

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

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

S. C. Application No. 14/90,

1. Weihenage Sirisena, No. 205/2,
Devala Road, Thalangama South,
Battaramulla.
2. Kalukapuge Neil Carmen Perera, No.
199, Devala Road, Thalangama
South, Battaramulla.
3. Aluthduwage Nandawathie
Gunawardena, No. 205/2,
Thalangama South, Battaramulla.
4. Kalukapuge Sirisena Perera,
199, Devala Road, Thalangama
South, Battaramulla
5. Kollurage Alice Nona,
199, Devala Road, Thalangama
South, Battaramulla

Petitioners

Vs

1. Earnest Perera, Inspector General of
Police, Police Headquarters,
Colombo 1
2. S.J. Selvarajah, Inspector of Police,
Police Station, Bambalapitiya
3. S.S. Senanayake, Officer in Charge,
Traffic Branch, Police Station,
Bambalapitiya
4. The Hon Attorney General, Attorney
General's Department, Colombo 12

Respondents

BEFORE: BANDARANAYAKE, J. FERNANDO, J. AND KULATUNGA, J.
COUNSEL: Faiz Mustapha P. C. with A. Panditharatne and Gaston Jayakody
for Petitioners,
C. R. de Silva D. S. G. with V. Kodagoda S. C. for respondents.
ARGUED ON: May 07 & 08, 1991.
DECIDED ON: August, 26, 1991

Fundamental Rights, Articles 11 and 13 of the Constitution - Compensation for infringement - Liability of State and Public Officer

A Pajero jeep belonging to one Ariapala a businessman collided on 04 April 1990 with a car driven by a lady who died of her injuries sustained in the collision. The 1st and 2nd Petitioners were engaged in carpentry work at Ariyapala's residence in Bullers Lane between 02 and 08 April. The 3rd, 4th and 5th Petitioners were arrested by the Police when they visited the Coroner's Court at the General Hospital Colombo on 21 April 1990 to see the 1st and 2nd Petitioners who had been arrested by the Police and produced before the Coroner to give evidence at the inquest. The 3rd to 5th Petitioners were detained by the Police and so deprived of their liberty from 11.30 a.m.

The 3rd respondent assaulted the first two Petitioners and threatened them and wanted them to implicate Ariyapala's son Indika as having driven the jeep. In view of the assaults they made the statement. On 22 April 1990 they were released. On the basis of the evidence led at the inquest the Police obtained an order from the Coroner to arrest the driver Weeraratne and Indika Ariyapala. The 2nd and 3rd respondents denied the allegations that the 1st and 2nd Petitioners were detained or subjected to torture by the Police.

Held:

(1) The allegation of torture is subject to infirmities but the petitioners had established infringement of their rights by illegal arrest and detention (under Articles 13 (1) and (2) of the Constitution) by the 2nd and 3rd respondents.

(2) Whether or not a person has been arrested depends not on the legality of the arrest but on whether he has been deprived of his liberty to go where he pleases. According to the plain meaning of the provisions of Article 13 (1) and (2) the rights claimed by the Petitioners are not limited to persons arrested on suspicion of having committed or being concerned with an offence. The protection against arbitrary arrest and detention is the central feature or the core of these provisions.

Per Fernando J :

"Article 13 (1) thus contains a prohibition on deprivation of liberty ___ no person shall be arrested. However, there is an exception, that such deprivation of liberty may be

effected "according to the procedure established by law" (and this is certainly more restrictive than the phrase "except in accordance with the law"). Further even if a person is arrested in accordance with the procedure established by law, he must nevertheless be informed of the reason for his arrest".

(2) In addition to the State, in appropriate cases, the public officer concerned may also be held concurrently liable in respect of the infringement and he may be ordered to pay compensation where the Court considers such an order to be just and equitable.

Cases referred to:

1. *State of Punjab v. Ajaib Singh* AIR 1953 S. C. 10
2. *Namasivayam v. Gunawardena* [1989] 1 Sri LR 394
3. *Somawathie v. Weerasinghe* S. C. Application No. 227/88 Supreme Court Minutes of 20.11.1990
4. *Saman v. Leeladasa* [1989] (1) Sri LR 7
5. *Thadchanamoorthi v. Attorney-General* 1 FRD 129
6. *Velumurugu v. Attorney-General* 1 FRD 180, 212, 213
7. *Ratnasara Thero v. Udugampola* 2 FRD 364
8. *Mariadas v. Attorney-General* 2 FRD 397
9. *Vivienne Goonewardena v. Perera* 2 FRD 426, 439
10. *Kapugeekiyana v. Hettiarachchi* (1984) 1 Sri LR 153
11. *Piyssiri v. Fernando* [1988] 1 Sri LR 173
12. *Spicer v. Holt* [1976] 3 All ER 71, 77 __ 78
13. *Karunaratne v. Rupasinghe* S. C. 71/90, S, C. Minutes of 17.6.1991

APPLICATION for relief against infringement of fundamental rights.

August, 26,1991

FERNANDO, J .

On 4.4.90 there was collision between a car driven by a young lady and a jeep owned by a businessman named Ariyapala. There were four persons in the jeep: Ariyapala's minor son, his driver Weeraratne, and the 1st and 2nd Petitioners (carpenters who had been engaged shortly before to effect some repairs to Ariyapala's residence). The young lady, the other passenger in the car, and others who witnessed the collision were not able to say who was driving the jeep. Weeraratne drove the jeep to the Bambalapitiya Police Station, while Ariyapala's son went home to inform his family. The 1st and 2nd Petitioners say that they too went to the Police Station, but that they were not questioned by the Police. Weeraratne's statement and the notes of investigation have not been produced, and hence we do not know whether he (or anyone else) had disclosed the fact that there had been others in the jeep, and their identity. There was no reason for Weeraratne to withhold the names of the Petitioners. A few days later the young

lady died in consequence of the injuries sustained in the collision, and the Police investigations took a drastically different turn, giving rise to this application.

According to the 3rd Respondent (the Officer-in-charge of the Traffic Branch of the Bambalapitiya Police), investigations revealed that the 1st and 2nd Petitioners had been in the jeep, and that they were working under Ariyapala; he also received reliable information that it was not Weeraratne but Ariyapala's son who had driven the jeep. On 14th, 15th, 17th and 18th April he visited the Ariyapala residence, but Ariyapala and the Petitioners were not present. On the 18th he asked Mrs. Ariyapala to convey a message to the Petitioners to come to the Bambalapitiya Police. According to A. S. P. Anthony of the Colombo City Traffic Headquarters, several days after the accident he too received reliable information that it was not Weeraratne but Ariyapala's son who had driven the jeep: and that the latter was a young boy not competent to drive motor vehicles. On the 18th, he says, he "enlightened the 2nd and 3rd Respondents", and instructed them to conduct investigations as to the identity of the driver; these instructions were not given immediately on receipt of the "reliable information", but only after he heard (on the 17th) that the young lady had died. No one mentions any attempt by the Police to question Ariyapala's son. I assume that as a matter of routine the statements of the persons who gave this "reliable information" would have been recorded; or, if there was some compelling reason not to record their statements, that appropriate entries would have been made in some official record. In any event, notes of investigation should also have been made, regarding the progress of the investigation, the instructions given by A.S.P. Anthony and the several visits to the Ariyapala residence. No such statements, notes or entries have been produced, and this tends to cast grave doubt as to the nature of the information and investigations.

