MAHINDA RAJAPAKSA
v.
KUDAHETTI AND OTHERS

SUPREME COURT
BANDARANAYAKE, J.
AMERASINGHE J. AND
DHEERARATNE, J.
18 AND 19 JUNE, 1992.

Fundamental Rights – Articles 13(1) and 14(1) (a) of the Constitution – Freedom of speech – Arrest.

In September 1990 the petitioner went to Katunayake airport to board an aircraft bound for Geneva where the 31st session of the working group on Enforced or Involuntary Disappearances was being held from 10-14 September. At the airport 1st respondent disclosing the fact that he was an Assistant Superintendent of Police informed the petitioner that he wished to examine his baggage for fabricated documents which were likely to be prejudicial to the interests of national security, and which were likely to promote feelings of hatred or contempt to the Government, an offence under Regulation 33 of the Emergency (Miscellaneous Provisions and Powers) Regulations. The petitioner refused to permit the search and wanted to contact a lawyer. The first respondent did not object to this. The petitioner then spoke on the telephone to Mrs. Sirimavo Bandaranaike the leader of the opposition and thereafter threw the bags at the first respondent and asked him to examine them. The first respondent examined the bags and recovered 533 documents containing information about missing persons and 19 pages of photographs and issued a receipt for them which was countersigned by the petitioner. The petitioner however refused to make a statement to the police.

The petitioner's complaint was that he was invited to address the "Working Group" but that he was not able to present his case fully before that group. The invitation to him was as Secretary of the Committee of Parliamentarians for Fundamental and Human Rights (which is an informal group of opposition members of Parliament and not a committee of the House) to submit information for consideration in the preparation of the Working Group's annual reports.

Held:

1. The invitation was neither an invitation to "address" the Working Group nor was it an invitation to attend the meeting, nor was there any evidence that he had even

an appointment to meet the Group. There was no evidence that the petitioner had spoken at all at the meeting quite apart from the fact he was unable to present his case **fully.**

What the Working Group sought was information which would be an important contribution to its efforts to reflect in its report the allegations and evaluations, made by non-governmental organizations or general problems and situations related to disappearances; what was sought was information of a **general nature** and not of a particular nature relating to individual cases.

The invitation clearly and without ambiguity set out the limited and special purpose for which the meeting was called. The meeting was concerned with general issues and, if the petitioner did speak at all, he made no attempt to show how the giving up of material prevented him from delineating the issues relevant to the meeting and presenting the factual contentions in an effective and meaningful manner. On the other hand, in terms of the carefully structured procedures of the Working group, the material which he was unable to take with him was of no relevance to the business of the meeting of the kind held in Geneva, its deliberations and its deliberative process. The material which the petitioner could not take with him was of evidential value only. As such it was irrelevant as it was not an evidentiary hearing that took place at the meeting. Neither the presentation, distribution or publication of the material given over, namely information on individual cases, was necessary (if indeed permissible at all for the exercise of his right of free speech **at that meeting.** Even material of a **general nature,** which was the subject-matters of the meeting, was requested, in terms of the invitation, to be submitted before August 20, 1990 about three weeks before the meeting. The material was taken by the 1st respondent on 11th September 1990, a day after the meeting had commenced.

The material given by the petitioner to 1st respondent was important and valuable and even relevant **at other times** and in other ways and not on the occasion of the meeting of 10–14 September. All of the materials, but two forms, were returned to the petitioner on 14 October 1990. The other two forms were returned, after reference to the Attorney-General for advice in February 1991. The material given over could have been sent to the Working Group **at any time**, unlike the general observations called for inclusion in the preparation of the annual report.

Per Amerasinghe, J. "in my view, if the expression of thoughts and beliefs, though not absolutely prohibited or prevented, is directly, definitely and distinctly, in a real, concrete and sufficiently palpable way, and not merely fancifully or inconsequentially, chilled or impaired or inhibited, without lawfully warranted

justification, I should hold that Article 14(1) (a) of the Constitution is violated, and grant appropriate relief and redress. However, the right to speak must be tailored to the occasion. It cannot be considered in the abstract or in a vaccum. One may be entitled to speak but only on a particular subject on a given occasion. One may be permitted to speak but only at an appointed time. One may be only permitted to orally say certain things on one occasion but permitted to table or publish certain written material only on another. One may speak but only during the time allocated. These limitations and other constraints are accepted without demur, so that the exercise of the right of free speech might at all serve its purposes. Statements that meet the test of admissibility and relevance qualify for utterance. But not all that comes into the brain of a speaker. Every speaker is familiar with the procedure of being cut down by the chair upholding a point of order."

2. As for the question of arrest, there was no imprisonment or forced confinement or durance or restriction of movement by reason of being placed in the custody of the law. He was not forced to abandon his journey and ordered to go elsewhere, to Police Stations and other designated places under surveillance and to remain under the control and coercive directions of law enforcement personnel or any other authority. He was not required to be in the presence or control of the first respondent or other officers of justice or law enforcement at any time even at the Airport. He was not in their keeping. There was no restraint of his freedom of movement by actual or threatened coercion. He was by no means coerced physically or by word or deed into a state of submission. Admittedly he complied with the proposal to leave the documents behind, not spontaneously but because it was suggested or prompted by the 1st respondent. The petitioner gave up the documents choosing between his options without duress or intimidation and without fear of losing his liberty by being placed in custody of the law. He did not have to choose between giving up the document or being imprisoned, confined or placed in the custody of the law. After giving up the suspicious documents in his possession he went on his way to Geneva as planned. Although the detention may have been irritating and irksome there was no arrest within the meaning of Article 13(1) of the Constitution and therefore the question of giving reasons for arrest did not arise.

