there were four or five occasions, as pointed out earlier in this judgment, on which the petitioner and his sister would have placed this on record in writing. It is probable that the petitioner was in fact assaulted and abducted by unknown persons on 1.1.93 and taken away in a vehicle; his version is supported to this extent by Wickramasinghe and Anandakumar and by the discovery of spent cartridge shortly thereafter. But on the

available evidence I cannot confidently conclude that either an EPDP vehicle or the 1st respondent involved. **The petitioner's claim against the 1st respondent must therefore be dismissed.**

ARREST AND DETENTION OF THE PETITIONER

In the information book immediately after the petitioner's statement, it is recorded that he was being handed over to the reserve to be held in custody for his protection and for further investigations, there is no reference to any suspicion of the commission of an offence to his being wanted for terrorist activities or to any other reason for being kept in custody. It is also noted that he had no personal possessions and there is no mention of his passport or its contents. There is no record of his injuries, although the next morning on the instructions of the 2nd respondent he was sent to the JMO.

In his affidavit, the 2nd respondent claims that he formed the suspicion that the petitioner could be a member of the LTTE 'on the following among other grounds'

(a) He was unable to explain his whereabouts from 4.1.93 to 6.1.93
(b) His sister had made a complaint to the effect that he had left home with some of his friends on 1.1.93 and had not returned and this was contrary to Anandakumar's statement that he had been abducted
(c) Upon inspection of the scene the police had discovered a spent cartridge indicating that firearms had been used in the alleged abduction and
(d) His passport indicated that he had visited India on several occasions.

He thought that 'further investigations (were) necessary to ascertain the true facts with regard to this matter' and therefore a detention order under Emergency Regulation 19(2) was issued 'with a view to continuing further investigations' This detention order was inexplicably not produced with his affidavit. When we indicated that it could not be assumed that a detention order had in fact been issued Learned Deputy Solicitor General searched his files and found an undated document, which he said was that detention order. We directed that this be produced. It reads thus:-

<u>Application for a detention order under Gazette Extraordinary No. 763/7 (89.6.20) read with Gazette Extraordinary No. 749/1 of 93.1.11</u>

I (the 2nd respondent) hereby report that I have taken the under mentioned suspect into custody for an offence committed under Emergency Regulation 19(2) of Gazette Extraordinary No.763/7 (89.6.20) read with Gazette 749/1 (93.1.11). Investigations regarding the offences committed by the suspect are continuing and the inquiry has not yet been concluded. I therefore request you to issue by virtue of the powers vested in you by Emergency Regulation 19(2) a detention order authorizing the detention of the suspect at the Kotahena Police Station for a period of 30 days from 6.1.93.

Name of suspect…..

(Signed by the 2nd respondent)

Detention order under powers conferred by Emergency Regulations Gazette Extraordinary No. 763/7 (89.6.20) read with Gazette Extraordinary No. 749/1 of 93.1.11

With reference to the application made on 6.1.93 (the 2nd respondent), I (the 3rd respondent) by virtue of the powers vested in me by Emergency Regulation 19(2) of Gazette Extraordinary No.763/7 (89.6.20) read with Gazette 749/1 (93.1.11).hereby authorize the detention of the under mentioned suspect for a period of 30 days from 6.1.93 to 5.2.93 at the Kotahena Police Station.

Name of suspect…..

This suspect who was wanted in connection with terrorist activities surrendered at the station. He was produced at the station by Police Sergeant 4846 Chandradasa. While he was wanted for an offence in breach of Emergency Regulation 18(1) he came to the Kotahena Police

(Signed by the 3rd respondent)

The written submissions filed on behalf of the 2nd respondent contained the following:

'On 7.1.93 (the petitioner's sister) had made a statement to the police to the effect that the petitioner was taken away by some friends on 1.1.93 and had returned only on 6.1.93. She had stated that she was not concerned with the incident. The only thing that she wanted was to live without any trouble in the future.

Because of the suspicious nature of the entire transaction and the fact that the petitioner was unable to explain his whereabouts from 1.1.93 to 6.1.93 a detention order under Regulation 19(2) of the Emergency Regulations was issued on him and the police continued investigations. As the investigations did not reveal any incriminating material against the petitioner, he was produced in Court on 28.1.93 and was released.

It is submitted that the facts of this case as reported to the police necessitated further investigations and it was therefore necessary for the petitioner to be detained to facilitate the investigations. It is also submitted that in the circumstances set out above the detention of the petitioner was not unlawful and therefore not in violation of Article 13(2) and 13(4) of the Constitution'.