If by the 18th the Respondents had reason to believe that it was not Weeraratne but Ariyapala's son who had driven the jeep, both could have been questioned. If they feared that such questioning might result in an attempt to influence the two Petitioners to support the version already given by Weeraratne, then I would have expected the Respondents to attempt to contact the Petitioners direct, and as soon as possible, instead of asking the Ariyapala's to produce them; if, as the Respondents say, they did not have the addresses, they should have attempted to obtain from Mrs. Ariyapala either the addresses or the name and address of the person who introduced the Petitioners to her. The fact that on the 18th the 3rd Respondent asked Mrs. Ariyapala to inform the Petitioners to come to the Bambalapitiya Police suggests that there was then no fear that the Petitioners might be influenced. According to Ariyapala's affidavit, when Mrs. Ariyapala had said that she did not have their addresses, the 3rd Respondent had threatened that if they were not produced, Ariyapala would be taken into custody: this was not denied by the 3rd Respondent. Mrs. Ariyapala went in search of the person who had brought the Petitioners, obtained their addresses, went to the 1st Petitioner's residence and left a message for the two Petitioners. The threat made to his wife probably induced Ariyapala not to be content with merely asking the Petitioners to go to the Police Station; instead, on the 19th he took them himself so that his compliance with the Police directive could not have been doubted. He then left the Police Station. The 3rd Respondent states that on questioning the Petitioners he suspected that they were

suppressing vital information on the advice and instigation of Ariyapala. Obviously, they maintained that Weeraratne had driven the jeep. Their statements were not recorded, and no entry was produced indicating that they had been questioned at the Police Station.

The principal complaint of the 1st and 2nd Petitioners is that they were not allowed to leave the Police Station on 19.4.90 and that they were unlawfully detained till 22.4.90. The Respondents' position is that they were not detained on the 19th, but were asked to report again at the Police Station the next day. According to the Petitioners, they were threatened by the 3rd Respondent in an endeavour to induce them to implicate Ariyapala's son; they were detained overnight; since they had not returned home even by 8 p.m., the 3rd Petitioner (the wife of the 1st) and the 4th and 5th Petitioners (the parents of the 2nd) contacted the Ariyapala's, since it was Mrs. Ariyapala who had conveyed the message the previous evening. Ariyapala came to the Police Station at about 9 a.m. on the 20th to inquire about the two Petitioners; he saw the two Petitioners there; while waiting for the 3rd Respondent, the 2nd Respondent abused and threatened him; when the 3rd Respondent arrived, he directed that Ariyapala's statement (as to why he came to the Police Station) be recorded; this was done at 9.40 a.m. and Ariyapala went away; this statement too has not been produced. If produced, this would have indicated whether the complaint that the Petitioners had been detained from the previous day had been made as early as 20.4.90. The Respondents' position is that the Petitioners came to the Police Station on the 20th morning; that the 3rd Respondent saw them at about 8.30 a.m.; that the Respondents had reason to believe that Ariyapala was taking steps to hamper the investigation, and hence was required to make a statement; since the 3rd Respondent was engaged in special traffic duties, he instructed the Petitioners to come again at 2.30 p.m. The latter reason is contradicted by a contemporaneous note of investigation made by him at 9.50 a.m. to the effect that when questioned further, it appeared that the Petitioners were concealing the truth. Further, if the Petitioners had come at about 8.30 a.m., there was ample time to question them between 8.30 and 9.50 a.m. It is difficult to understand why the 3rd Respondent wasted time recording Ariyapala's statement at 9.40 a.m., but apart from that he had one hour to question the Petitioners. Yet another possible reason for the failure to question the Petitioners emerges from A.S.P. Anthony's affidavit: that on 20.4.90 (at what time he does not say) he instructed the 3rd Respondent to inform the Petitioners to meet him or Chief Inspector Ranjit Perera at the Crime Detective Bureau ("C.D.B.") Headquarters, but the time is not mentioned. This was because, says A.S.P. Anthony, by this time he had been informed by the 2nd and 3rd Respondents that Ariyapala had come to the Bambalapitiya Police Station to hamper the investigation. These instructions must have been given after the Petitioners left the Police Station, because otherwise the direction to return to Bambalapitiya at 2.30 p.m. would have been pointless. The Respondents do not say whether the Petitioners did return at 2.30 p.m. but say that an officer was instructed to inform the Petitioners to proceed to the C.D.B. (again, the time is not mentioned). According to A.S.P. Anthony, the Petitioners arrived at 7 p.m. There is no explanation, in the Respondents' version, as to what happened between 2.30 p.m. and 7 p.m.; it is not suggested that the Petitioners came to Bambalapitiya several hours later than directed, and it is most unlikely that they

would have dared to do this; in any event, I cannot assume that they would deliberately have waited till late evening to present themselves for questioning, for it would have been natural to have preferred to return to their homes before dark. The 1st and 2nd Respondents claim that the Petitioners were not detained on the 20th; that having come to the C.D.B. at 7 p.m. they made voluntary statements; after these were recorded they left at 10.30 p.m. Apart from their own affidavits, they point to the absence of any entry relating to the Petitioners in the detention register as proof that the Petitioners were not detained.

