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

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

SC(FR) Aplications No. 68, 73, 74, 75,and 76/2002 ; Six Petitioners Vs. K. Udugampola SP and others

S.C. (FR) Application No. 68/2002

Shaul Hameed Mohamed Nilam,

No. 64, Diggala Road, Henamulla,

Panadura,

Petitioner

S.C. (FR.) Application

No. 73/2002

Prema Ananda Udalagama,

81, Akkarawatta Road,

Galagedera.

Petitioner

S.C. (FR.) Application

No. 74/2002

Herath Mudiyanselage Nissanka Herath,

Nagollawatta,

Weligapola,

Wadduwa,

Petitioner

S.C. (FR) Application

No. 75/2002

Ilandarige Edirisinghe Jayamanne

I27 B, Epitagedera Watta,

Karandupona,

Kegalle,

Petitioner

S.C. (FR) Application

No. 76/2002

Habeeb Mohamed Hilmy,

7, Trincomalee Road,

Mihintale.

Petitioner

Vs,

l. K. Udugampola,

Superintendent of Police,

Kandy.

2. R. A. P. Dharmaratne,

Sub-Inspector of Police,

Police Division,

Kandy.

3. M. A. E. Mahendra

Headquarters Inspector of Police,

Kandy.

4. Ashoka Ratnaweera,

Senior Superintendent of Police,

Kandy.

5. M. M. M. B. J. Mohottigedera,

Inspector of Police,

Officer-in-Charge,

Police Station,

Katugastota.

6. B. L. V. de S. Kodituwakku,

Inspector General of Police,

Police Headquarters,

Colombo 01.

7. The Attorney-General,

Attorney General's Department,

Colombo 12.

Respondents

BEFORE: Sarath N. Silva, C J.

Shirani A. Bandaranayake, J. &

P. Edussuriya, J.

COUNSEL: S.L. Gunasekera with Manohara de Silva, Dilshan Jayasooriya and Prasanna Gunasena for the Petitioners.

Shibly Aziz, President's Counsel with Faizzer Musthapha and Rohan Deshapriya for the 1st Respondent.

Kolitha Dharmawardane with Sampath Soyza for the 2nd and 3rd Respondents.

Upul Jayasooriya for the 4th and 5th Respondents.

Shavindra Fernando, Senior State Counsel with Viveka Siriwardena de Silva, State Counsel for the 6th and 7th Respondents.

ARGUED ON: 06.03.2003, 10.03.2003 and 17.07.2003

WRITTEN SUBMISSIONS

TENDERED ON

For the Petitioners - 15.09.2003.

For the 1st Respondent - 30.10.2003.

DECIDED ON 29.01.2004

Shirani A. Bandaranayake, J.

The petitioners in S.C. (Application) No. 68/2002 and S.C. (Application Nos.) 73-76/2002 complained that their fundamental rights guaranteed in terms of Articles 11, 12(1), 13(1) and 13(2) were infringed by the actions of the respondents in the following manner; viz.,

(a) that the petitioners' fundamental rights guaranteed under Article 11 of the Constitution were infringed by 1st, 2nd and 3rd respondents;

(b) that the petitioners' fundamental rights guaranteed under Article 12 (1) of the Constitution were infringed by the 1st, 2nd, 3rd, 4th, 5th and 6th respondents.

(c) that the petitioners' fundamental rights guaranteed under Article 13(1) of the Constitution were infringed by the 1st and 2nd respondents; and

(d) that the petitioners' fundamental rights guaranteed under Article 13(2) of the Constitution were infringed by the 2nd, 3rd, 4th and 5th respondents.

This Court granted leave to proceed for the alleged infringement of Articles 11, 12(1), 13(1) and 13(2) of the Constitution.

(A) <u>The Petitioners' version</u>

According to the petitioners, the petitioner in S.C. (Application) No. 68/2002 was the leader of a team of Soldiers attached to the Directorate of Military Intelligence (hereinafter referred to as the 1st petitioner) which, with the assistance of certain civilians conducted ‘under cover' operations known as ‘long range reconnaissance patrols’ in certain parts of the Eastern Province. The petitioners in S.C. (Applications) Nos. 73-77/2002 were members of the long range reconnaissance patrol of the said Directorate of Military Intelligence.

As stated by the petitioners, the Directorate of Military Intelligence of the Sri Lanka Army had taken on rent for their team a 'safe house' at the Millenium City Housing Complex by a tenancy agreement entered into by the owner of the said house, who was the wife of the petitioner in S.C. (Application) No. 68/2002, and Brigadier H. K. G. Hendavitharana, who was the Director of Military Intelligence of the Sri Lanka Army (P 1).

The team of the Directorate of Military Intelligence had gone, to Batticaloa on operations on the 21st December 2001, returned to the 'safe house' on the 26th/27th December 2001 consequent to the agreement on cease-fire between the Security Forces of the State and the Organization known as the Liberation Tigers of Tamil Eelam (LTTE), Thereafter the petitioners were directed by the Director of Military intelligence to return all arms, ammunition, explosives etc., which were in the possession of the said team. The petitioners prepared the requisite documentation for the return of the said arms, ammunition, explosives which had to be returned to Army Headquarters, the Regimental Headquarters of Military Intelligence and Army Camps at Kadawatha, Maradana, Panagoda and Kosgama. After returning the items to the respective camps, except the Army Camps at Kadawatha and Maradana, the petitioners returned to the 'safe house' around 5.30 p.m. on 2nd January 2002, intending to return

the balance weapons, ammunitions to those two Camps on the following day.

Before the petitioners returned to the 'safe-house", a party of armed and uniformed Police Officers, under the command of the 1st respondent, which included the 2nd respondent, acting under the colour of office, and accompanied by Major A. C. A. de Soysa of the Sri Lanka Camp of Military Police had arrived at the 'safe house'. At that time only Staff Sergeants I. E. Jayamanne and I. Subashkaran of the said team had been present. When the petitioners arrived at the 'safe house' the 1st respondent told the 1st petitioner that he came to inspect the safe house, on a Court order, but did not show such order. Thereafter the 1st respondent ordered the 1st petitioner to open the locked door of the room in which the balance weapons, ammunition, explosives were stored.

The 1st petitioner thereafter opened the said door. No sooner the 1st respondent saw the contents of the room he had uttered the words to the effect, " **ආ මේ තියෙන්නේ බඩුඃ මගේ වැඩේ හරි**" and directed them to take all the ammunition, weapons, out of the room, At that stage the 1st petitioner specifically informed the 1st respondent that, the weapons, ammunition, explosives were lawfully obtained from the Army by them; that special operations were conducted in the Eastern Province with them and tendered a file containing all relevant documentation in respect of the weapons, ammunition and explosives that were found in the said room to the 1st respondent to establish that they were lawfully obtained and the petitioners were in the process of returning them.

