SOMAWATHIE
V.
WEERASINGHE AND OTHERS

SUPREME COURT,
BANDARANAYAKA, J., AMERASINGHE, J. AND KULATUNGA, J.,
S. C. APPLICATION, No. 227/88.
AUGUST 24, 1990 AND SEPTEMBER 19 AND 21, 1990.

Fundamental Rights – Application by wife complaining of infringement of Fundamental Rights of husband – Has wife locus standi–Article 126 of the Constitution.

Held :

(Kulatunga J. Dissenting on question of law). Under Article 126(2) of the Constitution a petitioner can complain of the violation only of his or her own fundamental rights and not of the fundamental rights of any other person. The petition can be filed by a petitioner alleging his own rights to have been violated or by an Attorney-at-Law acting on such petitioner's behalf. In this case the petitioner was complaining of the violation of her *husband's fundamental rights*. She had no *locus standi* to maintain the application.

Per Amerasinghe, J :

"How should the word of this provision of the Constitution (Article 126(2)) be construed ? It should be construed according to the intent of the makers of the Constitution. Where, as in the Article before us, the words are in themselves precise and unambiguous, and there is no absurdity, repugnance or inconsistency with the rest

of the Constitution, the words themselves do best declare that intention. No more can be necessary than to expound those words in their plain, natural, ordinary, grammatical and literal sense".

Cases referred to :

(1) *Sussex Peerage Claim (1844) 11 Cl. & Fin 85, 143*

(2) *Grey v. Pearson (1857) 6 H.L. 61, 106*

(3) *Moti Ram Deka, Sudhir Kumar Das and Priya Gupta v. General Manager North East Frontier Railway and General Manager, North Eastern Railway AIR 1964 S. C. 600, 621*

(4) *W. Ansalin Fernando v. Sarath Perera, O. I. C., Chilaw Police Station et al. - S.C Application No. 18/87 - S.C. Minutes of 21.05.1990*

(5) *Jones v. Wrotham Park Estates 1980 A. C. 74, 105, 106*

(6) *Western Bank Ltd. v. Schindler [1977] Ch. 1, 18*

(7) *Thompson v. Gould & Co. 1910 A.C. 409, 420*

(8) *Vickers, Sons and Maxim Ltd. v. Evans [1910] A. C. 444, 445.*

(9) *Peoples Insurance Co., Ltd., v. Sardar Singh Caveeshar A.I.R. 1962 Punjab 105*

(10) *State Trading Corporation of India Ltd., v. The Commercial Tax Officer and Others A.I.R. 1963 S.C. 1811*

(11) *Srimathi Champakam Dorairajan and Another v. The State of Madras A.I.R. 1951 Madras 120*

(12) *Dupont Steel Ltd., v. Sirs 1980 1 All E.R. 529*

(13) *State of Bihar v. Kameshwar Singh A.I.R. 1952 S.C. 252, 273, 309*

(14) *In the matter of the Central Provinces and Berar Sales of Motor Spirits and Lubricants Act 1938, All India Reporter 1939 Federal Court of India 1*

(15) *A. K. Gopalan v. State of Madras A.I.R. 1950 S.C. 27, 42*

(16) *Keshavan Madhava Menon v. The State of Bombay A.I.R. 1951 S.C. 128, 129 paragraph 5*

(17) *Rananiaya Singh v. Baijnath Singh and Others A.I.R. 1954 S.C. 749, 752*

(18) *Ramakrishna Singh Ram Singh and Others v. State of Mysore and Others A.I.R. 1960 Mysore 338, 345*

(19) *Kesavananda Bharati v. State of Kerala 1973, 4 S.C. 225*

(20) *Loan Association v. Topeka 622 L. ed 455*

(21) *Wijesiri v. Siriwardena 1982 1 Sri L.R. 171, 175*

(22) *Priyasiri v. Fernando A.S.P 1988 1 Sri L.R. 173, 176, 180*

(23) *Christie v. Leachinsky 1947 A.C. 573*

(24) *Wickremabandu v. Cyril Herat et al S.C. Application No. 22/88 Supreme Court Minutes of 06th April, 1990.*

APPLICATION under Article 126 alleging infringement of fundamental rights under Articles 11 and 13 of the Constitution.

C. Sooriyarachchi for petitioner.

D. S. Wijesinghe, P.C. with Mr. *Somasiri* for 2nd and 3rd respondents.

N. G. Amaratunga, S.S.C. for the 1st and 5th respondents.

Cur. Adv. Vult.

November 20, 1990

AMERASINGHE, J.

The petitioner complains of the infringement of the fundamental rights guaranteed by Articles 11 and 13 of the Constitution. The complaint is not based on the violation of the petitioner's own rights. It is based on the violation of the rights of her husband.

Learned Senior State Counsel and Mr. Wijesinghe, P.C. submitted that this Court was precluded from entertaining the petitioner's application. They submitted that Article 126(2) of the Constitution provides that where any person alleges that any fundamental right relating to such person has been infringed he may either himself or by an attorney-at-law on his behalf apply to the Supreme Court by way of petition addressed to such Court praying for relief or redress in respect of such infringement. The alleged violations in this case neither related to the petitioner herself nor was the petitioner an attorney-at-law acting on behalf of a person whose rights were alleged to have been violated. Therefore, learned counsel submitted, the petitioner had no *locus standi.*

Article 126(2) of the Constitution is as follows :–

"Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two Judges."