There are a number of infirmities in the Respondents' version. They claim that Ariyapala was attempting to hamper the investigation by influencing the Petitioners; even on the 19th morning. Having directed Ariyapala, under threat of taking him into custody, to produce the Petitioners, it seems ironic that his presence at the Police Station should be construed as an attempt to hamper the investigation. However, accepting that they did actually entertain such a fear, did they think that Ariyapala's malign influence would cease if the Petitioners remained at liberty? Or would they have sought to exclude Ariyapala's influence by keeping the Petitioners in Police custody? The fact that the 3rd Respondent gave contradictory reasons for not questioning the Petitioners and recording their statements on 20.4.90 tends to support the Petitioners position that they were being kept in custody until they became more amenable to disclose what the Respondents considered to be the truth. The failure to produce all the statements recorded and the notes of investigation adds to the infirmities in the Respondents version. The only entries produced are notes of investigation made by the 3rd Respondent (a) at 8.50 a.m. to the effect that he met the Petitioners at the entrance to the Police Station and asked them to wait inside, and (b) at 9.50 a.m. that he questioned them further and found that they were concealing the truth. Apart from the slight discrepancy of 20 minutes as to the time at which he saw the Petitioners, these entries appear to have been a rejoinder to the statement made by Ariyapala that he came to inquire about the fate of the two Petitioners who had not returned home the previous night after their visit to the Police Station — an attempt to suggest that the Petitioners had not been detained overnight, but came again on the 20th morning. In view of the failure of the Respondents to place all the material, in the form of statements, notes and other entries, before this Court, I am unable to accept these entries as reliable. Next, how did the Petitioners know at what time they should report to the C.D.B.? According to Chief Inspector Ranjit Perera, A.J.P. Anthony asked him to be present at 7 p.m. Obviously therefore if the A.S.P. communicated with the Respondents, he would have stipulated the time, and the Respondents should in turn have caused the Petitioners to be informed that they come to the C.D.B. at 7 p.m.; if not, they may have turned up later, thus keeping senior officers waiting. But nowhere do the Respondents claim that the Petitioners were informed of the time at which they should report to the C.D.B. The only situation in which it would not have been necessary to inform the Petitioners was if they were already in custody, and could be taken wherever, anti whenever, the Respondents chose. Finally, the Petitioners say they were released only at 9 a.m. on the 22nd, after they had pleaded with Inspector Wijeratne, the Officer-in-Charge of the Bambalapitiya Police. The 2nd and 3rd Respondents deny this, the former adding that none of the Petitioners were detained *on the 21st*, and the latter

adding that he does not see how they could have met Inspector Wijeratne on the 22nd since they were not at the Bambalapitiya Police Station that day. If Inspector Wijeratne did not order their release on the 22nd, it would have been perfectly simple to have produced an affidavit from him, but there is no such affidavit. In these circumstances, I have no hesitation in rejecting the Respondents' version. The 1st and 2nd Petitioners' version is consistent, is supported by the affidavits of the other Petitioners and Ariyapala, and is intrinsically more probable. I hold that they were deprived of their liberty from 9 a.m. on the 19th until 9 a.m. on the 22nd.

The Petitioners were kept in custody obviously to persuade them to make statements different to those made on the 19th and again on the 20th, and implicating Ariyapala's son. It is their case that on the 20th in addition to threats and abuse, they were hit, kicked, and dragged by their hair; that the assault was of such a serious nature that they had wounds on their elbows and knees, their faces were swollen, and there was blood all over their bodies. Their clothes would have been bloodstained, and even the next morning there would have been visible signs of the assault. They were produced before the Coroner on the 21st, and the 1st Petitioner gave evidence at the inquest; there is nothing to indicate that the Coroner noticed anything unusual. The affidavit of the Attorney-at-law who represented Ariyapala's son and driver was produced, but I do not take this into consideration as the Petitioners had not served a copy of this affidavit on the Respondents, whose Counsel became aware of it only in the course of the hearing. The Petitioners obtained medical treatment on the 22nd, but no medical evidence is forthcoming as to their condition. In these circumstances, while I accept that the Petitioners were subjected to harsh and unlawful treatment, there is not the required degree of proof that it amounted to torture or cruel, inhuman or degrading treatment.

The 3rd to 5th Petitioners claim that at about 11.30 a.m. on the 21st, after the conclusion of the inquest proceedings, they were arrested by the 2nd Respondent and detained at the Bambalapitiya Police Station till 8 p.m. Ariyapala and a hospital employee support this allegation. The 2nd Respondent denies this. I have set out the reasons why the 2nd Respondent's affidavit cannot be acted upon, and I prefer to act on the affidavit of the 3rd to 5th Petitioners. I hold that the 3rd to 5th Petitioners were deprived of their liberty from 11.30 a.m. to 8 p.m. on the 21st .

It is clear that the 1st and 2nd Petitioners were deprived of their liberty because the Respondents wished to interrogate them, and not because they were suspected of any offence. The learned Deputy Solicitor-General submitted that such a deprivation of liberty was not an "arrest" within the meaning of Article 13(1), and would only be an actionable civil wrong. An arrest, he submitted, is a deprivation of liberty based upon an allegation of the commission of an offence; i.e. as contemplated by the law relating to criminal procedure. When it was pointed out to him that the law made provision for "arrests" in other circumstances (e.g. for preventive detention, for deportation and under section 298 of the Civil Procedure Code), he modified this definition, submitting that an arrest was a deprivation of liberty for the purpose of being dealt with under the law; he gave the example of a Police Officer who compelled an able-bodied citizen to clean the precincts of a Police Station, which, he said, would not be an arrest within the meaning

of Article 13(1). Having in mind the disastrous consequence of this line of reasoning, I inquired whether a Police Officer who deprived one candidate of his liberty in the course of an election campaign, solely in order to enhance the prospects of a rival candidate, would be infringing Article 13(1). His reply was that this would not be an arrest. He relied on *State of Punjab v Ajaib Singh (1)*, *Somawathie v Weerasinghe (3)*, and extracts from an article by Dr. Glanville Williams entitled "Requisites of a valid arrest", (1954) Criminal Law Review 6:

"..... obviously it is not every imprisonment or arrest that constitutes an arrest. To be an arrest, there must be an intention to subject the person arrested to the criminal process - to bring him within the machinery of the criminal law; and this intention must be known to the person arrested. Arrest is a step in law enforcement, so that the arrestor must intend to bring the accused into what is sometimes called the custody of the law"

Since this contention was advanced, and pressed on behalf of the State

(despite the decision in *Namasivayam v Gunawardena, (2)*, approved in *Piyasiri v Fernando, (11)*), it is necessary to deal with it fully.