The 1st respondent refused to examine the said documents stating that, **"මේවගෙන් මට වැඩක් නැහැ, මම දන්නවා මෙතන මොනවද වෙන්නේ කියලා".** The 1st petitioner then attempted to speak to the Director of Military Intelligence on the said incident which was refused by the 1st respondent. Thereafter on the instructions of the 1st respondent all the

weapons, ammunitions, explosives etc. were brought out of the said room and kept in the centre of the hall where they could be seen from the road by any passerby. Although the 1st petitioner pleaded with the 1st respondent not to do so, that was of no avail. While explaining their position, the 1st petitioner requested the 1st respondent to examine the file of documents to confirm the fact that the petitioners were a special team conducting operations against the LTTE. The 1st respondent had persistently refused to examine the said file of documents, but he took the said file into his custody and had not returned the said file to date.

Shortly thereafter the Officer-in-Charge of the Athurugiriya Police had arrived at the 'safe house' in a lorry. By that time a large crowd had gathered around the house and the 1st petitioner had heard Police Officers telling the people that they were a dangerous gang of criminals, in possession of prohibited weapons. Thereafter the 1st respondent had taken several telephone calls on his mobile phone; the petitioners contended that from the conversation, they had become aware that the 1st respondent was giving details of his 'raid' to the electronic and print media.

In the meantime the 1st petitioner had requested Major A. C. A. de Soysa to permit him to telephone his wife. When this was permitted, the 1st petitioner had told his wife to inform Major T. S. Sally, of the Directorate of Military Intelligence, who was the petitioner's immediate Superior Officer, of their predicament. This conversation, according to the petitioner, had taken place in Tamil.

After the conversation the 1st respondent had with the media, he directed the said team to load all weapons, ammunition and explosives except the Thermobaric Flame Throwers into the vehicle brought by the Athurugiriya Police, and directed the said team to load the Thermobaric Flame Throwers into the vehicle of the team and

directed them to travel in that vehicle. The petitioners did as directed as they had no other alternative.

The petitioners alleged that it was in those circumstances that they were arrested by the 1st respondent, 2nd respondent and the other Police Officers whose names are unknown to the petitioners, around 8.30 p.m. on 02.01.2002. No reason was given by the respondents for such arrest.

The petitioners therefore submitted that the 1st respondent and the team of Police Officers under his command, which included the 2nd respondent, violated the petitioners' fundamental rights guaranteed by Article 13(1) of the Constitution.

The petitioners were thereafter taken to the Camp of the Sri Lanka Corp of Military Police at Narahenpita. On the information given by the 1st petitioner to his wife, Major Sally and Brigadier H. K. G, Hendavitharana, Director of Military Intelligence, had come to the said Camp. Both of them had explained to the 1st respondent the kind of investigations and operations that were carried out by the petitioners and the latter specifically requested the 1st respondent to carryout any investigations that is necessary but to refrain from giving publicity as that would endanger the lives of the petitioners and adversely affect the operations they were carrying out.

Thereafter Deputy Inspector General of Police, Nimal Gunatillake and the Commander of the Special Task Force arrived at the said Camp. The Deputy Inspector General of Police who knew the petitioners and the kind of work they were carrying out had informed the petitioners that the discussions with the respondents were unsuccessful and that the petitioners would be taken to the "Special Operations Division" of the Police Station in Kandy.

According to the petitioners, Brigadier Hendavitharana informed the petitioners that the 1st respondent had said that steps would be taken to

record the statements of the petitioners and to produce them before the High Court of Kandy after which they would be released on 3rd January 2002, He had further informed the 1st respondent that the Legal Officer of the Army would come to Kandy around 12 noon on the following day to take charge of the said team from the Courts. The petitioners had filed an affidavit from Brigadier Hendavitharana (P3).

However, the petitioners were not taken to Kandy, but to the Police Station at Cinnamon Gardens. Upon approaching the said Police Station, the petitioners had seen vehicles belonging to all the electronic media as well as journalists of the print and electronic media out side the said Police Station with cameras ready to photograph them. The petitioners realized the danger they would be in if they were photographed and appealed to the journalists present not to do so, to which they adhered, The petitioners were detained at the said Police Station for about two hours and during that period the weapons, ammunition and explosives were unloaded and were photographed and video taped by the journalists. No statements were recorded from the petitioners at the Cinnamon Gardens Police Station and no act pertaining to any kind of investigation into the recovery of weapons took place at the said Police Station. Therefore the petitioners' belief is that they were brought to the Cinnamon Gardens Police Station before being taken to Kandy, in order to expose them to the media as well as for the 1st respondent to gain publicity.

After their arrest on the night of 02.01.2002, the petitioners were detained at the Police Station, Kandy from the early hours of the morning of 03.01.2002 until the afternoon of 05.01.2002 when they were taken to and detained at the Katugastota Police Station until they were released on 13.01.2002.

The 3rd and 5th respondents, according to the petitioners, were in charge of the petitioners whilst they were detained in Kandy and Katugastota Police Stations respectively.

The petitioners were produced before Magistrate Kandy in the afternoon of 06.01.2002 and they were taken back to Katugastota Police Station.

The petitioners accordingly submitted that their detention was wrongful, arbitrary, capricious, mala fide, unlawful and illegal and was effected by the 1st, 2nd, 3rd, 4th, 5th and 6th respondents and other Police Officers whose names are unknown to the petitioners, infringing their fundamental rights guaranteed under Article 13(2) of the Constitution.

The petitioners further submitted that they are Commissioned Officers of the Sri Lanka Army performing lawful duties of national importance for and on behalf of the State and were entitled to the protection of the State. Furthermore they submitted that although the arrest and detention of the petitioners were wrongful, arbitrary, capricious, mala fide, illegal and unlawful, the State and/or the 1st to 6th respondents took no action to secure the release of the petitioners from detention until 13.01.2002. The petitioners therefore submitted that the aforementioned circumstances amount to inaction of the respondents which is an infringement of the fundamental right guaranteed by Article 12(1) of the Constitution.

The petitioners contended that when they were brought to Kandy in the early hours of the morning on 03.01.2002 and were kept in a cell in the Kandy Police Station. Thereafter they were taken to Katugastota Police Station on 05.01.2002. The petitioners submit that the treatment meted out to them while they were in Police custody from 03.01.2002 to 05.01.2002, constitutes torture and/or cruel, inhuman and/or degrading treatment and/or punishment in terms of Article 11 of the Constitution.

(B) <u>The Respondents' version</u>

The 1st respondent contended that the initial arrest of the petitioners was made on the orders of the Deputy Inspector General of Police, Kandy. The 1st respondent had only carried out the instructions given by the said DIG and he had no discretion in the matter as he was duty bound to comply with such orders. To substantiate this position, the 1st respondent has filed an affidavit from the said DIG of Police (1R12). Further the 1st respondent submitted that the Magistrate, Teldeniya had made an order to facilitate the inquiries carried out at Athurugiriya on 02.01.2002 (1R7).