Some of the reasons given by the 2nd respondent for the arrest of the petitioner are clearly false, while the others do not justify arrest or detention. (a) the petitioner did give an explanation for the movements from 1.1.93 to 6.1.93 and if the 2nd respondent was not satisfied he should have questioned him further in particular to ascertain the name

and address of the petitioner's friend who could have been questioned if further clarification or confirmation was really needed. That was not done. (b) the petitioner's sister's statement that the petitioner had left home with friends and had not returned is perfectly consistent with Anandakumar's statements that he had (i.e. subsequently) been abducted. In any event her statement was made only at 11.30 am on 7.1.93 so that at the time of the petitioner's arrest the previous night it was not possible for the 2nd respondent to have taken any 'inconsistency' between the two statements into consideration. (c) the fact that firearms had been used in the alleged abduction was in no way a justification for further depriving the victim of his liberty, instead, it should have galvanized the police into action to trace and apprehend the culprits (d) since the police records show that the petitioner had nothing with him, obviously his passport was not examined, and naturally there is no record of any such examination. The petitioner's sister's statement that the passport was at home and the police never came and examined it there, was not contradicted.

There is no doubt that the 2nd respondent did not have any reasonable ground for suspecting that the petitioner was concerned in or had committed an offence under any Emergency Regulation (or any other law). This is confirmed by the fact that the detention order does not refer to any offence and it discloses some confusion as to whether the 'offence' was under ER 18(1) or 19(2) neither of which create offences. The arrest was therefore not in accordance with procedure established by law. The arrest not having been in terms of the Emergency Regulations, the petitioner could not have been detained thereunder.

It is unfortunate that the written submissions of the 2nd to 4th respondents side -stepped the crucial issue- whether *an offence* was reasonably suspected – by vaguely referring to 'the suspicious nature of the entire transaction' and asserting that therefore further 'investigations' (and consequential detention) were necessary. It is axiomatic that arrest and detention cannot be justified in that way and I would have expected the Attorney General's Department to have so advised these respondents at the outset without unnecessarily prolonging these proceedings upon a plainly untenable basis.

Article 13(1) requires that any person arrested be informed of the 'reason' for his arrest and that means not any explanation whatsoever but a ground which would in law justify arrest of Gunasekera v de Fonseka (1972) 75 NLR 246. The 'reason' which the 2nd respondent had namely investigation to discover whether there was any ground for suspicion, was not a reason, but only an explanation of the object of the detention. Giving that **reason was no matter than giving no reason**.

The petitioner's arrest was not even in the purported exercise of the powers conferred by Emergency Regulation 18(1) but was for 'investigations' and was thus capricious and arbitrary. Since Emergency Regulations 18 and 19 do not authorize the continued

detention of a person arrested in such circumstance, the petitioner's detention was *ab initio* contrary to the procedure established by law, nothing that happened afterwards made that detention valid, and thus there was a deprivation of liberty which amounted to an 'arrest' within the meaning of Article 13(1) for the reason given by Amerasinghe J. in Pieris v AG SC 146-155/92 SCM 17.6.94.

Further even if the arrest and detention had initially been proper Emergency Regulations 18 and 19 do not compel but merely authorizes detention for a period 'not exceeding' ninety days and also require production before a Magistrate 'within a reasonable time…..' and in any event not later than thirty days…. This does not mean that detention for the full period of ninety days is either mandatory or proper, or that production before a Magistrate can without justification be delayed with impunity. If in the circumstance there has been unreasonable delay either in production or release it is no answer that the specified time limits have not been exceeded. **In the present case detention was unnecessarily prolonged, without the shadow of an excuse and that is an alternative ground for holding that the detention was an infringement of Article 13(1).**

The procedure established by law in respect of arrest and detention, covers the place of detention as well, detention at the Kotahena Police Station would have been lawful only if there had been a detention order under Emergency Regulation 19(2). In this case, for the reasons I set out later in this judgment there was no valid detention order and in that respect too there was an infringement of Article 13(1).

Further, there was no good reason why the petitioner could not have been produced before a Magistrate and released almost immediately and therefore, the petitioner was not brought before the judge of the nearest competent court according to the procedure established by law, namely within a reasonable period as provided by the Emergency Regulations and was held in custody otherwise than in terms of the order of such a Judge, this was in violation of Article 13(2).

In general there must be strict compliance with these procedural safeguards, if not, irreparable harm may result Ganeshi Kumarasena v Shriyantha SC 257/93 SCM 23.5.94 so clearly demonstrates. There a young school girl was arrested in clear violation of Article 13(1) by one police officer and was released after just six hours. But during that short time she was subjected to sexual molestation and mental humiliation, of an aggravated kind by some other police officers this would probably have caused very serious psychological and mental harm. If that petitioner had been produced immediately before a Magistrate she would have been spared that ordeal. If the victim of an unconstitutional arrest may run the risk of such grave harm while in police custody

it seems to me that what is a 'reasonable time' for production before a Magistrate must necessarily be given a strict interrogation.