How should the words of this provision of the Constitution be construed ? It should be construed according to the intent of the makers of the Constitution. Where, as in the Article before us, the words are in themselves precise and unambiguous and there is no absurdity, repugnance or inconsistency with the rest of the Constitution, the words themselves do best declare that intention. No more can be necessary than to expound those words in their plain, natural, ordinary, grammatical and literal sense. (*Cf. Sussex Peerage Claim(1) per Lord Wenslydale in Grey v. Pearson.*(2) .In Moti Ram Deka, Sudhir Kumar Das and Priya Gupta v. General Manager North East Frontier Railway and General Manager, North Eastern Railway (3) Suba Rao, J. at p. 621 paragraph 65 said :

> "The general rule of interpretation which is common to statutory provisions as well as to constitutional provisions is to find out the expressed intention of the makers of the said provisions from the words of the provisions themselves."

Construed in this way, Article 126 (2) confers a recognized position only upon the person whose fundamental rights are alleged to have been violated and upon an attorney-at-law acting on behalf of such a person. No other person has a right to apply to the Supreme Court for relief or redress in respect of the alleged infringement of fundamental rights. The petitioner is neither the person whose fundamental rights are alleged to have been infringed nor the attorney-at-law of such a person. Therefore the petitioner has no *locus standi* to make this application.

Learned Counsel for the petitioner did not dispute the fact that in terms of Article 126 (2) of the Constitution there were only two persons who could come before this Court for relief or redress, namely, the person whose rights were alleged to have been infringed and the attorney-at-law of such a person. Learned Counsel for the petitioner, however, cited the decision of this Court in *W. Ansalin Fernando v. Sarath Perera, O.I.C., Chilaw Police Station et al.(4)* and submitted that relief or redress could on the basis of that decision be granted in other cases as well.

In *Ansalin Fernando's case* relief was granted where the application was made by the mother of the person whose rights had been violated. No objection was raised in that case to the standing of the petitioner. I concurred with the judgment proposed in that case by my honourable and learned brother, Kulatunga, J. However I did not in that case consider the question of *locus standi.*

In *Ansalin Fernando's case* I would have come to a different conclusion had my attention been turned towards the question of the petitioner's standing by a submission from counsel with regard to that matter.

It has been suggested that in certain specified circumstances, the next of kin may be permitted to make the application provided it is supported by an affidavit from the party whose rights have been affected because this would make the application "virtually" that of the affected party and in accordance with the "spirit" of Article 126 (2), the petitioner may be "excused" for a failure to make "literal compliance" with the provisions of that Article.

With great respect, I am unable to agree. It is not apparent that the makers of the Constitution by inadvertence overlooked and so omitted to deal with the case of persons in detention. Unless it is apparent that there was such an omission to deal with an eventuality that required to be dealt with if the purposes of the Constitution were to be achieved. I am precluded from giving any construction other than the literal meaning of the Article. (Cf. per Lord Diplock in *Jones v. Wrotham Park Estates(5).*

Numerous applications have been entertained, and continue to be entertained, by this Court in terms of Article 126 (2) from such persons and from attorneys-at-law who have acted, and continue to act, on behalf of incarcerated persons. If, as suggested, an affidavit from the party affected is necessary, (an affidavit was filed in the case before us), it is difficult to understand why a proxy appointing an attorney-at-law could not also be signed by the person on whose behalf it is claimed that fundamental rights were violated.

Even assuming that a certain situation had been inadvertently overlooked by the makers of the Constitution, with what certainty can we add any words to convey the intention of the makers of the Constitution, had their attention been drawn to the omission? Unless it is possible to state with certainty the additional words that would have been inserted, any attempt by this Court to repair the omission in the Constitution cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a provision in the Constitution. The Court would go beyond its duty of construction. (Cf. per Lord Diplock in *Jones v. Wrotham Park Estates* (ibid.)). Would they have confined the exception to those in detention? Would the requirement of allegations of

torture also have been included? Would they have confined the exception to cases where personal injury has resulted? Why would these and not other criteria be included instead of or in addition to these requirements? Who would have been declared entitled to make the application–the parents? spouse? children? grandchildren? other relatives? a mistress? a friend? a neighbour? a concerned citizen? Or would the makers of the Constitution have conferred the right only on the next-of kin? Why? I do not know how to repair the supposed omission in accordance with the intentions of the makers of the Constitution because I do not know, and have no way of discovering, what they might have said. There is nothing I can necessarily imply from the words used. In such circumstances, to add some words of my own might transform the certain text of Article 126(2) into one that raises doubts. Judicial intervention would then, by introducing private beliefs, render a disservice to the Rule of Law which rests on the certainty of the law. (Cf. Cross, op. cit. p. 45 ; Bindra, op.cit. 990 fin. - 991).