The 1st respondent further submitted that due to the following facts a reasonable suspicion arose and therefore he had to arrest the petitioners.

The 1st respondent was the Superintendent of Crimes and Operations of Kandy Division at the time this incident took place. The 1st respondent was given direct instructions by the Inspector General of Police to investigate the 'Udathalawinna Massacre', which occurred during the General Election in 200l. According to the 1st respondent Chanuka Ratwatte and Lohan Ratwatte were considered prime suspects in the said incident. On 31.12.2001 around 10.30 a.m. the 1st respondent received a telephone call from one Mores Moses Moonasinghe of Rajagiriya, an informant, stating that Chanuka Ratwatte was seen visiting a house owned by a Muslim Army Officer in the Millenium Park Housing Scheme at Athurugiriya. On a request dated 31.l2.200l, the Magistrate, Teldeniya issued orders to the Military Police Corp to release Major A. C. A. Soysa of the Sri Lanka Corp of the Military Police to assist the 1st respondent (1R7). Upon receiving the said order made by the Magistrate, the 1st respondent faxed a copy of the same to Major General lvan Dassanayake of the Military Police Head Quarters in Colombo on 01.01,2002. Thereafter the 1st respondent proceeded to Millenium Park Housing Scheme at Athurugiriya along with Major A. C. A. Soysa on 02,01,2002. On arrival at the said Housing Scheme the 1st respondent entered the

Millenium Park Housing Scheme office and made inquiries and were directed to two houses in the scheme that were owned by Muslim persons. The 1st respondent further stated that on his arrival at the first house and having spoken to the occupants cordially entered the said premises without any objections from them.

The 1st respondent further contended on the telephone call he received from the informant in the following terms: (1R5):

"I. I state that Mr. Balasooriyage Ajith at No. 30, Ahinsa Gardens, Egodawatte, Oruwala, Athurugiriya is employed at the Millenium Park Housing Scheme in Athurugiriya in the capacity of a gardener, is also known to me for the last ten years.

II. He informed me that Mr. Chanuka Ratwatte was seen frequenting a house owned by a Muslim person in the Millenium Housing Scheme at Oruwala, Athurugiriya. He also had noticed suspicion looking men in Army uniform entering and leaving the said premises.

III. In accordance with this information, I telephoned the 1st respondent at about 10.30 a.m. on 31st of December on his mobile telephone and informed him that I had

received information that Mr. Chanuka Ratwatte was seen visiting a house owned by a Muslim person in the Millenium Housing Scheme at Oruwala, Athurugiriya and also had noticed suspicious characters in Army uniform entering and leaving the aforesaid premises.

The 1st respondent further submitted that there was reasonable suspicion for several other reasons to arrest the petitioners, such as,

(a) that the 1st respondent inspecting the said premises was unable to satisfy himself that the petitioners had legal authority for the storage of weapons which justified the 1st respondent's suspicion that the said premises was not in fact an Army safe house.

(b) the 1st respondent obtained a document marked 1R8 which contained the list of weapons.

(c) There were a number of weapons which were not mentioned in the file marked lR8 which included 66 LTTE uniforms, Cyanide capsules were found in the uniforms.

(d) The petitioners did not request Major Soysa or any other Officer who was at the house at the

time of the arrest to examine the documents so that the respondents could have been satisfied that the weapons were lawfully stored in the said premises.

(e) The petitioners gave no explanation that there were 66 LTTE uniforms when there were only 6 persons present at the safe house.

(f) The Petitioners did not provide an explanation as to why a long range reconnaissance patrol needed to be established in Athurugiriya instead of the North and East.

(g) Two claymore mines were found in Panwila and Pathadumbara, the areas in which Anuruddha Ratwatte was the Chief Organizer.

(h)The petitioners had in their possession, thermobaric flame throwers, which causes oxygen in the area to be sucked up to 250 meters and thus there was reasonable suspicion that the Army could not have a safe house which was detrimental to persons living in a residential neighbourhood.

(i) When an Army safe house is generally carried out the police of the area would be informed of such activity. However, the Police Station at Athurugiriya was not aware of such a safe house within their area.

For the aforementioned reasons, the 1st respondent submitted that there was reasonable grounds for concluding that the premises in question was not an Army safe house and therefore he claimed that the arrest of the petitioners is justified and there was no violation of Article 13(1).

(C) Violation of Article 13(1) of the constitution

It is common ground that the petitioners were arrested on 02.01.2002 by a team of Police Officers led by the 1st respondent from Kandy. It is also not disputed that the petitioners consisted of one commissioned Officer and four non-commissioned Officers of the Sri Lanka Army, all of whom were attached to the Directorate of Military Intelligence.

Article 13(1) of the Constitution, which relates to the freedom from arbitrary arrest, is in the following terms:

. "No person shall be arrested except according to procedure established by law. Army person arrested shall be informed of the reason for his arrest".

According to the 1st respondent he had proceeded to Millenium Park at Athurugiriya as he had received a telephone call from a person named Mores Moses Moonasinghe, who had informed that Chanuka

Ratwatte who was wanted in respect of the murder at Udathalawinna, had been seen visiting the house of a Muslim Army Officer at Millenium Park.

The 1st respondent had submitted an affidavit in support of his contention marked 1R5. This affidavit dated 29.07.2002, is from one Morasus Mothoj Nilanga and not from a person known as Mores Moses Moonasinghe. Moreover in the affidavit the said Morasus Mothoj Nilanga has not claimed to have any personal knowledge of the matter or to have seen Chanuka Ratwatte frequenting a house owned by a Muslim person in the Milleniumn Housing Scheme at Athurugiriya. Instead what he had averred is that, one Ajith had given him the said information regarding Chanuka Ratwatte. According to the affidavit, it is averred that,

> "L state that Mr. Balasooriyage Aiith at No. 30, Ahinsa Gardens, Egodawatte, Oruwala, Athurugiriya is employed at the Millenium Park Housing Scheme in Athurugiriya in the capacity of a gardener, is also known to me for the last ten years.
>
> He informed me that Mr. Chanuka Ratwatte was seen frequenting a house owned by a Muslim person in the Millenium Housing Scheme in Oruwala, Athurugiriya.
>
> He also had noticed suspicion looking men in Army uniform entering and leaving the said premises".

However, it appears that the 1st respondent has not made any effort either to question the said informant or the said Ajith to verify the credibility of such information received by him. Moreover, as correctly pointed out by the learned Counsel for the petitioners, not

even the elementary step that could be expected from an experienced Police Officer, of keeping the premises in question under surveillance had been carried out by the 1st respondent.