It is not every detention or delay in going on, nor the imposition of conditions including the requirement to hand over or leave behind certain things, nor even the prevention of going on that constitutes an arrest in the relevant sense. **Per Amerasinghe, J.** "However, in my view, in order to sustain the petitioner's claim that his fundamental right of freedom from arrest granted by Article 13(1) of the

Constitution has been violated, he must establish that there was an apprehension of his person by word or deed and an imprisonment, confinement, durance or constraint by placing him (such apprehension and placing having been signified by physical action or by words spoken or by other conduct from which it might have been inferred) in the custody, keeping, control or under the the coercive directions, of an officer of justice or other authority, whether the purpose of such arrest was to enable the petitioner to be available and ready to be produced to answer an alleged or suspected crime or to assist in the detection of a crime or in the arrest or prosecution of an offender or some such or other purpose of the officer making, or authority ordering, the arrest. I do not intend this to be a definition of arrest. A definition, I suppose, must await the wisdom of the future."

Cases referred to:

1. *Namasivayam v. Gunawardena* (1989) 1 Sri LR 394.
2. *Piyasiri and Others v. Nimal Fernando, A.S.P. and Others* (1988) 1 Sri LR 173.
3. *Grainger v. Hill* (1838) 5 Scot 561 575.
4. *Warner v. Riddiford* (1858) 4 CB (N5) 180.
5. *Somawathie v. Weerasinghe and Others* [1990] 2 Sri LR 121.
6. *Withanage Sirisena and Others v. Ernest Perera and Others* [1991] 2 Sri LR 97.
7. *Youngstown Sheet and Tube Co. V. Sawyer* (1952) 343 US 579.
8. *Goldwater v. Carter* (1979) 444 US 996.
9. *Immigration and Naturalization Service v. Chadda* (1983) 462 US 919.
10. *Dames and Moore v. Regan* (1981) 453 US 654.
11. *Haig v. Agee* (1981) 453 US 280.

APPLICATION for relief for violation of fundamental rights under article 14(1) (a) and 13(1) of the Constitution.

R. K. W. Goonesekera for the petitioner.

Upawansa Yapa, Deputy Solicitor-General for respondent.

Cur. adv. vult.

28th July, 1992.

AMERASINGHE, J.

In this matter, leave to proceed had been granted to the petitioner in respect of the alleged infringement of the fundamental rights guaranteed by Articles 12, 13(1), 13(2) and 14(1) (a) of the Constitution.

Articles 12 and 13(2)

At the hearing, learned Counsel for the petitioner informed the Court that he did not wish to proceed with the matters pertaining to Articles 12 and 13(2) and that he wished to confine himself to seeking relief and redress in respect of the alleged violations of Articles 13(1) and 14(1) (a) of the Constitution. This application in respect of the alleged violations of Articles 12 and 13(2) of the Constitution is, therefore, dismissed.

Articles 14(1) (a)

According to paragraph 2 of his affidavit, the petitioner is a Member of Parliament belonging to the main opposition group, an "active campaigner for the protection of human rights", and the Secretary of the Committee of Parliamentarians for Fundamental and Human Rights.

On 11th September, 1990, the petitioner went to Katunayake Airport to board an aircraft bound for Geneva where the 31st session of the Working Group on Enforced or Involuntary Disappearances was being held from 10 –14 September. When the petitioner arrived at the Airport, the first respondent, after disclosing the fact that he was an Assistant Superintendent of Police, informed him that he wished to examine his baggage. The first respondent wished to examine the bags because, as he explained in his affidavit, he had information that the petitioner was attempting to take with him "fabricated documents which were likely to be prejudicial to the interests of national security and which were likely to promote feelings of hatred or contempt to the Government, an offence under Regulation 33 of the Emergency (Miscellaneous Provisions and Powers) Regulations." The petitioner informed the first respondent

that he had certain documents, photographs and forms pertaining to the deaths or disappearance of, and injuries caused to, certain persons which he was taking to be produced at a conference in Geneva, which were not "offensive or subversive", but intended to be used to "promote the protection of human rights in Sri Lanka." (Paragraph 7 of the petitioner's affidavit). The petitioner refused to permit a search of his bags and wanted to contact a lawyer. The first respondent did not object to this. The petitioner then spoke on the telephone to Mrs. Sirimavo Bandaranaike, the Leader of the Opposition, and threw the bags at the first respondent and asked him to examine them. In the words of the first respondent (Paragraph 6(b) of his affidavit):

> "I searched the leather bag in his presence and on top of the leather bag were some rice, dhal, chillies, dried fish and some tins of salmon. Underneath were some clothes and at the bottom of the bag there were 11 bundles of papers which the petitioner informed me, contained photographs and particulars of the missing persons. Among these bundles was a bundle with pictures of dead bodies."