Dr. Glanville Williams was not dealing with the concept of an "arrest" in relation to fundamental rights; he was not even purporting to define an "arrest" for the purpose of the criminal law. Rather, he was seeking to clarify the requisites of a *valid* arrest. Thus the intention of the arrestor, and its communication to the arrestee, are not ingredients of an arrest; rather, they are the conditions essential to the *validity* of an arrest. "Arrest" in Article 13(1) does not refer to a *valid* arrest, but rather to a *defacto* arrest; indeed, it is difficult to conceive of situations in which an arrest which is valid would contravene Article 13(1). In common usage, "arrest" connotes a physical act: to stop (growth, motion, moving person or thing) or to seize (person or ship) especially by legal authority (Concise Oxford Dictionary). Some of its synonyms given in Roget's International Thesaurus (3rd edition, sections 132, 144, 269, 728, 758, 759) are stop, stay, detain, confine, restrain, take captive, take prisoner, apprehend, capture, seize. In *Spicer v Holt (12)*, the phrase "arrested under section 5....." had to be construed. It was held that if the word "arrested" had stood alone, then it had to be given its natural meaning; but since it was followed by the words "under section 5.....", it meant an arrest authorised by section 5 and so must mean a lawful arrest. Arrest according to Halsbury's Laws of England (Vol, 11, 4th edition, para 99) "consists in the seizure or touching of a person's body with a view to his restraint; words, however, amount to an arrest if, in the circumstances of the case, they are calculated to bring, and do bring, to a person's notice that he is under compulsion and he thereafter submits to the compulsion." Whether or not a person has been arrested depends not on the legality of the arrest *but on whether he has been deprived of his liberty to go where he pleases.*

Article 13(1) thus contains a prohibition on deprivation of liberty -no person shall be arrested. However, there is an exception, that such deprivation of liberty may be effected "according to the *procedure* established by law", (and this is certainly more

restrictive than the phrase "except in accordance with the law"). Further, even if a person is arrested in accordance with the procedure established by law, he must nevertheless be informed of the reason for his arrest. Thus Article 13(1) clearly and unambiguously prohibits the arbitrary deprivation of liberty, and it is unnecessary to consider the very different language of the corresponding Indian provisions and the *Ajaib Singh* case. Reference to *Somawathie v Weerasinghe* (3), is superfluous, since "arrest" does not now appear to my brother Kulatunga as it appears to have appeared to him then.

I must add that had there been any ambiguity in regard to the meaning of Article 13(1) there are two reasons why I would have preferred the wider meaning of the word "arrest". Article 13(1) recognises a basic human right; it is not absolute or unqualified, as the law may prescribe the "procedure" for arrest; and Article 15(7) permits certain restrictions. In these circumstances, any ambiguity must be resolved in favour of the liberty of the: citizen, by preferring that interpretation which enhances the right rather than another which diminishes it, thereby complying with Article 4(d) which directs the Judiciary to "respect, secure and **advance**" fundamental rights, and not to "**abridge, restrict** or deny" them. A consideration of relevant international declarations and covenants - although these may not be a source of municipal law - reveals a general trend in the protection and advancement of fundamental rights which it would be legitimate to consider in dealing with a doubt or difficulty. The Universal Declaration of Human Rights proclaimed that no one shall be subjected to arbitrary arrest, detention or exile; the International Covenant on Civil and Political Rights recognised that everyone has the right to liberty and security of person, and that no one shall be subjected to arbitrary arrest or detention. When these, as well as other instruments to which Sri Lanka is not a party, indicate that the law of nations is progressing towards a general recognition as a basic right of the freedom from arbitrary deprivation of liberty, it would be a retrograde step to give Article 13(1) the restrictive interpretation contended for.

The arbitrary deprivation of the liberty of the Petitioners was caused by the 2nd and 3rd Respondents, not because they *bona fide* suspected that the Petitioner was involved in the commission of an offence, but for the wholly improper and illegal purpose of extracting statements containing what they conceived to be the truth. They have thereby infringed the fundamental rights of the Petitioner, for which Article 126 makes them liable; the circumstances do not warrant them being excused or exempted from liability. For the reasons set out in *Karunaratne v Rupasinghe*, (13), I am of the view that relief should be granted against them personally.

Accordingly, I grant the Petitioners the following reliefs:

(1) (a) a declaration that the fundamental rights of the 1st and 2nd Petitioners under Articles 13(1) and 13(2) were infringed by the 2nd and 3rd Respondents by reason of their arrest on 19.4.90, and their detention from 19.4.90 to 22.4.90;

(b) compensation in a sum of Rs. 3,000/- each to the 1st and 2nd Petitioners, payable by the State;

(a) compensation in a sum of Rs. 500/- each to the 1st and 2nd Petitioners, payable by the 2nd and 3rd Respondents;

(2) (a) a declaration that the fundamental rights of the 3rd, 4th and 5th Petitioners under Articles 13(1) and 13(2) were infringed by the 2nd Respondent by reason of their arrest and detention on 21.4.90;

(b) compensation in a sum of Rs. 500/- each to the 3rd, 4th and 5th Petitioners, payable by the State;

(c) compensation in a sum of Rs. 250/- each to the 3rd, 4th and 5th Petitioners, payable by the 2nd Respondent; and

(3) one set of costs in a sum of Rs. 2,000/- payable by the State.

I further direct the 1st Respondent, the Inspector General of Police to hold a full inquiry into the allegations made by the 1st and 2nd Petitioners in respect of the treatment meted out to them from 19th to 22nd April 1991, and to submit to this Court a report in respect of such inquiry within four months of the date of this order; the case will be called on 16th January 1992 to consider that report.

Bandaranayake, J.

I have read the judgements of my brothers Fernando, J., and Kulatunga, J., and agree with the orders made by them.

Where the fundamental rights of a petitioner are found to have been infringed by a public officer, acting under colour of his office, I agree that in addition to the State, in appropriate cases, such public officer may also be held concurrently liable in respect of such infringement, and that he may be ordered to pay compensation where the Court considers such an order to be just and equitable.

Kulatunga, J.

The 1st and the 2nd Petitioners are carpenters, the 3rd Petitioner is the wife of the 1st Petitioner and the 4th and 5th Petitioners are the parents of the 2nd petitioner. They complain of unlawful arrest by the 2nd and 3rd Respondents. The 2nd Respondent is an Inspector of Police who functioned as the Officer-in-Charge of the Bambalapitiya Police Station and the 3rd respondent is a Sub-Inspector of Police who was the O.I.C. Traffic Branch of that Police Station, during the relevant period. The Petitioners also complain of unlawful detention at the Bambalapitiya Police Station and elsewhere subsequent to their arrest. The 1st and the 2nd Petitioners allege that during their detention they were subjected to torture or cruel, inhuman or degrading treatment by the Police. They pray for a declaration that by the said acts their rights under Articles 11 and 13 of the Constitution have been infringed and for damages totalling Rs. 300,000/-.

The case for the Petitioners which I shall presently refer to in greater detail is that the 1st and the 2nd Petitioners were arrested by the Police in order to, procure their evidence regarding an accident which had occurred on 04.04.90 when a Pajero jeep belonging to one Ariyapala a businessman who is ensued in the sale of motor vehicles collided with a car causing serious injuries to a lady who drove the car. A few days thereafter, she succumbed to the injuries and died. The 3rd, 4th and 5th Petitioners were arrested by the police when they visited the Coroner's Court at the General Hospital Colombo on 21.04.90 to see the 1st and the 2nd Petitioners who had been arrested by the Police and produced before the Coroner to give evidence at the inquest.