Be that as it may, if the visit to the Housing Scheme at Millenium Park was based on the information received by the 1st respondent from his informant, there should be supporting documents to substantiate the position taken up by the 1st respondent.

However, the documents marked as P 15 and P 16 clearly contradict the position taken by the 1st respondent. P 15 is a document dated 03.01.2002, sent by the 2nd respondent to the 4th respondent through the 1st respondent. By this letter the 2nd respondent had requested the 4th respondent to issue a Detention Order for the detention of the petitioners. The reason for such detention was the raid conducted by the 1st respondent on the basis of information received by the 1st respondent that a large stock of weapons was being collected for the use of treason or terrorist activities. The document marked P 16 dated 03.01.2002 was sent by the 1st respondent to the 4th respondent confirming the contents of the letter marked as P 15.

The reason for the arrest, according to the respondents was the 'unauthorized possession of a large quantity of arms' at Athurugiriya, The respondents have submitted that there was no authority for the storage of the said weapons by the petitioners.

At the time of the incident the petitioners had produced the relevant files which indicated the kind of weapons that were stored in the said safe house. In fact the document marked as 1R8 indicated the weapons found on the premises and confirmed that they were lawfully issued by the Sri Lanka Army to the petitioners. Folios 1, 2, 11, 14, 17, 26, 34, 35, 36, 37, 38, 39, 41, 42, and 43 indicate the weapons, ammunition and equipment that were stored in the said safe house. While the folios 3, 4, 5, 6 and 8 confirm the return of some weapons to the relevant Army establishments on the day of the arrest of the

petitioners, folios 23, 24, 25, 27, 28 and 29 were relevant documents prepared for the return of weapons stored at the said safe house.

Furthermore, the statement made by Brigadier Hendawitharana, the Director of Military Intelligence must be taken into account. He had spoken to the 1st respondent at the time the petitioners were taken into the Sri Lanka Corp of Military Police at Narahenpita. In his affidavit, Brigadier Hendawitharana explained what took place in the following terms:

> "I introduced myself and Major T. S. Sally to 1st respondent and explained to him that the said team under the command of the petitioner (1st petitioner) had been conducting long range reconnaissance patrols in areas of the Eastern Province which are under the illegal control of the said Liberation Tigers of Tamil Eelam, that the said operations conducted by them were expressly approved by the Commander of the Army, that all weapons, ammunition, explosives etc. which were in their possession and recovered by the 1st respondent and the Police party under his command had been duly, properly and lawfully issued to them by the Sri Lanka Army for such operations, that the said safe house was a house which had been taken on rent by the Army for the use of the said team and nothing illegal was done there at and/or by

the said team'"

Major T. S. Sally too explained to the 1st respondent in further detail the nature of the operations being conducted by the said team.

Despite the aforesaid explanations given by Major Sally and me the 1st respondent said that he would have to take the said team to Kandy, record their statements there and produce them before the High Court, Kandy on the following day and assured us that they would then be released".

It must also be said that if the reason for the arrest was the unlawful possession of firearms, the offence was committed at Athurugiriya within the jurisdiction of the Athurugiriya Police and the Kaduwela Magistrate's Court. It cannot possibly come within the jurisdiction of the Kandy Police or the Magistrate's Court of Kandy.

The Code of Criminal Procedure Act, No. 15 of 1979 provides for the procedure established by law for arresting a person. Accordingly an arrest could be made with or without a warrant and the respondents have not produced any material to show that there was a warrant issued for the arrest of the petitioners. In such circumstances the arrest of the petitioners had clearly been without a warrant. Such an arrest,

according to the Code of Criminal Procedure Act, would have to be in terms of Section 32(1) (b), where a person

> “who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned'"

Section 107(3) of the Code of Criminal Procedure Act, also provides for the arrest of a person without a warrant. This Section reads thus:

> "A peace officer knowing of an attempt to commit any cognizable offence may arrest without orders from a Magistrate and without a warrant the person so attempting if it appears to such officer that the commission of the offence cannot be otherwise prevented".

Section 109(5)(a) of the Code of Criminal Procedure Act, describes the procedure to be followed when a cognizable offence is suspected or breach of the peace is apprehended. In such circumstances, either from information received or otherwise, an officer-in-charge of the Police Station or inquiries has reason to suspect the commission of any offence, he should himself make an investigation or depute one of his subordinate officers to make such investigation. In a situation where the offence is a cognizable offence, he should submit a report to the Magistrate's Court having jurisdiction of such offence.

It is to be noted that, as has been stated by Gratiaen, J. in Muttusamy v Kannangara [(1951) 52 NLR 324] that although police officers must be vested with powers so as to facilitate the 'prevention and detection of crime' such powers should be within circumscribed limits. In Gratiaen, J's words:

> "That such powers should be vested in them, within circumscribed limits, is necessary so as to facilitate the prevention and detection of crime. Nevertheless, they are always attended by grave responsibilities and justice requires that the Courts should be very vigilant to ensure they are not abused through inexperience, excess of zeal or insolence of officers ".

The 1st respondent's version is that he had on receiving information from one of his informants had visited the safe house at the Millenium Park Housing Scheme. Considering the facts of this case the arrest of the petitioners could have taken place only if there was a reasonable complaint made against the petitioners, or credible information had been received or a reasonable suspicion existed of their having been concerned in the commission of an offence. The suspicion should be reasonable and for this purpose it is necessary to be proved to be reasonable on the basis of the material which has been placed before the Police Officers.

Learned Counsel for the 1st respondent also took up the position that the initial arrest of the petitioners was made on the orders of the DIG of Kandy. In order to substantiate this submission, an affidavit of the DIG of Kandy was filed (1R12) along with the objections of the 1st respondent. However it is to be noted that barring the fact that the 1st respondent 'was performing duties in the Kandy division under his

supervision as SP Crimes and Operation', the said affidavit does not speak of any duty that was assigned to the 1st respondent, which is even remotely connected to the arrest of the petitioners. Further the said affidavit, which is in the following terms, refers to conferences, which have taken place not prior to, but only after the arrest of the petitioners.

"I, Mahinda Balasuriya Deputy Inspector General of Police, Police Transport and Communication Range, being a Buddhist do solemnly, sincerely and truly, declare, affirm and state as follows:

01, I am the affirmant above named and affirm to the facts hereinafter set forth,

02.. I state that whilst I was performing duties as DIG CR (West), the Inspector General of Police summoned me and SP Mr. K. Udugampola for a Conference at Police Headquarters on 07. 01. 2002.

03. I state that Mr. Udugampola was performing duties in Kandy division under my supervision as SP Crimes and Operations.

04. I state that at the conference on 07. 01. 2002 at the I.G.'s Conference Room, the Inspector General of Police Mr. B.L.V. de S. Kodituwakku inquired from SP Mr. Udugampola the facts

pertaining to the arrest of the Army Personnel allegedly involved in Long Range Reconnaissance Patrols of the Sri Lanka Military Intelligence Corp.