The petitioner was asked to make a statement. However, no statement was recorded because, the petitioner refused to make a statement. The first respondent then took charge of 533 documents containing information about missing persons and 19 pages of photographs. A receipt (P2) was issued by the first respondent, countersigned by the petitioner, for the documents and photographs.

What was the result? In paragraph 10 of his affidavit the petitioner states as follows:

> In consequence of the 1st respondent taking into custody the said documents, I was prevented from presenting, distributing and or publishing them at the Conference in Geneva, thus violating my fundamental right of freedom of speech guaranteed by Article 14(1) (a) of the Constitution. As a result, I was not able to present my case fully before the Committee.

Article 14(1) (a) of the Constitution provides that "Every citizen is entitled to the freedom of speech and expression including publication."

This case is somewhat different to those in which petitioners have complained that they were absolutely prohibited from speaking or expressing themselves in writing. The petitioner was not, like Viola in the *Twelfth Night*, faced with the possibility of casting away his speech, perhaps "excellently well-penned" and prepared with "great pains" like Viola's piece. There was no complaint that the text of his speech or notes for his speech for the business of the meeting were taken from him. That might have been an altogether different matter. The complaint in this case is that the taking away of certain (one might for the time being say "less critical") documents prevented the petitioner from expressing himself fully in delivering an address he made. In my view, if the expression of thoughts and beliefs, though not absolutely prohibited or prevented, is directly, definitely and distinctly, in a real, concrete and sufficiently palpable way, and not merely fancifully or inconsequentially, chilled or impaired or inhibited, without lawfully warranted justification, I should hold that Article 14(1) (a) of the Constitution is violated and grant appropriate relief and redress. However, the right to speak must be tailored to the occasion. It cannot be considered in the abstract or in a vacuum. One may be entitled to speak but only on a particular subject on a given occasion. One may be permitted to speak but only at an appointed time. One may be only permitted to orally say certain things on one occasion but permitted to table or publish certain written material only on another. One may speak but only during the time allocated. These limitations and other constraints are accepted without demur, so that the exercise of the right of free speech might at all serve its purposes. Statements that meet the test of admissibility and relevance qualify for utterance. But not all that comes into the brain of a speaker. Every speaker is familiar with the procedure of being cut down by the chair upholding a point of order. There is no novelty. For instance, one recalls that in 1593, in reply to the usual petition of the Speaker, Sir Edward Coke, (*Parliamentary History of England from the earliest period to the year 1803, 1862), said :*

> "Liberty of speech is granted you, but you must know what privilege you have; not to speak everyone what he listeth or what cometh in his brain to utter; but your privilege is "aye" or "no"... Wherefore, Mr. Speaker, Her Majesty's pleasure is, that if you perceive any idle heads that will not stick to hazard their

> own estates; which will meddle with reforming the Church, and transforming the Commonwealth, and do exhibit any bills to such purpose, that you receive them not, until they be viewed and considered by those who it is fitter should consider of such things and better judge them."

Whether the petitioner's expressive activity was so interfered with as to violate his right of speech would depend on the context established in this case, including the nature and methods and carefully structured procedures of the Working Group of the Commission on Human Rights on Enforced and Involuntary Disappearances, evolved over a number of years, after much discussion and deliberation, by those who had considered such matters and judged them; and the terms of the notice he received, setting out the business to be transacted, as determined by the Group in accordance with its objectives, principles and practices.

According to the evidence placed before us by the petitioner, special international concern with the problem of the "enforced or involuntary disappearance" of persons dates back to 1978, when the General Assembly of the United Nations adopted Resolution 33/173 entitled "Disappeared Persons", *inter alia,* calling upon the Commission on Human Rights to consider the matter and make appropriate recommendations. On 29 February 1980, the Commission on Human Rights adopted Resolution 20 (xxxvi), in terms of which a Working Group of five of its members were appointed as experts in their individual capacities to examine questions relevant to the enforced or involuntary disappearance of persons by way of promoting the implementation of General Assembly Resolution 33/173. The Resolution of 1980 embodied the decision that the Working Group, in carrying out its mandate, should seek and receive information from Governments, intergovernmental organizations, humanitarian organizations and other reliable sources. Governments were requested to co-operate with and assist the Working Group in the performance of its tasks and to furnish all requested information. The Working Group was requested to submit to the Commission on Human Rights a report on its activities together with its conclusions and recommendations.

Although the Working Group had been originally appointed for one year, its mandate was extended, and meetings of the Group were held from time to time at various places. According to a letter from the Chief of the Special Procedures Section dated 12 July 1990, addressed to the petitioner (P1), the 31st Session of the Working Group was to be held in Geneva from 10-14 September 1990.