The first two Petitioners were engaged in carpentry work relating to repairs to Ariyapala's residence in Bullers Lane between 2nd to 8th April. On the morning of the 4th they went to Ariyapala's stores in Bambalapitiya in a jeep driven by the driver one Weeraratne to obtain timber required for their work but returned without timber as the Security guard of the stores was not available at the time. They made a second trip when Ariyapala's son Indika Ariyapala who is about 16 years old accompanied them in the jeep which according to them was driven by Weeraratne. Indika was seated in the front seat. When they were going along Duplication Road, a black car emerged from Vajira Road when the jeep collided with it. The lady driver of the car was thrown out of the car. She and another passenger were seriously injured and rushed to the hospital.

Two policemen arrived. As required by them Weeraratne drove the jeep to the Bambalapitiya Police Station while one of the policemen drove the car involved in the collision to the Bambalapitiya Police Station. Indika left for home to inform his parents about the accident. The two Petitioners also claim to have gone to the Police Station and state that they saw the driver seated on a bench and that after about half an hour they all returned to the residence of the said Ariyapala.

On 05.04.90 the driver Weeraratne was produced before the Magistrate and was bailed out. Neither the passenger of the car nor the witness who had been present at the scene and whose statements had been recorded by the police were able to identify the person who drove the jeep at the time of the accident. The statements of the two Petitioners had not been recorded though they claim to have, gone to the Police. It appears from their averments that even if they had gone to the Police they had not identified themselves as witnesses and the police had probably not been aware of fact that they had travelled in the jeep.

Subsequently, on the instructions of the police Ariyapala sent for the two Petitioners who lived in Battaramulla and when they arrived at his house took them to the Bambalapitiya Police Station on the morning of 19.04.90 and left them there. At about 10.00 a.m. the 3rd respondent took them in a police jeep to the City Traffic Police, Mihindu Mawatha, Pettah There the 3rd Respondent threatened them to implicate Indika saying that the police were aware that he drove the jeep at the time of the collision; however they were not prepared to make a statement to that effect. In the afternoon they were brought back to the Bambalapitiya Police Station. Whilst they were thus detained the 3rd Respondent again threatened them and unsuccessfully attempted

to record their statements on the desired lines after which they were detained at the Bambalapitiya Police Station that night.

As the first two Petitioners failed to return home on the 19th the 3rd, 4th and 5th Petitioners got a relation of Ariyapala resident in Battaramulla, to telephone Ariyapala and inform him about their failure to return home. Consequently on 20.04.90 Ariyapala visited the Bambalapitiya Police Station and saw the two Petitioners there. On that occasion the 2nd Respondent abused Ariyapala for visiting the Police Station and had his statement recorded by the 3rd Respondent before he was allowed to leave the Police Station.

At about 10.30 a.m. on the 20th the 3rd Respondent took the Petitioners in a jeep to the Mihindu Mawatha City Traffic Police Station. There, the 3rd Respondent had them blind folded and took them in a jeep in the company of others whom they believed were police officers to an unknown destination. Later they came to know it to be the Crime Detective Bureau, Gregory's Road, Colombo 7. On the way and at the Bureau the 3rd Respondent and the other Police Officers abused them; they also threatened the Petitioners with death by burning on tyres, and assaulted and kicked them. As a result there was blood all over their bodies; they were bleeding from their lips; they had wounds on their elbows and knees and their faces were swollen. They screamed and pleaded with the 3rd Respondent and finally agreed to make a statement implicating Ariyapala's son as required by the 3rd Respondent. Thereafter the 3rd Respondent left. At about 9.30 p.m. three Police Constables made them to sign two statements which were not read over to them or explained. They spent that night at the Bureau and were asked to sleep on benches.

On 21.04.90 at about 7.30 a.m. they were taken by Police Officers to the Traffic Headquarters at the Secretariat building, Fort and later at about 10.30 a.m. to the Coroner's Court General Hospital, Colombo. The 2nd and 3rd respondents and two Assistant Superintendents of Police were there. One of them (A.S.P. Karunaratne) called the 1st Petitioner to testify at the inquest and led his evidence by a series of leading questions. The 1st Petitioner fainted twice and was sobbing in the witness box; at about 11.30 a.m. the 2nd Respondent arrested the 3rd, 4th and 5th Petitioners at the General Hospital and handed them over to several Police Constables. At about 12.30 p.m. the 1st and 2nd Petitioners were brought to the Traffic Headquarters, Fort and kept there till about 7.30 p.m. and at about 8.00 p.m. they were taken to the Bambalapitiya Police Station where they saw the 3rd to 5th Petitioners who were released at about 8.00 p.m.; however, the 1st and 2nd Petitioners were detained at the Police Station and they were required to lie on benches throughout the night.

On 22.04.90 they met Mr. Wijeratne O.I.C. of the Bambalapitiya Police Station and pleaded for their release. He permitted them to go home but with instructions to report at the Police Station again at 5.00 p.m. However, they did not comply with the said instructions. Instead they went to the Government Hospital, Thalangama for treatment. But when they said that they had received injuries by a police assault the Medical Officer at the O.P.D. refused to examine them for want of a police report. As such, they

obtained treatment from a private medical practitioner without disclosing the fact of the police assault.

On the basis of the evidence led at the inquest the police obtained an order from the Coroner to arrest the driver Weeraratne and Indika Ariyapala. They were accordingly produced before the Magistrate and were remanded until they were subsequently enlarged on bail.

In support of their case the Petitioners have produced several affidavits in particular from Ariyapala senior, a hospital labourer Kumara Perera and Ananda Malalgoda the Attorney-at-Law who watched the interests of Indika Ariyapala and the driver Weeraratne at the inquest (P1, P3 and P4). Ariyapala senior states that on 19.04.90 he accompanied the two Petitioners to the Bambalapitiya Police; that they were at the Police Station on the 20th when he went there; and that on the 21st when they were brought to the Coroner's Court by the Police they appeared to be in pain. He also speaks to the arrest of the 3rd, 4th and 5th petitioners by the 2nd respondent at the Coroner's Court on the 21st .

Kumara Perera states that he saw the 1st Petitioner limping and walking with difficulty when he was being brought to the Coroner's Court by the police. He had also seen the 3rd Petitioner and two others weeping and wailing there and that they were arrested and taken away by Police Officers on the orders of the 2nd Respondent.

Mr. Malalgoda, Attorney-at-law states that he watched the interests of Indika Ariyapala and the driver Weeraratne at the inquest; that the 1st Petitioner was helped into the witness box; he was crying, appeared to be weak and unsteady on his feet and on two occasions assumed a crouching position in the witness box; and that the proceedings in the Coroner's Court ended in confusion.