05. I state that Mr. Udugampola explained the circumstances surrounding the arrest of the Army Personnel.

06. I state that at the conclusion of Mr. Udugampola's briefing the Inspector General of Police was appreciative of the investigations conducted by Mr. Udugampola in this regard.

The 1st respondent further took up the position that he was duty bound to comply with the orders given by the DIG of Kandy. He submitted that he could substantiate this position by the order made by the learned Magistrate of Teldeniya to facilitate the on going inquiries at Athurugiriya on 02.01.2002. The 1st respondent stated that if the steps taken by him were illegal or lacked jurisdiction, the Magistrate, Teldeniya would not have issued such order (1R7). The said order issued on 31. 12. 2001 by the Acting Magistrate to the Commander of the Army was in the following terms:

තෙල්දෙනිය මහේස්ත්‍රාත් අධිකරණය,

තෙල්දෙනිය,

2001 .12.31.

ලුතිනන් ජනරාල් එල්.පී. බලගල්ල,

යුධ හමුදාපති,

හමුදා මූලස්ථානය,

කොළඹ 03.

<u>යුධ හමුදා පොලිස් සහය ලබා දීම සම්බන්ධ අධිකරණ</u>

<u>නියෝග</u>

01. මහනුවර උඩතලවින්න දස මිනිස් ඝාතනය සම්බන්ධව යුධ හමුදාව තුල වැදගත් පරීක්ෂන කටයුතු රාශියක් කිරීමට පොලිස් අධිකාරී කේ.උඩුගම්පල මහතා ඇතුළු පරීක්ෂන නිළධාරීන්ට යුධ හමුදා පොලීසීයේ සහය ලබා දිය යුතුව ඇත. එම පරීක්ෂන නිලධාරී කන්ඩායමට යුධ හමුදාව තුල කරනු ලබන පරීක්ෂන කටයුතු සඳහා හමුදා පොලීසියේ විශේෂ විමර්ශන ඒකකයේ මේජර් ක්ලිපර්ඩ් සොයිසා අනුයුක්ත කරන ලෙසට නියෝග කරමි.

02. මෙම දස මිනිස් ඝාතනය සඳහා ඉහත පොලිස් දෙපාර්තමේන්තුවේ පරීක්ෂන නිලධාරීන්ට අවශ්‍ය කරනු ලබන සියළුම ලිපි ලේඛන සහ වෙනත් අදාල භාන්ඩ සියල්ලක්ම භාර දීමට කටයුතු කරන ලෙසටද නියෝග කරමි.

03. හමුදා පොලීසියේ විශේෂ විමර්ෂන ඒකකයෙන් අනුයුක්ත කරනු ලබන සියළු පහසුකම් ලබා දෙන ලෙසටද මෙයින් නියෝග කරමි.

අත්.

වැ.බ. මහේස්ත්‍රාත්,

මහේස්ත්‍රාත් අධිකරණය,

තෙල්දෙනිය.

As would be clearly seen, this is an order specifically issued to the Commander of the Army ordering,

(a) the secondment of Major Clifford de Soysa of

the special Investigation Unit of the Military Police, to assist the team investigating the Udathalawinna Murders, to carry out investigations within the Sri Lanka Army:

(b) to hand over all documents and other items relevant to the said murders; and

(c) to provide all necessary facilities to Major Clifford de Soysa to carry out the said Investigations.

None of these orders, pertain to any matter, even distantly connected to the incident that took place at Athurugiriya. Whereas the orders made by the Magistrate of Teldeniya refer to obtaining assistance from the Army for the on going investigations of the Udathalawinna Murders, what the 1st respondent carried out at Athurugiriya was to raid a safe house and take the petitioners into custody. Therefore, the 1st respondent cannot be heard to say that the Magistrate of Teldeniya made an order on 31.12.2001 to facilitate the 'on going inquiries that went on at Athurugiriya on 02.01.2002' and use the order made by the Magistrate of Teldeniya as a shield for his conduct in arresting the petitioners.

It is a requirement in terms of Article 13(1) of the Constitution, that any person arrested should be informed about the reasons for such arrest.

In connection with an arrest and the basic principles which are applicable in such circumstances, what was stated by Lord Chancellor Simon half a century ago in Christie v Leachinsky (1947 AC pg, 573) in my view, clearly spells out the true meaning of what is stated in Article 13(1) of our Constitution. In Lord Chancellor Simon's words,

> "1. If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a soft, which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words a citizen is entitled to know on what charge or on suspicion of what crime he is seized.
>
> 2. If the citizen is not so informed, but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment;"

Although an arrest could be made on reasonable suspicion it is an essential feature that the Police Officers concerned should be certain about the suspicion that has arisen. If in the circumstances the relevant officer could not have reasonably suspected the person in question to

have carried out the action in question and committed the offence, an arrest in such circumstances would be in contravention of Article 13(1). As pointed out by Amerasinghe, J. in Malinda Channa Peiris [(1994) 1 Sri LRl]

> "A suspicion does not become ‘reasonable' merely because the source of the information is creditworthy. If he is activated by an unreliable informant, the Officer making the arrest should, as a matter of prudence, act with greater circumspection than if the information had come for a creditworthy source".

In a situation where there is a contradiction in the versions given by the 1st respondent, I cannot envisage how he could have informed the petitioners of the charges against them or how there could have been reasonable suspicion against them. Our law does not permit an arrest or framing of charges without assigning valid reason. In this instance, the 1st respondent has given two versions regarding the reasons for the arrest of the petitioners. On the one hand he relies on an informant who had referred to information obtained from a third party. The identity of this person alone is questionable as the name given by the 1st respondent and the name appearing in the affidavit are completely different. On the other hand, the 1st respondent relied on the order obtained form the Magistrate of Teldeniya which refers to an order given to the Commander of the Army. On a consideration of the totality of the circumstances of this case, I am of the view that at the time of the arrest of the petitioners the 1st respondent had no valid basis for such arrest and he had not informed the petitioners the reason for their arrest. Accordingly, I hold that the petitioners

fundamental rights guaranteed in terms of Article 13(1) of the Constitution have been infringed by the 1st respondent.

(D) Violation of Article 13(2) of the constitution

The petitioners complained that their fundamental right guaranteed in terms of Article 13(2) was violated. Article 13(2) of the Constitution is in the following terms:

> "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."

It is not in dispute that the petitioners were arrested on 2nd January 2002 and that they were detained at the Police Station, Kandy from the early hours of 3rd January 2002 until 5th January 2002. Thereafter the petitioners were taken to the Police station Katugastota and were detained in that station from 5th January 2002 to 13th January 2002.