The petitioner's complaint is that he was "invited to address the Working Group" but that he was not able to present his "case fully" before that Group. P1 (which the petitioner submitted as the only evidence of an "invitation" to attend and address the meeting) was a letter inviting him as Secretary of the Committee of Parliamentarians for Fundamental and Human Rights – which learned Counsel for the petitioner explained was not a Committee of the House, but an informal group of opposition members of Parliament – *to submit information for consideration in the preparation of the Working Group's annual report.* The petitioner was also informed by P1 that, should he "or his organization be interested in meeting with the Group during" the session, he should contact the Centre for Human Rights "in order to arrange a mutually convenient date and time." There was no evidence that the petitioner had spoken *at all* at the meeting, quite apart from the fact that he was unable to present his case *fully.* We are to infer that he did speak from the so-called "invitation" to speak, viz., P1. This was neither an invitation to "address" the Working Group, nor was it an invitation to attend the meeting, nor was there any evidence that he had even an appointment to meet the Group. No agenda was produced. We were not told *when* he spoke and *who* he "addressed". The speech at the Geneva meeting was central to his complaint. To submit the letter P1 as the only evidence of the fact that he was invited to address the Working Group or that he was expected to speak or did speak or that he even had a definite opportunity of speaking to the Group was, to say the least, to lean his case upon a slender reed.

According to what the petitioner referred to as his "invitation" (P1), the Working Group had decided, as it had done before, to request non-governmental organizations to forward "all information of a general nature, or reports providing an assessment of a situation in a

given country." The information sought was regarded as an "important contribution" to the efforts of the Working Group, at its Geneva meeting between 10–14 September, 1990, "to faithfully reflect in its report the allegations and evaluations made by non-governmental organizations *on general problems and situations related to disappearances."* It was emphasized, and, (as the words "of course", and "as you are aware", seem to indicate), *it was assumed to be obvious,* that what was sought for the purpose of this meeting, concerned as it was with the preparation of its annual report, was information of a *general nature* and not of a *particular nature relating to individual cases.* The letter (P1) said :

> The aforementioned, of course, does not refer to individual cases of disappearances which, as you are aware, may be sent at any time during the year, and, if possible, immediately after the first internal steps to locate the missing person have been unsuccessful.

As a *notice,* P1, clearly and without ambiguity, set out the limited and special purpose for which the meeting was called. The meeting was concerned with general issues and, if the petitioner did speak at all, he made no attempt to show how the giving up of the material prevented him from delineating the issues relevant to the meeting and presenting the relevant factual contentions in an effective and meaningful manner. On the other hand, in terms of the carefully structured procedures of the Working Group, the material which he was unable to take with him was of no relevance to the business of the meeting of the kind held in Geneva, its deliberations and its deliberative process. The petitioner in paragraph 8 of his affidavit shows that he himself regarded the material given over to the first respondent as being of "evidential value only". As such, it was irrelevant, for the meeting did not approximate a judicial trial. It was not an evidentiary hearing. Neither the presentation, distribution or publication of the material given over, namely information on individual cases, was necessary (if indeed permissible at all) for the exercise of his right of free speech at that meeting. Even material of a *general nature,* which was the subject-matter of the meeting was required, in terms of P1, to be submitted before August 20, 1990 –

about three weeks before the meeting. The material was given by him to the first respondent on 11th September 1990, a day after the meeting had commenced.

I do not disparage the importance and value of the material given by the petitioner. Reports on individual cases were certainly relevant to the work of the Group. They were indeed essential and welcome; at other times and in other ways, although not on this occasion for its decided and stated purposes. Human Rights fact-finding is a specialized sphere in which standards and working methods have been carefully evolved, *having regard to the goals of a particular fact-finding exercise at a given time.* Fact-finding aimed at clarifying disputed facts arising in the context of specific human rights violations is carried out in conformity with formal complaint procedures: Material relating to individual cases are prepared and submitted in a prescribed form in accordance with the directions given in an Explanatory Note of the United Nations Centre for Human Rights bearing the reference CHR/WGEID/1987. The forms are designed to identify with particularity and reliability the information relevant to the specific purpose of tracing missing persons. It is clear enough from documents P3 A, B, C and D, filed by the petitioner to illustrate his averment that the 533 documents referred to by him in paragraph 8 of his affidavit and referred to in the receipt given by the first respondent (P2) when he took them over, are reports of individual cases in the prescribed, printed U.N. form. There are copies of photographs of the persons concerned attached to P3 A, B, C and D. The instructions state, *inter alia,* that "A photograph of the missing person and annexes, such as *habeas corpus* petitions or statements of witnesses, can be sent with the suggested form". The petitioner has referred in paragraph 8 of his affidavit to "thirty photographs attached to nineteen" other documents. However, he has neither explained what these were nor their relevance to the work of the Group, then or at any other time. Mr. Goonesekere did concede, albeit somewhat later during his submissions, that some of the material given over was of doubtful relevance at all; while the other documents taken over were being transmitted for consideration *in response to the request for reports on individual cases* and not in response to the request for general observations required for the meeting.