On behalf of the Respondents affidavits have been made by the 2nd and 3rd Respondents, A.S.P. Harold Anthony who was in overall charge of investigations into the fatal accident, Chief Inspector of Police Ranjit Perera who recorded the statements of the 1st and 2nd Petitioners at the Crime Detective Bureau on the 20th and A.S.P. Karunaratne who led evidence at the inquest on the 21st into the death of the deceased Miss Deepani Premaratne.

The case for the Respondents is that several days after the accident the driver of the motor car Miss Deepani Premaratne died of injuries sustained in the collision and it became necessary to further investigate to identify the driver who drove Ariyapala's Jeep at the time of the accident. Such investigations had become important presumably for the reason that neither the other passenger who travelled in Deepani's car nor the persons who were at the scene of the accident had been in a position to identify the driver. In the meantime the police had information that the 1st and 2nd Petitioners who had been employed by Ariyapala were in the jeep at the time of the accident. Consequently, the 3rd Respondent made several efforts from about the 14th of April to

trace the Petitioners and for this purpose visited Ariyapala's residence and failed to meet Ariyapala or the Petitioners.

By the 18th A.S.P. Harold Anthony had information that it was not Weeraratne who drove the jeep at the time of the accident but Indika Ariyapala although Weeraratne had reported the accident and admitted to the police to have driven the jeep. On the 18th the A.S.P. directed the 2nd and 3rd Respondents to investigate the matter and the 3rd Respondent visited Ariyapala's residence and as Ariyapala was again not present requested his wife to send a message to the Petitioners to attend the Bambalapitiya Police Station. On the 19th, Ariyapala brought the Petitioners. On being questioned they appeared to suppress vital information on the advice of Ariyapala and hence the 3rd Respondent told them to come next day by themselves. They came on the 20th at about 8.30 a.m. but as the 3rd Respondent was on special traffic duty, they were told to come at 2.30 p.m. the same day. On the instructions of A.S.P. Harold Anthony the Petitioners were instructed to proceed to the Crime Detective Bureau, Gregory's Road, Colombo 7.

The A.S.P. says that he shifted the place of inquiry as the 2nd and 3rd Respondents had reported that Ariyapala was interfering with the investigations. At the Bureau he himself questioned the Petitioners who admitted Indika Ariyapala having driven the jeep at the time of the accident. Their statements were recorded by Chief Inspector Ranjit Perera, at about 10.30 p.m. on the 20th after which he instructed them to leave and to attend the Coroner's Court the next day. On the 21st when the 1st Petitioner was giving evidence before the Coroner suspect Indika Ariyapala and his father were seen pointing their fingers at the witness who then appeared to be frightened and confused whereupon the Coroner offered him a seat. A crowd of about 10 (believed to have been instigated by Ariyapala senior) created a disturbance in the Coroner's Court. After the inquest the Petitioners were permitted to leave with instructions to give evidence when noticed by Court. Subsequently, both of them left.

The Respondents deny the allegation that the 1st and 2nd Petitioners were detained or subjected to torture by the police; they also deny the allegation that they were at one stage taken to the City Traffic Police Quarters, Mihindu Mawatha. It is their position that this application has been filed at the behest of Ariyapala as the police had taken action against his son.

It is apparent that the interests of the prosecution and of Indika Ariyapala in the investigations into the death of Miss Deepani Premaratne were evenly matched. The investigations by the police were carried out under the direction of A.S.P. Harold Anthony to establish the complicity of Indika Ariyapala. The suspect's father would be naturally interested in doing everything to safeguard his son including by assisting the Petitioners in this application. This is evident from the fact that he has given an affidavit to the Petitioners together with a supporting affidavit from one of his customers (P2); Mr. Malalgoda, Indika's Attorney-at-Law has also given an affidavit. The Petitioners contend that the accusation against the suspect Indika is false and engineered by the police

without justification. The Respondents contend that it is based on a reasonable suspicion and that they were only interested in ascertaining the truth.

The police have no record of the information on which they suspected Indika. If the police acted on mere conjecture their conduct in suspecting Indika would be totally unjust or liable to impeachment on the ground of actual malice. However, their suspicion is also attributable to the fact that although Indika had been in the jeep at the time of the accident, he was admittedly not at the scene when the police visited the scene. It also appears that the 1st and 2nd Petitioners who were witnesses to the accident and who claim to have gone to the Police Station with the driver Weeraratne had not presented themselves as witnesses; and the police had not been aware of their existence immediately after the accident. As such, their statements were not recorded and there was no witness who was in a position to identify the person who drove the jeep at the time of the accident. It was in this background that the police decided to interrogate the Petitioners as to the possible involvement of Indika in the accident and hence I am unable to regard the conduct of the police as being altogether unjust or affected by actual malice.

The Respondents have produced marked X and Y the statements of the Petitioners recorded on 20.04.90. Even if these statements were made under duress they describe in detail the events on the day of the accident. The Petitioners say that as they were leaving the house on the 4th of April to bring timber, Indika asked the driver to first go to the place where the air-conditioner had been given for repairs. The jeep was then driven to a place near the railway track in Castle Street when the driver got down and went up to the gate of a house. He spoke to a man. At this stage Indika got into the driving seat. When the driver returned, he found Indika at the wheel and therefore occupied the front seat and Indika drove the jeep until it met with the accident. After the accident Indika went to inform his parents, a shortwhile thereafter Ariyapala returned with Indika, and said that he would attend to the accident and asked the two Petitioners to go home and attend to the work which they did.

I am satisfied that the above statement (whether they state the truth or not) have been made under duress through fear of the police in whose custody the Petitioners had been unlawfully detained from the 19th to 22nd of April 1990; In the circumstances of this case, I am unable to accept the Respondents' version that when the Petitioners were brought to the Bambalapitiya Police Station on the 19th they were instructed to call over the next day and that on the 20th they went to the Crime Detective Bureau on their own as instructed by the police. The Respondents have not produced any information book extracts of the notes of investigation which would give credence to their version; and I accept the position that the Petitioners were in continuous detention and were taken by the police to the several places mentioned by them in order to procure their statements and were kept in police custody even after the conclusion of the inquest on the 21st.

I am also satisfied that the 3rd, 4th and 5th Petitioners have been arrested by the police in the Coroner's Court on the 21st and were detained at the Bambalapitiya Police

Station until their release the same evening. The evidence shows that they were agitated by the detention of the 1st and 2nd Petitioners by the police and were weeping and wailing. The inquest itself ended in confusion. In normal circumstances, the police might have arrested any person committing a breach of the peace there but here the position is different. These Petitioners were the wife of the 1st Petitioner and the parents of the 2nd Petitioner respectively. I do not think that their conduct warranted arrest and detention for a breach of the peace. I therefore hold that their arrest and detention is unlawful.