The respondents took up the position that the petitioners were arrested under the provisions of the Prevention of Terrorism Act and were detained in terms of Section 7(1) of that Act, They submitted that as provided under Section 7(I), a motion was preferred to the Secretary to the Ministry of Defence for a Detention Order in terms of Section 9 of the Prevention of Terrorism Act.

Section 7 is in part I of the Prevention of Terrorism (Special Provision) Act and this part deals with Investigation of Offences. Section 7(1) provides for the detention of a person arrested under Sub Section (1) of section 6 to be kept in custody for a period not exceeding seventy two hours. In terms of Section 7(1) of the said Act, if there is no Detention Order under Section 9 in respect of such a person, he should be produced before a Magistrate before the expiry of seventy two hours.

When the petitioners were arrested on 02.01.2002 they were detained in terms of a Detention Order under Section 7(1) of the Prevention of Terrorism Act. This order (P5) was admittedly signed by the 4th respondent. Thereafter, the petitioners were produced before the Magistrate and a request was made to the Minister of Defence for a 3 months' detention of them. This request, according to the 1st respondent was made by the Deputy Inspector General of Police (Central Division) (1R14). The said request dated 05. 01, 2002 is addressed to the Secretary, Ministry of Defence and was signed by the said DlG for Central Province. However, although a request was made for Detention Orders, there is no material before this Court to show that Detention Orders under Section 9(1) of the Prevention of Terrorism Act were issued by the Minister of Defence.

Although the petitioners were taken into custody on 02.01.2003, the respondents claim that they were brought to Kandy and were detained at the Police Station, Kandy only from the early hours of 03.01.2002, Even if the time is counted from the early hours of 3rd January, the initial order issued for the detention of the petitioners would be valid only until the early hours of 06.01.2002.

It is not disputed that the petitioners were produced before the Magistrate of Kandy only on 07.01.2002. On that day, the respondents have submitted to the Magistrate of Kandy that the petitioners are detained on Detention Orders issued in terms of

Section 9(1) of the Prevention of Terrorism Act and sought an order from the learned Magistrate for the continued detention of the petitioners at the said Police Station. Learned Magistrate of Kandy had granted this request. When a person is arrested in terms of Section 6(1) of the Prevention of Terrorism (Temporary Provisions) Act, he has to be produced within 72 hours of such arrest before a Magistrate unless a Detention Order under Section 9 of the said Act has been made in respect of such person. In the event of no valid Detention Order being available, such a person should be produced before the Magistrate before the expiry of seventy two hours, and an application made in writing on that behalf by a police officer not below the rank of Superintendent that such person be remanded until the conclusion of the trial of such person.

The application which was made to the Magistrate of Kandy on 07.01.2002, was not made by a police officer not below the rank of Superintendent, but by the Officer-in-Charge of the Police Station, Kandy (P17B). Such request also was made on the basis that the petitioners be detained on the basis of the Detention Orders. As referred to earlier no such Detention Orders were issued on the petitioners and this fact is clearly substantiated by letter dated 12.01.2002 sent by the Secretary/Defence to Deputy Inspector General of Police (Central Division) P 18.

It is to be noted that although the 1st respondent took pains to describe the circumstances in which he and his team had approached the 'safe house' at Millenium Park, Athurugiriya, a different version has been given in the B Report dated 07.01 .2002 (P17A). According to the said B Report, the 1st respondent had received information that dangerous weapons, ammunition and explosives were being collected at a house in the Millenium Park. On such information the 1st respondent, along with a team of officers has searched the said

residence. Further the 1st respondent had stated that the petitioners were arrested and such arrest was made in terms of Section 2(1) (a) of the Prevention of Terrorism Act and Section 2(1)(b) of the Dangerous Weapons Act.

Section 7(1) of the Prevention of Terrorism (Temporary provisions) Act, does not authorise the issue of a Detention Order by any Police Officer or any other person. As pointed out earlier, Section 7(1) provides for a person to be kept in custody for a period not exceeding seventy two hours, and he has to be produced before a Magistrate before the expiry of such period unless a Detention Order under Section 9 of the Act has been made. As referred to earlier no Detention Order under Section 9 of the said Act was issued by the Ministry of Defence at any time and the respondents had no authority to keep the petitioners in custody after the lapse of 72 hours, which came to an end in the early hours of 06.01.2002. Accordingly, the detention of the petitioners from 6th January to 13th January 2002 undisputably unlawful.

The 1st respondent has taken up the position that although he arrested the petitioners, he is not responsible for their detention. He, in paragraph 40 of his affidavit stated as follows:

> "I state that having arrested and transported the petitioners and the other members of his team to the Kandy Police Station I handed the custody of the said persons to the 3rd respondent on the early hours of the 3rd of January. **I further state that I was in no way responsible for the detention of the said persons thereafter**……(emphasis added)".

However, as demonstrated by the learned Counsel for the petitioners, it appears that on 03.01.2002, the 2nd respondent addressed the 4th respondent through the 1st respondent (P 15) and again on the same day the 1st respondent addressed the 4th respondent (P 16) to obtain Detention Orders to detain the petitioners in terms of Section 7(1) of the Act. In the said document marked as P 16, the 1st respondent expressly requested the 4th respondent to issue Detention Orders in order to detain them for the purpose of carrying out investigations.

Moreover the document addressed to the Secretary, Ministry of Defence, seeking Detention Orders (1R14), though sent by the Deputy Inspector General (Central Province), it is only a letter forwarding the applications for such Detention Orders

''(ඉල්ලුම් කර ඇති රැඳවුම් නියෝගයන් ලබා ලැනීම සඳහා ඉදිරිපත් කර ඇති ඉල්ලුම්පත් සුදුසු කටයුතු සඳහා කරුණාකර ඔබතුමා වෙත ඉදිරිපත් කර සිටිමි)''.

Such applications for the said Detention Orders were apparently sent by the 1st respondent as he has stated so in his letter to the 4th respondent on 03.01.2002 (P 16). It is also to be noted that the Deputy Inspector General (Central province) has only forwarded the said applications and did not even recommend them.

In such circumstances, the 1st respondent cannot be heard to say that he is not responsible for the detention of the petitioners. On a careful consideration of the material placed before this Court, it is abundantly clear that the 1st and 2nd respondents were responsible for the arrest and detention of the petitioners. The 3rd respondent was the Officer-in-Charge of the Police Station, Kandy when the petitioners were detained from 03rd to 05th January, 2002 and the 5th respondent was the Officer-in-Charge of the Police station, Katugastota when the petitioners were detained from 05th to 13th January 2002. In normal circumstances, both these respondents, being Officers-in-Charge of their respective Police Stations, should be held responsible for the

violations complained by the petitioners. However, it should be remembered that both Officers had to act according to the instructions and orders given to them by their Superior Officers. The petitioners contended that as the said orders were manifestly unlawful it would be no defence for them to plead that they were merely following the orders of a Superior. However, there is no material before this Court to indicate the nature of orders given to the 3rd and 5th respondents and whether they were informed on the availability of Detention Orders to detain the petitioners at the respective Police Stations. In the circumstances the 3rd and 5th respondents may have acted in the belief that there were valid orders for the detention of the petitioners. On a consideration of the totality of the circumstances, I am of the view that the 3rd and 5th respondents cannot be held personally liable for the infringements of the petitioners' fundamental rights guaranteed in terms of the Constitution.