The time and occasion for publishing reports of individual cases was *any time* during the year but not, as it was made clear in P1, at this meeting. All of the materials, but two forms, were returned to the petitioner on 14 October 1990, receipt of which was acknowledged by the petitioner (1R1). The other two forms were returned, after reference to the Attorney-General for advice, in February 1991. The material given over could have been sent to the Working Group at any time, unlike the general observations called for inclusion in the preparation of the annual report: For the purpose of the individual reports in the prescribed form and annexed photographs in accordance with the instructions given by the United Nations Centre for Human Rights in document CHR/WGEID/1987, was to enable the Working Group to communicate with the Government and others to obtain "clarification" of individual cases from time to time during, what was called, the "Group's annual working cycle". (For a review of the activities in relation to the processing of individual cases in relation to Sri Lanka see paragraphs 281 – 306 of UN Document E/CN. 4/1990/13). The State was not attempting to thwart the efforts of the Working Group by withholding information, (as the petitioner's reference to orders from "higher ups" might imply). Learned Counsel for the petitioner, in demonstrating the character of the body whose meeting the petitioner was to attend, emphasized the fact that the Government of Sri Lanka had always closely co-operated with it. Reference was made to paragraphs 12, 294 and 299 of Document E/CN. 4/1990/13, dated 24 January 1990, published by the Economic and Social Council of the United Nations. They show the extent of co-operation between the Working Group and other UN bodies dealing with human rights and the Government of Sri Lanka. If the reports on individual cases did have a bearing on the annual report under preparation, they could, in terms of the instructions in P1, have been sent before the finalization of the annual report in December. The petitioner was reminded how and when information on individual cases were to be submitted, even though this was deemed to be obvious to the initiated. The giving over of the material on 11 September, 1990 did not prevent him from submitting the reports on individual cases at the appropriate time for due consideration, for they were returned to him while their relevance and usefulness yet remained unimpaired and undiminished in any way.

I am left with the definite and firm conviction that there was no violation of the petitioner's freedom of speech and expression : I cannot conclude that the petitioner was unable to explain his case *fully* for lack of the apprehended material when it has not been established that he spoke *at all.* Moreover, having regard to what was demanded and expected of him, it has not been established that the material was necessary for discharging his duties as a speaker at the Geneva meeting. The petitioner has failed to show that it was even receivable. In fact, the evidence points to the probability that the material given up by him was irrelevant to the purposes of the meeting and were not admissible and publishable at all at that meeting. The subsequent release of the material enabled the petitioner, and left him free, to publish the material, at a time and in a manner he was expected to do so, by those with whom he wished to communicate.

I therefore, dismiss the petitioner's application in respect of the alleged violation of Article 14(1) (a) of the Constitution.

Article 13 (1)

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

The petitioner in paragraphs 4 and 5 of his affidavit stated as follows :

> 4. When I arrived at Katunayake Airport on 11.9.90 to board the plane due to take me to Geneva, the 1st Respondent arrested and took me into custody and detained me in the Airport for a period of about two hours from about 9 p.m. to 10.45 p.m. on 11.9.1990. The action of the 1st Respondent was illegal and contrary to law and in violation of Article 13 (1) of the Constitution as there was no reason to arrest and detain me, a person of good character and not wanted in respect of any violation of the law of the land nor was there any warrant or authority from a Court to take me into custody or search me.

5. I was also not informed of the reason for my illegal arrest and detention in violation of Article 13 (1) of the Constitution.

Learned Counsel for the petitioner, citing the decisions in *Namasivayam v. Gunawardena*[1] and *Piyasiri and Others v. Nimal Fernando, A.S.P., and Others*[2], submitted that the act of delaying and preventing him from proceeding as it pleased the petitioner, constituted an "arrest" within the meaning of Article 13 (1) of the Constitution. I do not read those cases as supporting such a proposition.

In *Namasivayam v. Gunawardena* (*supra*), the petitioner was travelling in a bus on his way to Nawalapitiya, when a police officer stopped him and ordered him to accompany him to Ginigathena Police for questioning. The petitioner complied, and was released after his statement was recorded. Sharvananda, C.J. (Atukorale and H. A. G. de Silva, JJ. agreeing), held that an arrest in violation of Article 13 (1) of the Constitution had taken place.

His Lordship the Chief Justice said at p. 401 :

"The petitioner states that he was arrested on 28.7.86 when he was travelling in a bus, by the 3rd Respondent and that he was not informed of the reason of his arrest. The 3rd Respondent in his affidavit admitted the incident but stated that he did not arrest the petitioner. According to him he only required the petitioner to accompany him to the Ginigathena Police Station for questioning and released him after recording the statement at the station. If this action constituted an arrest in the legal sense, implicit in the 3rd Respondent's explanation is the admission that he did not give any reason to the petitioner for his arrest. In my view when the 3rd Respondent required the petitioner to accompany him to the Police Station, the petitioner was in law arrested by the 3rd Respondent. The petitioner was prevented by that action of the 3rd Respondent from proceeding with his journey in the bus. The petitioner was deprived of his liberty to go where he pleased. It was not necessary that there should have been any actual use of force; threat of force used to procure the petitioner's submission was

sufficient. The petitioner did not go to the Police Station voluntarily. He was taken to the Police by the 3rd Respondent. In my view the 3rd Respondent's action of arresting the petitioner and not informing him the reasons for the arrest violated the petitioner's Fundamental rights warranted by Article 13 (1) of the Constitution."