It must be noted that the over enthusiasm of the respondents in investigating the offence has been counter productive and has thwarted the successful prosecution of the offender. What is more it has led to an allegation of the infringement of rights under Articles 11 and 13 of the Constitution.

For the reasons I shall presently elaborate I am satisfied that the Petitioners have established an infringement of their rights under Articles 13 (1) and (2) of the Constitution. However, the evidence as regards the alleged infringement of Article 11 is not sufficiently cogent and is affected by certain infirmities. Thus the averment that the 1st and 2nd Petitioners had blood all over their bodies and that they were bleeding from their lips or the statement that they had wounds on their elbows and knees and that their faces were heavily swollen by the police assault is not supported by the evidence of Mr. Malagoda, Attorney-at-Law. If the conditions spoken to existed in the night of the 20th Mr. Malalgoda should have observed them next morning. The Petitioners were produced to the Coroner's Court from police custody and presumably in the same clothes as they had on them the previous night; but Mr. Malalgoda does not refer to any blood stains or injuries. There is also no medical evidence of injuries although the Petitioners did obtain treatment from a Medical Practitioner. Having regard to the competing interests and influences in the case, exaggeration of the petitioners' case in this respect is probable. Mr. C. R. de Silva, Senior State Counsel pointed out to the fact that the affidavits are in English and have not been read out and explained to the Petitioners some of whom have signed them in Sinhala whilst one has placed his thumb impression. It would not be safe to act on bare allegations contained in such affidavits unless they can be regarded as intrinsically true in the circumstances or are corroborated by other evidence. I hold that the alleged infringement of Article 11 has not been established.

I now revert, to the alleged infringement of rights under Article 13 (1) and (2) of the Constitution. In response to certain questions by me during the hearing the learned Senior State Counsel submitted that in the event of this Court holding that the Petitioners had been taken into custody by the police he would submit that it would not entitle the Petitioners to relief for an infringement of Article 13 (1) and (2) of the Constitution. On the authority of *State of Punjab v. Ajaib Singh* (1) he submitted that such taking and detention did not constitute "arrest" and "detention" within the meaning of the said article because there was no allegation or accusation of an offence by the Petitioners or an intention on the part of the respondents to subject the Petitioners to the process of law. He contends that the remedy of the Petitioners is limited to claiming civil

damages whilst the officers liable for such unlawful conduct may also become liable for an offence; but the Petitioners cannot seek relief for violation of fundamental rights. Mr. Faiz Musthapha, P.C. for the Petitioners submitted that there is no justification for such a restrictive interpretation of Article 13. He cited in support the decision of this court in *Namasivayam v. Gunawardena* (2).

In *Ajaib Singh's* case (supra) the taking into custody of an abducted person by a Police Officer and the delivery of such person by him into the custody of the Officer-in-Charge of the nearest camp under S.4 of the Abducted Persons (Recovery and Restoration) Act, 1949 was challenged on the ground of conflict with certain fundamental rights provisions of the Indian Constitution. It was alleged inter alia, that S.4 was in conflict with and violative of the provisions of Article 22(1) and (2) of the Constitution which provide

22 (1) _ "No person who is arrested and detained in custody shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

(2) _ "Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate."

Das J. held (p. 15) -

"The language of Article 22(1) and (2) indicates that the fundamental right conferred by it gives protection against such arrests as are effected otherwise than under a warrant issued by a Court on the allegation or accusation that the arrested person has, or is suspected to have, committed, or is about or likely to commit an act of a criminal or quasi criminal nature or some activity prejudicial to the public or the State interest".

The Court was of the opinion that the protection which has been made a matter of substantive fundamental right (with improvements) is the protection which is contained in the Criminal Procedure Code. Thus under S.56 an arrested person is entitled to be informed of the grounds for his arrest. This right is enshrined in Article 22(1). As regards Article 22(2) Das J. observed (p.15) ___

"It is also perfectly plain that the language of Article 22(2) has been practically copied from Sections 60 and 61 of the Criminal Procedure Code which admittedly prescribe the procedure to be followed after a person has been arrested without warrant".

The petitioners before us have invoked Article 13(l) and (2) of the Constitution which reads ___

13(1) ____ "No person shall be arrested except according to the procedure established by law. Any person arrested shall be informed of the reason for his arrest".

(2) ____ "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".

According to the plain meaning of these provisions the rights claimed by the petitioners are not limited to persons arrested on suspicion of having committed or being concerned with an offence. The protection against arbitrary arrest and detention is the central feature or the core of these provisions. Under the Indian Constitution such protection is afforded by Article 21 which reads ____

"No person shall be deprived of his life or personal liberty except according to the procedure prescribed by law".

Article 22(1) and (2) of that Constitution provides protection to persons arrested without a warrant in the circumstances set out in *Ajaib Singh's* case (supra). Article 13 of our Constitution enshrines the rights provided by Articles 21 and 22(1) and (2) of the Indian Constitution.

The 1st and 2nd Petitioners complain of arbitrary arrest and detention by the police for the purpose of procuring their evidence against Indika Ariyapala. The other Petitioners also complain of arbitrary arrest and detention when they came to the Coroner's Court. I am of the opinion that such arrest and detention are violative of Article 13(1) and (2) of the Constitution. Neither the facts nor the constitutional provisions which came in for consideration in *Ajaib Singh's* case (supra) have any application to this case whilst the decision of this Court in

Navasivayam's case (supra) is exactly in point. I wish to add that having listened to a full argument on the point I have changed the view which I expressed (obiter) in my separate judgment in *Somawathie v. Weerasinghe* (supra) on the scope of Article 13. Accordingly I determine that the 2nd and 3rd Respondents have infringed the fundamental rights of the Petitioners secured by Article 13(1) and (2) of the Constitution.

The 2nd and 3rd Respondents have by their acts made the State liable to pay compensation to the Petitioners. However, the evidence establishes that these Respondents are personally responsible for the impugned acts. I am, therefore, of the view that this is an appropriate case to make the order for relief against them and the State. Before making my order, I wish to consider the decision of this Court in *Saman v. Leeladasa* (4), in which the majority of the Judges ordered compensation only against the State. After examining the previous decisions Amerasinghe J. said (p. 38) ____

"It is therefore the State that is liable to pay compensation to the Petitioner".

Fernando J. however, awarded compensation against the 1st Respondent and the State jointly and severally applying the common law principle of delictual liability against master and servant. He said (pp.23-24) ___

"Article 126 does not define an ingredient of an infringement of fundamental rights; it merely ousts the jurisdiction of other Courts and tribunals in respect of one category of such infringements namely those committed by executive or administrative action".