The petitioners submitted that they do not wish to proceed against the 4th respondent.

In such circumstances, it is abundantly clear that the detention of the petitioners since 06. 01. 2002 was in any event unlawful and therefore the petitioners' fundamental right guaranteed in terms of Article 13(2) of the Constitution was violated,

(E) Violation of Article 11 of the Constitution

The petitioners complained that the respondents have infringed their fundamental right guaranteed in terms of Article 11 of the Constitution.

The respondents submitted that whilst the petitioners were held at the Kandy Police Station or thereafter, the petitioners were not subjected to any inhuman or degrading treatment and were not tortured at any stage. Further the respondents submitted that prior to the petitioners

being incarcerated, the 1st respondent made arrangements for the District Medical Officer to conduct a Medico Legal Examination of the petitioners. The respondents claim that the petitioners have not urged any proof before this Court to substantiate the allegation with regard to torture against the respondents.

Article 11 of the Constitution provides that,

> "No person shall be subjected to torture or to cruel,
>
> inhuman or degrading treatment or punishment."

The majority of the applications which are made on alleged violations of Article 11 of the Constitution, complain of brutal physical assaults, which have resulted in physical impairment either temporary or permanent by nature. However, Article 11 is not restricted to physical impairment as the Article clearly refers to cruel, inhuman and degrading treatment or punishment. It is well settled law that Article 11 could be applicable to physical as well as psychological trauma and the only required criterion is that consideration should be given to the circumstances of each case to see whether the incident complained of would come within the purview of 'degrading treatment'.

In the instant case the petitioners complaint on the infringement of Article 11 was based on the degrading treatment meted out to them, Such degrading treatment, according to the petitioners', was based on two grounds: firstly the kind of incarceration they had to suffer from 03. 01. 2002 to 05.01.2002 and secondly the way in which the petitioners were transported to Katugastota.

Referring to the first incident, petitioners submitted that initially, all of them were locked up in a cell where there was one occupant, but removed from that cell and transferred into another cell, which was at the time occupied by three persons who were in a state of extreme intoxication.

The said cell had three walls on three sides and a barred door on the other side, which opened into the interior of the Police Station, The cell was about 10 feet long and 6 feet wide and had an open toilet pit which according to the petitioners, was overflowing and had no flush. Although there was a tap inside the said cell there was no water available. The only source of ventilation to the said cell was through the barred door which opened to the inside of the Police Station. At the time the petitioners were put inside the cell, the three inmates who were in a state of extreme intoxication, had already vomited inside. The cell which was designed for two occupants had at that time nine occupants.

The petitioners, who could not bear the stench which emanated from the over flowing toilet pit and the vomit, were pleading for water to clean the cell, which went completely unheeded, had to remain huddled by the aforementioned barred door in an attempt to be away from the unbearable stench.

Although our Courts have held that, to prove an infringement of Article 11 of the Constitution, it is not essential to sustain physical violence and that it would embody pain of mind as well, there are only a few authorities, which had discussed this aspect in the Sri Lankan context. In W. M. K. de Silva v Ceylon Fertilizer Corporation [(1989) 2 Sri L. R. 393] Justice Jameel was of the view that a very high degree of maltreatment is required to establish inhuman treatment. Discussing the degrading and humiliating incidents the petitioner had to face, Justice Jameel stated that'

> "while this treatment would undoubtedly amount to a grossly unfair labour practice, it does not constitute torture or cruel, inhuman or degrading treatment or punishment'"

Justice Amerasinghe, however took a different view in a separate judgment in the said case, and observed that,

> Article 11 of the Constitution prohibits any act by which severe pain or suffering, whether physical or mental is, without lawful sanction in accordance with a procedure established by law, intentionally inflicted on a person by a public official acting in the discharge of his executive or administrative duties or under colour of office….."

In Kumarasena v Sub-Inspector Sriyantha and Others (SC Application 257/93 - SC Minutes 23.05.1994) although there was no assault causing physical disability or impairment the Court held that,

> "In the circumstances of this case, the suffering occasioned was of an aggravated kind and attained the level of severity to be taken cognizance of as a violation of Article 11 of the Constitution".

In fact our Courts in Fernando v Silva [SC (Application)7/89 SC Minutes 03.05.1991] held that imprisonment of a person without medication and food and without basic amenities for the performance of normal bodily functions constituted a violation of Article 11 of the Constitution.

The suffering the petitioners had to undergo was not restricted to the time they spent in remand custody in Kandy. Prior to being brought into the Police station, Kandy as has been referred to earlier, the petitioners were taken to the Police Station, Cinnamon Gardens where

they were detained for over 2 hours. At that time the stock of the weapons, ammunition and explosives were unloaded and they were photographed and videotaped by the said journalists (P20A, P20B, P20C and P20D),

Degrading treatment, as has been defined by the decisions in Tyrer v UK [(1978) 2 E.H.H.R. 1] and the Greek Case [127 B (1969) Com. Rep. 70], refers to situations where there is humiliation or debasement. A situation where there is humiliation, the conduct could become degrading, although a person would have suffered less suffering than torture. Inhuman treatment on the other hand does not require the victims to have suffered any physical injury (Ireland v UK) (Case Law of the European Court of Human Rights Vol. 1 pg. 82). As has been suggested in the Ireland Case, the crucial distinction is based on the degree of suffering caused. Understandably less intense suffering would amount to inhuman or degrading treatment, whereas the severity of such treatment could be categorized as torture. In Campbell and Cosans v UK, (Case Law of the European Court of Human Rights Vol, 1 pg, 170), it was stated that a threat of torture, which is "sufficiently real and immediate" could generate enough mental suffering to be categorised as inhuman treatment. Simultaneously the detention of a person in inhuman conditions has been treated as another form of inhuman treatment.

Whether the condition of treatment in places of detention amounts to inhuman treatment was considered in the well known Greek Case (Supra), where it was held that overcrowded cells with inadequate heating, toilets and sleeping facilities amount to inhuman treatment.

In response to the allegations based on violation of Article 11 of the Constitution, the 1st respondent submitted that all the cells operated at the Kandy Police station are cleaned on a daily basis by labourers employed by the said Police Station. He has submitted the statements

made in the Information Book maintained at the Kandy Police station on 3rd January 2002 in this respect. The contention of the respondents therefore is that there were no infringement of the petitioners fundamental right guaranteed in terms of Article 11 of the Constitution.