In *Piyasiri and Others v. Nimal Fernando and Others* (*supra*) the fourteen petitioners were customs officers returning home after work. They were stopped near the Seeduwa Police Station by a police Officer. The first respondent, dressed in civilian clothes and without identifying himself to be the police officer he was, questioned the petitioners as to whether they had foreign currency or whiskey. The first respondent then ordered the petitioners to proceed to the Seeduwa Police Station, which they did, followed by the first respondent and other police officers in uniform. They were searched at the Police Station and money in their possession was taken over by the Police. They were then ordered to proceed to Colombo to the Office of the Bribery Commissioner in Colombo, where their statements were recorded. In the words of H. A. G. de Silva, J. (at p. 176) :

"During the period during which they were in the Bribery Commissioner's Department which was till about 10.00 p.m. that day they were kept under the continuous control and orders of the Police whom they had no alternative but to obey and even their friends and relations who sought to contact them were not allowed to do so. At 10.00 p.m. they were permitted to leave only after they had given a written undertaking to appear in the Magistrate's Court, Colombo, the following morning."

H. A. G. de Silva, J. (Atukorale and L. H. de Alwis, JJ agreeing) at pp. 179-183 said :

"Section 23 (1) of the Code of Criminal Procedure Act No. 15 of 1979 states how an arrest is made. It says :

"In making an arrest the person making the same shall actually touch or confine the body of the person to be arrested unless

there be a submission to the custody by word or action and shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested."

The explanation to that subsection states that

"Keeping a person in confinement or restraint without formally arresting him or under the colourable pretension that an arrest has not been made when to all intents and purposes such person is in custody shall be deemed to be an arrest of such person."

After quoting from, Dr. Glanville Williams article on *Requisites of a Valid Arrest*, (1954) Criminal Law Review 6, (an essay somewhat more concerned with the ingredients of what constitutes an "arrest", rather than, as it has been sometimes supposed, concerned, with the subject of *jurisdiction* for an arrest), His Lordship said :

. . . After the petitioners were signalled to stop by the Police Officers near the Seeduwa Police Station, they were, till they appeared in the Magistrate's Court the next day, under the coercive directions of the 1st respondent. Surrounded by Police Officers, some of whom were in uniform, it would have been foolhardy, to say the least, for any of the petitioners to have attempted to exercise their right to the freedom of movement. Custody does not today, necessarily import the meaning of confinement but has been extended to mean lack of freedom of movement brought about not only by detention but also by threatened coercion the existence of which can be inferred from the surrounding circumstances."

Professor Glanville Williams (op.cit.) at pp. 11-15 states :

"An imprisonment or deprivation of liberty is a necessary element in an arrest; but this does not mean that there need be an actual confinement or physical force. If the officer indicates an intention to make an arrest, as for example, by touching the suspect on the shoulder, or by showing him a warrant of arrest, or in any other way by making him understand that an arrest is

intended, and if the suspect then submits to the direction of the officer, there is an arrest. The consequence is that an arrest may be made by mere words provided that the other submits. As Tindall, C.J. said . . . if the bailiff who has process against one, says to him, when he is on horseback or in a coach, *You are my prisoner, I have a writ against you*, upon which he submits, turns back or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process. (*Grainger v. Hill* [3]).

The same rule is shown by a case where the plaintiff, suing for false imprisonment, showed that he was not allowed to go upstairs in his own house except in the company of an officer; the court held that it was an arrest, because it was meant to be conveyed to the mind of the plaintiff that he should not go out of the presence or control of the officers. (*Warner v. Riddiford* [4]).

Grainger v. Hill seems further to decide that if the officer announces that he will arrest the other unless he gives up a certain thing, and the other complies, this is a sufficient constraint upon the person to amount to an imprisonment. The reason for the rule is obvious: an officer who makes such a threat is impliedly saying that the other must not go out of his presence until he complies with the condition. The threat therefore becomes an imprisonment as soon as it is complied with. By a slight extension of this reasoning, it might be held that there is an imprisonment if the officer makes it clear that he will not let the suspect go until he answers a question, for instance, give his name and address, and if the suspect complies under this duress.

The rule in *Warner v. Riddiford* assumes that the suspect acquiesces in the arrest. If he does not acquiesce, but persuades the officer to leave him alone or successfully takes to flight, there is no arrest . . .

If the person to be arrested plainly does not acquiesce . . . it is necessary and sufficient for the officer to touch the person to be arrested, at the same time making it plain to him that he is arrested, and where possible stating the act for which the arrest is made . . .

The upshot of this discussion is that, for the purpose of putting the suspect into the position of an arrested person, he need not be touched if he submits, or appears to submit, but if he does not make submission he must be formally touched.

The foregoing remarks do not mean that every request by a police constable to a suspect to accompany him, followed by acquiescence, amount to an arrest. One has to face the very difficult distinction between a command and a request. If an officer merely makes a request to the suspect, giving him to understand that he is at liberty to come or refuse, there is no imprisonment and no arrest. If, however, the impression is conveyed that there is no such option and that the suspect is compelled to come, it is an arrest. The distinction does not turn merely on the words used but on the way in which they are spoken and on all the circumstances . . . .

. . .Obviously it is not every imprisonment or detention 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 arrester must intend to bring the accused into what is sometimes called "the custody of the law." But this is a somewhat metaphysical expression and we need to try to define more precisely what is the intention that is required.