The question is whether the decisions of this Court prior to *Saman v. Leeladasa* (supra) preclude relief under Article 126 being granted against a Respondent who is found personally responsible for the infringement of fundamental rights and the State. In *Thadchanamoorthi v. Attorney General* (5), the alleged torture (infringement of Article 11) was held to have been not proved for want of cogent material. Wanasundara J. proceeded to consider the preliminary objection taken on behalf of the State that an act of a State functionary would not constitute "executive or administrative action" unless it is done within the scope of the powers given to him, which means that if it is an unlawful or ultra vires act, it would not be considered State action but only as the individual act of the person concerned. He agreed that such a test would make Article 11 a dead letter and held that an act of a public officer under the colour of office would constitute State action except when it ought to be considered purely as an individual or private act. This exception is subject to the qualification that even such acts would entail State liability if their exception is subject to the qualification that even such acts would entail State liability if there is an administrative practice sanctioning or tolerating them.

In *Velumurugu v. Attorney-General* (6), it was held (Sharvananda J. (as he then was) and Ratwatte J. dissenting) that the evidence failed to establish the alleged torture of the Petitioner. In this case, the State took up the position that an act of an officer would constitute "executive or administrative action", if it is performed in the course of his duties and under colour of authority and in support relied on decisions on vicarious liability of a master for the acts of his servant in the sphere of the law of tort. Wanasundera J. said (p.210) ___

"We are here dealing with the liability of the State under public law, which is a new liability imposed directly on the State by the constitutional provisions. While the decisions relating to the vicarious liability of a master for the acts of his servant may be useful to the extent that all cases where a master can be held liable in tort would undoubtedly fall also within the liability of the State under the constitutional provisions, the converse need not be true unless we are to give a restricted interpretation to the constitutional provisions. The Common Law test of tortious liability therefore cannot provide a sufficient test and we have to look elsewhere for the appropriate principles".

He expressed the view that all acts done under colour of office including ultra vires acts or acts in disregard of a prohibition would raise State liability; and that the concept of "administrative practice" would help to extend such liability viz. State liability would arise if the acts complained of are attributable to a general situation created by negligence or indifference of those in authority (pp. 212, 213).

In the above decisions the Court was concerned with defining State liability for infringement of fundamental rights in the widest possible terms. The Court had no occasion to go into the nature of the liability for such infringements by private persons not subject to public law e.g. liability arising under Article 12(3) by exclusion of any person from a shop etc. on the ground of race, religion, language, caste or sex; nor did the Court consider whether compensation may be awarded against both the offending officer and the State which is a question relating to the scope of the redress an applicant would be entitled to under Article 126.

In *Ratnasara Thero v. Udugampola* (7) a Divisional Bench of this Court ordered the 1st Respondent (a Superintendent of Police) to pay the Petitioner a sum of Rs. 10,000/- for infringement of Article 14(1)(a) by the seizure of certain pamphlets.

In *Mariadas v. Attorney-General* (8), the State was ordered to pay compensation in a sum of Rs. 5,000/- for infringement of the Petitioner's rights under Article 13(1) whilst the 1st Respondent was ordered to pay the Petitioner the costs of the application. The Court said it would not make an order against Sub Inspector Godagama who was also found responsible for the infringements as he was not a party to the proceedings.

Sharvananda J. said (p. 404) ___

"The protection afforded by Article 126 is against infringement of fundamental rights by the State, acting by some public authority endowed by it with the necessary coercive powers. The relief granted is principally against the State, although the delinquent official may also be directed to make amends and/or suffer punishment".

In *Vivienne Goonewardena v. Perera* (9) this Court adopted the above dicta as to the nature and the scope of the liability for infringement of fundamental rights by the State. The officer who was responsible for the wrongful arrest of the Petitioner was not a party to the application. Accordingly, the Court awarded Rs. 2,000/- as compensation against the State for infringement of Article 13(1). In *Kapugeekiyana v. Hettiarachchi* (10), the 1st and 2nd Respondents were ordered to pay Rs. 10,000/- as compensation for violation of the Petitioner's rights under Article 13(2) by illegally detaining him on the fourth floor of the Criminal Investigation Department for three days.

With great respect, there is nothing in these decisions which would support the implication of the majority opinion in *Samara v. Leeladasa* (supra) that a determination under Article 126 would enable the grant of relief only against the State. In fact relief has been freely granted previously not only against the State but also against Respondents who were found to have been personally responsible for infringement of fundamental rights. Even if the liability is not based on delict but liability *sui generis* under public law, this Court has the power under Article 126(4) read with Article 4(d) to grant relief against the offending public officer and the State. That Article reads ___

"The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstances in respect of

any petition or reference referred to in paragraphs (2) and (3) of this Article

"

"Executive or administrative action" would make the State primarily liable for such action viz. independently of the state officer concerned and as a matter of public law. But Article 4(d) which provides that fundamental rights shall be respected, secured and advanced by all organs of government would make the offending public officer being a member of the executive organ also liable for the infringement of such rights; and Article 126(4) would empower this Court to grant relief against the State and such officer. It is necessary that such relief should be just and equitable. Giving relief against individual officers in addition to the State in appropriate cases would also help to curb any tendency on the part of State officers to violate fundamental rights in the belief that the State alone is liable for such violation.

In ordering relief to the Petitioners before us, I wish to emphasize that whilst it is the duty of the police to investigate offences using all lawful powers, they are not entitled to arrest or detain persons in the course of investigations in the manner disclosed in these proceedings. As already pointed out such overzealous conduct would only impede the successful prosecution of offenders and give rise to complaints of violation of fundamental rights. In all the circumstances, I think it just and equitable to make order that the 1st and 2nd Petitioners are each satisfied to compensation in a sum of Rs. 3,000/- (Rupees Three Thousand) payable by the State. The 1st and 2nd Petitioners will also be entitled to compensation in a sum of Rs. 500/- (Rupee Five Hundred) each payable by the 2nd and 3rd Respondents respectively. The 3rd, 4th and 5th Petitioners will each be entitled to Rs. 500/- (Rupees Five Hundred) as compensation payable by the State. Each of them will also be entitled to compensation in a sum of Rs. 250/- (Rupees Two Hundred and Fifty) payable by the 2nd and 3rd Respondents respectively. I direct the payment of these amounts accordingly by the State and the 2nd and 3rd Respondents together with one set of costs in a sum of Rs. 2,000/- (Rupees Two Thousand) payable by the State. I also agree to the making of the further direction as stated by my brother Fernando J. in his judgement whereby the Inspector General of Police is required to inquire and report on the allegations made by the 1st and 2nd Petitioners.

Compensation ordered *against State and Public*

officers concerned for illegal

arrest.