Discussing the difficulties in the proof of allegations of violation of Article 11 of the Constitution, Sharvananda, J. (as he then was) cited with approval the observations of the European Commission of Human Rights in the Greek Case [I27B (1969) Com. Rep. 70] (European Court of Human Rights Decisions, Supra Journal of Universal Human Rights, Vol. I, No. 4 l979, Pg, 42) in Velmurugu V Attorney General [(1980) 1 FRD 180] in the following terms:

> "There are certain inherent difficulties in the proof of allegation of torture or ill-treatment. First, a victim or a witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals upon himself or his family. Secondly, acts of torture or ill-treatment by agents of the Police or Armed Services would be carried out as far as possible without witnesses and perhaps without the knowledge of higher authority. Thirdly, when allegations of torture or ill-treatment are made, the authorities, whether the Police or Armed Services or the Ministers concerned, must inevitably feel that they have a collective reputation to defend, a feeling which would be all the stronger in those authorities that had

> no knowledge of the activities of the agents against whom the allegations are made in consequence there may be reluctance of higher authority to admit or allow inquiries to be made into facts which might show that the allegations are true. Lastly, traces of torture or ill-treatment may with lapse of time become unrecognizable, even by medical experts, particularly where the form of torture itself leaves….. few external marks".

These observations were later followed in Abeywickrama v Dayaratne (SC Application 125/88 – SC Minutes of 12.07.1989) and was cited in Channa Pieris and others v Attorney General [(1994) 1 Sri L.R]

Referring to the observations made in the Greek Case (Supra) Amerasinghe, J. in Channa Pieris's case (Supra at pg. 108) stated that,

> "The Supreme Court has been conscious of the difficulties in the proof of allegations of torture and stated that it will have regard to the circumstances of a case and not impose undue burdens on a petitioner which might impede access to justice".

On a consideration of the observations made in the Greek Case, which are exclusively limited to physical harm and the other decisions such as W. M. K. de Silva v Ceylon Fertilizer Corporation (Supra) Karunasena v Sub Inspector Sriyantha and others (Supra), it could be observed that the test that has to applied in considering whether there

has been a violation of Article 11 would depend on the nature of the act complained of by the petitioners. In Karunasena's case (Supra), Amerasinghe, J. held that,

> "The assessment of whether a person has been subjected to treatment violation of Article 11 depends on the nature of the act or acts complained of in the circumstances in which they were committed."

It is to be remembered that the petitioners were Officers who were engaged in official duties of the Army at the time of their arrest. The petitioners were officers who had put their lives in jeopardy in order to protect 'the sovereignty and territorial integrity' of the country and were attached to the Directorate of Military Intelligence. In fact, soon after the arrest was made, the Sri Lanka Army through their official spokesman Brigadier S, G, Karunaratne, had issued a press communiqué (P 4) stating inter alia that the petitioners were Officers who had been serving the Sri Lanka Army in order to safeguard and protect the sovereignty and territorial integrity of the country.

No regard was given by the respondents to any of the aforementioned factors. The plea of the 1st petitioner at the time they were arrested by the 1st respondent that the petitioners were a special team conducting operations against the LTTE and that since such operations were conducted with the utmost secrecy, any publicity given to them would endanger their lives fell on deaf ears resulting in tragic consequences as submitted by Counsel for the petitioner referred to below. In such circumstances, on a consideration of the totality of the events that took place, I am of the view that the actions meted out by the respondents would have aroused feelings of humiliation and the suffering that the petitioners had to undergo was of an aggravated kind that reached the expected level of severity that is necessary to establish a violation of Article 11 of the Constitution on the basis of

degrading and inhuman treatment. This position is further strengthened by the fact that the petitioners were Army Officers who were only carrying out the duties which were assigned to them by their Superior Officers.

I therefore declare that Article 11 of the Constitution was violated by subjecting the petitioners to inhuman and degrading treatment.

(F) Violation of Article 12(1) of the constitution

The petitioners complained of the violation of their fundamental right guaranteed in terms of Article 12(1) of the Constitution. They contended that their arrest and detention were arbitrary, capricious and mala fide.

As submitted by the petitioners, they were commissioned and non commissioned Officers of the Sri Lanka Army who were conducting operations at a risk to their lives which they had undertaken 'well over and above' the call of duty and therefore were citizens who were entitled to the protection of law. However, irrespective of the aforesaid position, the petitioners were arrested, detained and treated in an inhuman and degrading manner notwithstanding the press communiqué issued by the official Army spokesman (P 4).

Article 12(1) of the Constitution not only refers to equal treatment, but also refers to equal protection of law. Such guarantee of equality is directed against arbitrary discrimination and the petitioners should have been treated in a manner equal to the treatment meted out to persons who were substantially in similar circumstances or conditions. Considering the circumstances examined earlier, it is abundantly clear that the petitioners were treated differently. This fact emerges on a consideration of the infringement of Articles 11, 13(1) and 13(2) of the Constitution. No rational grounds have been shown by the respondents to justify their claims that there was no infringement of Article 12(1) of the Constitution. On the other hand

as referred to earlier, the steps that were taken from the time the petitioners were arrested at Athurugiriya indicate clearly that the petitioners were treated differently. If there was a reason for discriminatory treatment, such purpose cannot be presumed. It will have to be shown or should appear clearly on the face of the respondents' action. In the absence of any such evidence; I hold that the respondents have violated the petitioners' fundamental right guaranteed by Article 12(1) of the Constitution.

Conclusion and relief

For the reasons aforementioned I declare that the petitioners' fundamental rights guaranteed under Articles 11, 12(1), 13(1) and 13(2) of the Constitution were violated, by executive and administrative action.

Learned Counsel for the petitioners submitted that as a result of the conduct of the 1st respondent and his subordinates several patriotic intelligence operators have already been murdered. The covert operation that was being conducted by the petitioners was exposed and their lives and those of their families were exposed to the greatest of risk. It was therefore submitted that the petitioners are entitled to very substantial compensation. It was also submitted that the cause of the predicament of the petitioners and the deaths of so many intelligence operators resulting in irreparable damage to national security was due to the conduct of the 1st respondent and that therefore he should be personally responsible for what had taken place.

Considering the aforementioned submissions I direct the State to pay each petitioner a sum of Rs. Seven Hundred and Fifty Thousand (Rs. 750,000/-) as compensation and costs. The 1st respondent to pay each petitioner, personally a sum of Rs. 50,000/- as compensation. Each petitioner would therefore be entitled to a sum of Rs. Eight Hundred Thousand (Rs. 800,000/-) as compensation and costs.

These amounts to be paid within 3 months from today. The Register of the Supreme Court is directed to send a copy of this judgment to the Inspector General of Police.

Judge of the Supreme Court

I agree.

Sarath N. Silva, C.J.

I agree.

P. Edussuriya, J.