If one thinks about the matter there can hardly be any doubt that it must be an intention in some sense to take the first steps in charging the suspect with a crime . . . The intention certainly need not be an absolute one: the officer may have the full intention of releasing the suspect if a satisfactory explanation should transpire. But it is not sufficient, on this view, that he intends to charge the suspect only in the event of extracting incriminating admissions from him. There is a clear difference between these two situations: between an intention to charge unless the suspect clears himself, and no intention to charge unless he gives himself away."

Although in *Somawathie v. Weerasinghe and Others*[5], Kulatunga, J. said that "deprivation of liberty is not sufficient to constitute the seizure of

a man an arrest in law. It would amount to an arrest usually if he is seized for an offence", yet in *Withanage Sirisena and Others v. Ernest Perera and Others* [C], His Lordship altered his view and held that taking persons into custody and detaining them for the purpose of procuring their evidence in the circumstances of the case amounted to an arrest in terms of Article 13 (1) of the Constitution. Fernando, J. was of the same view in *Sirisena's* case. I would respectfully agree that "arrest" in Article 13 (1) might include placing a Person in custody otherwise than as a first step in the process of bringing criminal suspects to justice. Professor Williams was primarily concerned with arrest in the criminal law. However, he was well aware when he said "there must be an intention in some sense to take the first step in charging the suspect with a crime" that this may not be applicable in other circumstances. At p.15 he says : "There may, of course, be an arrest on civil process which this definition would not fit : we are considering exclusively arrest as a step in a criminal proceeding."

Although we were not given any precise definitions of "arrest" by Counsel, there is no lack of judicially discoverable and manageable standards for resolving the matter before us. The principles and conclusions set out by Professor Williams, *mutatis mutandis*, and adopted, explained and applied by this Court in *Piyasiri*, in construing Article 13 (1) are clear enough and quickly yield a result in this case without causing me difficulty.

Admittedly, there was a *detention* in the matter before us in the sense that the petitioner was *delayed* in going on his way into the area of the Airport where his departure formalities had to be attended to. However, was his detention by the first respondent any more an arrest in the relevant sense than his detention when his tickets and visas were checked and his baggage weighed and labelled and taken over, when customs officers stopped him to look at his declaration and examine his baggage, when Airport security staff stopped him to screen him and put his hand luggage through the screening machines, when he was stopped by the emigration officers to stamp his Passport, when he was stopped by Airline ground staff to examine his boarding card, and when he was stopped inside the aircraft for an examination of his boarding card to ascertain what was his allocated seat ? To be sure, it would have

been much nicer if he could have simply walked into the aircraft without all or some of these detentions. But was he arrested several times before he boarded the aircraft because he was detained in this way ? We halt and wait when our cars are searched; we are stopped to produce our identity cards or we wait to be personally searched before we are permitted to enter certain premises, sadly, almost as a matter of routine today. Are we arrested ? A man is hoping to drive to town on a certain road. A police officer halts him and informs him that he cannot go on because a bridge ahead has collapsed. Is he arrested because he cannot go as it pleases him ? A man is prevented from entering a theatre because he has no ticket. Is he arrested because he is not allowed to go in to see the play ? If the airline refused to carry the petitioner because he had no visa or because his ticket was not valid, would he have been arrested because he could not go as it pleased him ? It may please a man to take a stroll through the President's official residence or Parliament or come into this Court or wander through your home. Should he be allowed to successfully complain that his fundamental rights relating to freedom from arrest was violated because he was prevented from going where it pleased him ? These may, arguably, be constraints on the *freedom of movement.* Whether they are justiciable and actionable in the circumstances of a particular case is yet another matter. However, is there an *arrest* merely because one is stopped from going where one pleases ? Is that the only test ? Or are there other criteria to be satisfied ?

Nor does the need to tarry, in order to answer certain questions, or having to give up certain possessions as a condition precedent to going on, without, more, constitute an arrest. A person who brings in animal or plant material which is suspected of being noxious may be required to give it up on his arrival from abroad. The material may be inspected and tested and returned later on, or subject to fumigation or other treatment; or the material may be released conditionally or it may be destroyed. The importer who gives the material up may, in time, make other claims; but may he complain that he was *arrested* ? We are not allowed to enter certain premises unless we leave our bags behind. We are required to give over our baggage to the airline attendant and collect them later on arrival. An airline may refuse to carry you unless you give up knives or firearms or even a can of hairspray or shaving cream containing certain potentially explosive gasses. Are you therefore arrested ?

It is of much significance that no precedent sustaining the right to maintain applications like this has been called to our attention, although thousands of detentions do take place every day and although people are prevented from going about as they please, taking with them what they desire to take with them. This is not surprising, for it is not every detention or delay in going on, nor the imposition of conditions including the requirement to hand over or leave behind certain things, nor even the prevention of going on, that constitutes an arrest in the relevant sense. The act of stopping, halting or delaying a person from going on his way is to arrest his continuance in motion and progress. However, in my view, in order to sustain the petitioner's claim that his fundamental right of freedom from arrest guaranteed by Article 13 (1) of the Constitution has been violated, he must establish that there was an apprehension of his person by word or deed and an imprisonment, confinement, durance or constraint by placing him, (such apprehension and placing having been signified by physical action or by words spoken or by other conduct from which it might have been inferred), in the custody, keeping, control, or under the coercive directions, of an officer of justice or other authority, whether the purpose of such arrest was to enable the petitioner to be available and ready to be produced to answer an alleged or suspected crime or to assist in the detection of a crime or in the arrest or prosecution of an offender or some such or other purpose of the officer making, or authority ordering, the arrest. I do not intend this to be a definition of "arrest". A definition, I suppose, must await the wisdom of the future. Nor is it an attempt to lay down general guidelines concerning other situations not involved here. I do not even suggest that a bright line can be easily drawn that separates the type of deprivation of liberty within the reach of Article 13 (1) from the type without. Close questions undoubtedly will sometimes arise in the gray area that necessarily exists in between. Whether an act amounts to an arrest will depend on the circumstances of each case.