I therefore declare that the petitioner's arrest and detention was in violation of his fundamental rights under Article 13(1) and 13(2)

THE DETENTION ORDER

When detention is authorized by the Emergency Regulations, the detention order under Emergency Regulation 19(2) merely identified the authorized place of detention. Keeping the petitioner at the Kotahena Police Station, without an order, authorizing detention there would have been a deprivation of liberty not 'according to procedure established by law' such deprivation of liberty would have amounted to an 'arrest' within the meaning of Article 13(1) and would have been in violation thereof. Here the 2nd respondent tried to make the court believe that he applied for a detention order on 6.1.93. The first part of the document which has been produced is referred to in the second part as an application made on 6.1.93. However, in four places, the document refers to a Gazette of 11.1.93 obviously that application had been prepared only after 11.1.93. It is clear that this document came into existence only after and probably only because the police received a copy of the letter which the Presidential Commission wrote to the petitioner's sister on 11.1.93. In response, the police informed the Commission that the detention was covered by a detention order and the Commission decided not to look into the matter. Not only did the 2nd respondent show that he did not suspect the petitioner of an offence but his application for the detention order referred to an offence under Emergency Regulation 19(2). There is no such offence. On the material placed before him the 3rd respondent could not possibly have thought that the petitioner was suspected of an offence. Although he states in the detention order that the petitioner was wanted for terrorist activities, the 3rd respondent must have shown that there was nothing in the police records which even hints at this, otherwise his reference to an offence in breach of Emergency Regulation 18(1) which patently creates no offence but only confers a power of arrest. This contention order was thus not only belated but a sham meant to cover up a blatantly illegal detention. Another circumstance which confirms that the document was a sham is that the 3rd respondent recites that the petitioner was wanted in connection with terrorist activities, although the 2nd respondent only claimed that he suspected that he could be a member of the LTTE.

I may mention in passing that the new Emergency Regulation 19 (Gazette 771/16 dated 17.6.93) provides that detention may only be upon an order by a police officer not below the rank of DIG and requires the Secretary, Ministry of Defence to publish list of the authorized places of detention, detention elsewhere is prohibited, and detention contrary to Regulation 19 had been made an offence.

CONCLUSION

Every stage of this case, from beginning to end, has given us cause for dismay and disquiet. The police made no effort to investigate a serious crime involving armed violence, and this despite Mr. Thondaman's letter dated 4.1.93 copied to the 4th respondent (who has not denied its receipt) neither he nor the other two police officers have even thought it necessary to venture some excuse or explanation for this flagrant disregard of the basic public duty of the police force. The 2nd and 3rd respondents blatantly disregarded every constitutional safeguard against the arbitrary deprivation of liberty, and between the two of them a sham detention order was concocted. The 2nd respondent then filed in this court an affidavit which sought to his decision to deprive the petitioner of his liberty at 11.30 pm on 6.1.93 by reference *inter alia* to a statement made the next meeting and the contents of a passport to which he then had no access. He failed to annex the detention order to his affidavit, perhaps because he knew it was sham. If an Attorney at Law had any hand in the preparation of that affidavit, other serious questions arise; Were the information book extracts and other documents including the detention order, made available to him? If so, why did he not insist on the detention order being annexed? Did he notice the discrepancies in that document particularly in regard to its date? Did he know that at least two of the reasons for arrest stated in that affidavit could not have been true? Why were written submissions drafted as if the existence of reasonable grounds for suspicion of involvement in an offence was not the central issue?

The constitutional duty imposed on the Executive by Article 4(d) to respect secure and advance Fundamental Rights was emphatically reaffirmed by the Attorney General on behalf of the State, in the following terms in a statement made in March 1994 to the United Nations Human Rights Commission:

'As a commitment to the promotion of accountability through pursuit of legal mechanism effective steps will be taken to prosecute human rights violations by undertaking vigorous investigations and the institution of prosecutions in court'.

In this case the conduct of public officers – law enforcement officers at that – has fallen short of that norm and may instead have contributed to abridging, restricting or denying the petitioner's fundamental rights.

I grand the petitioner relief as follows:

(a) A declaration that the petitioner's fundamental rights under Article 13(1) and (2) have been willfully infringed by the 2nd and 3rd respondents
(b) Compensation in a sum of Rs. 20,000/- and costs in a sum of Rs. 5,000/- payable by the State.
(c) Compensation in a sum of Rs. 15,000/- payable by the 2nd respondent

(d) Compensation in a sum of Rs. 15,000/- payable by the 3rd respondent

I further direct the 4th respondent:

(i) To place a copy of this order in the personal files of the 2nd and 3rd respondents

(ii) To issue after consulting the Attorney General precise and detailed instructions to all Officers in Charge of Police Stations as to their duties in terms of Article 4(d) of the Constitution to respect, secure and advance the fundamental rights guaranteed by Article 13(1) and (2) including the procedures to be followed in regard to arrest and detention and to forward a copy of such instructions to the Registrar of the Court before 30.9.94. and

(iii) To take such action as he may consider proper in regard to the failure of the Police to investigate the complaint that the Petitioner had been abducted and to report to this Court on or before 30.4.94 on the action taken by him.

JUDGE OF THE SUPREME COURT

Amerasinghe J

I agree

JUDGE OF THE SUPREME COURT

Wijetunga J

I agree

JUDGE OF THE SUPREME COURT