In *Youngstown Sheet and Tube, Co. v. Sawyer*[7] (Cf per Brennan, J. in *Goldwater v. Carter*[8] per Powell, J. in *Immigration and Naturalization Service v. Chadda*[9] per Rehnquist, J. in *Dames and Moore v. Regan*[10]), Mr. Justice Frankfurter said as follows :

> Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the

> Constitution. The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle – preferably forever a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits. An English observer of our scene has acutely described it : "At the first round of a new argument over the United States Constitution and its interpretation the hearts of Americans leap with a fearful joy. The blood stirs powerfully in their veins and a new lustre brightens their eyes. Like King Harry's men before Harfleur, they stand like greyhounds in the slips, straining upon the start." The Economist, May 10, 1952, p. 370. The path of duty for this court, it bears repetition, lies in the opposite direction.

It was not suggested by the petitioner that there was any actual or threatened intention to bring him into the custody of the law and deprive him of his liberty in subjecting him to the criminal process or otherwise. There was no imprisonment or forced confinement or durance or restriction of movement by reason of being placed in the custody of the law. He was not forced to abandon his journey and ordered to go elsewhere, to Police Stations and other designated places, as the petitioners were required to do in *Namasivayam* and *Piyasiri*, under surveillance and to remain under the control and coercive directions of law enforcement personnel or any other authority. He was not required to be in the presence or control of the first respondent or other officers of justice or law enforcement at any time even at the Airport. He was not in their keeping. There was no restraint of his freedom of movement by actual or threatened coercion. He was by no means coerced physically or by word or deed into a state of submission. The petitioner certainly did not cower: When a request was made to search his bags, he defiantly refused to open his bags. He wanted to seek advice. He was free to do so. He telephoned the Leader of the Opposition and then made up his mind. He threw his bags at the first respondent when he decided that they might be examined. He refused to make a statement, although he was requested to do so. Admittedly, he complied with the proposal to leave the documents behind, not spontaneously, but because it was suggested or prompted by the first respondent. The petitioner preferred

to take the documents. Nevertheless he gave them up, choosing between his options without duress or intimidation and without fear of losing his liberty by being placed in the custody of the law. He did not have to choose between giving the documents up or being imprisoned, confined or placed in the custody of the law, but between acquiescing in the necessity and propriety of giving up for scrutiny, material suspected of being objectionable, and not being allowed to proceed to Geneva. It was not announced, and he was never made to understand, that he would be imprisoned or confined or placed under police surveillance, or subject to coercive directions of law enforcement officers unless he gave up the documents. He was free to return home or go elsewhere without being subject to the control of law enforcement officers and without being placed or under their surveillance or coercive directions. The giving up of the material may have given rise to other claims, indeed, the petitioner claimed that this violated his rights under Article 14 (1) (a) of the Constitution – but not, in the circumstances of this case, a sustainable claim based on the ground of *arrest*. Preventing him from proceeding may have given him cause to complain that his fundamental right of freedom of movement guaranteed by Article 14 (1) (h) had been violated. However, no such claim has been made, and that is another matter. After giving up the suspicious documents in his possession, he went on his way to Geneva as planned. I am of the view that, although the detention might have been irritating, and irksome, there was no arrest within the meaning of Article 13 (1) of the Constitution. I dismiss the petitioner's application in respect of Article 13 (1) of the Constitution.

The petitioner in paragraph 13 of his affidavit suggested that the detention and search was occasioned by the "orders of higher-ups". There is no evidence of this. However, if *as he supposed*, the Executive may not have regarded the petitioner as a welcome traveller, and did look upon his policies and actions with disfavour, yet, it did not use any one of the several means at its disposal to prevent him from proceeding on the flight on which he was booked to go to Geneva. It rather seems to have accepted and acted on the principle that, just as popular and unpopular speech must be protected, it had likewise to protect the rights of both popular and unpopular travellers. (Cf. per Brennan, J. in *Haig v. Agee*[11]).

There being no arrest, it is unnecessary for me to decide whether there was a valid, justifiable and excusable arrest in that he was informed

of the reasons for his arrest, and arrested according to procedure established by law, although we were addressed at length, and vigorously, on this matter by learned counsel for the petitioner who was anxious that we should decide whether the first respondent had "'objectively" defensible grounds for his conduct.

For the reasons stated in my judgment, I dismiss the petitioner's application in respect of the alleged violations of Articles 12,13 (1), 13 (2) and 14 (1) (a) of the Constitution.

BANDARANAYAKE, J. – I agree.

DHEERARATNE, J. – I agree.

Application dismissed.