. Moreover, the separation of powers requires me as a Judge not to presume that I know how best to complete the legislative scheme. In such a situation, any attempt on my part to fill the supposed gaps would lead me to cross the boundary between construction or interpretation and alteration or legislation. It would become,in the words of Lord Diplock in *Jones v. Wrotham Park Estates Ltd.* (5) "a usurpation of the function which under the Constitution of this country is vested in the legislature to the exclusion of the Courts." (*See* also Sir Rupert Cross, *Statutory Interpretation,* 2nd Ed. at p. 45. It is one thing to put in words to express more clearly what the makers of the Constitution said by implication ; but quite another to make them say what I conjecture they could have or would have said if a particular situation had been brought to their attention. (Cf. E.A. Driedger, *Construction of Statutes,* 1983, 2nd Ed. 101). I do not wish to cross the boundary I have referred to without clear necessity for doing so by reading into the Constitution a large number of words which are not there. (Cf. per Scarman L.J. in *Western Bank Ltd. v. Schindler* (6) I have no difficulty in understanding why, as a Judge, I should refrain from becoming unduly creative in this way. It is a wrong thing to do. (Cf. per Lord Mersey in *Thompson v. Gould & Co.,* (7) per Lord Loreburn in *Vickers, Sons and Maxim Ltd. v. Evans.* (8).

In discharging my duties in terms of Article 4 (d) of the Constitution, I must actively co-operate to give such fair, broad, large, liberal,

purposive and progressive construction as will best ensure that the fundamental rights declared and recognized by the Constitution are respected, secured and advanced according to the true intent, meaning and spirit of the provisions of the Constitution. In *Peoples Insurance Co. Ltd. v. Sardar Singh Caveeshar,* (9) Tek Chand, J. at p. 103 paragraph 4 drew attention to the fact that the "naked words of the statute governing constitutional privileges are not always a safe guide for determining their applicability." His Lordship said :

> "Where fundamental rights are involved, it is the *sentia legis* more than the *nuda verba,* which throws light and gives guidance."

In State Trading Corporation of India Ltd., v. The Commercial Tax Officer and others (10) Das Gupta. J., after holding that the corporation concerned was not a citizen for the purpose of fundamental rights in terms of the Citizenship Act, went on to state as follows at p. 1887 paragraph 76 :

> "That according to the respondent should end the search for light. I am unable to agree. After all it is a Constitution that we are interpreting and it has again and again been laid down that those on whom falls this task have to take a broad and liberal view of what has been provided and should not rest content with the mere grammarian's role. If as is undoubtedly true, a syllogistic or mechanical approach of construction and interpretation of statutes should always be avoided, it is even more important when we construe a Constitution that we should not proceed mechanically but try to reach the intention of the Constitution makers by examining the substance of the thing and to give effect to that intention, if possible."

"If possible". When is it to be properly regarded as possible ? There are limits beyond which I must not venture. In *Srimathi Champakam Dorairajan and another v. The State of Madras* (11) Viswanatha Sastri, J. at pp. 130-131 paragraph 31 said :

> "We have been told on high authority that a Constitution must not be construed in any narrow and pedantic sense especially a. . . . Constitution with its nice balance of. . . individual rights and state power, and that we must approach it in a broad and liberal spirit,

so as, if possible, to validate legislative and administrative action. A person who assails the legislative or administrative action of Government must carry the burden of demonstrating beyond doubt its unconstitutionality. We have also been warned by equally high authority that we have to interpret the Constitution on the same principles of interpretation as apply to ordinary law and that we have no right to stretch or twist the language in the interest of any political, social or constitutional theory. The principle that in interpreting a Constitution, a construction beneficial to the exercise of legislative or administrative power should be adopted, may not be of any great help when the statutory provisions that fall to be considered relate to the constitutional guarantees of the freedom and civil rights of individual citizens against abuse of governmental power. We must assume that there was a sufficient and indeed a grave need for the enactment of the Chapter on fundamental rights as part of the Constitution. The question before us is not as to the expediency, still less as to the wisdom of these provisions, but is one of law depending on the construction of the relevant articles of the Constitution. It is no doubt a legitimate, and in the case of a Constitution, a cogent argument, that the framers could not have meant to enact a measure leading to manifestly unjust or injurious results to the nation and that any admissible construction which avoids such results ought to be preferred. Having regard to the precise and comprehensive provisions of chap. III of the Constitution, we are not in the happy position of a learned Judge of the United States, who is said to have observed that there was no limit to the power of judicial legislation under the "due process" clause of the 5th and 14th Amendments, except the sky. I consider it to be both legally and constitutionally unsound, even though the invitation has been extended to us by learned counsel, to eviscerate the Constitution by our own conceptions of social, political or economic Justice".

Where the rights of citizens have been abridged, restricted or denied by the Constitution, in their description or in the manner of their exercise, I can only give effect to the intention of the makers of the Constitution, however inexpedient, or unjust or immoral it may seem. (Cf. per Lord Diplock in *Dupont Steels Ltd. v. Sirs* (12) per Mahajan, J. in *State* of *Bihar v. Kameshwar Singh,* (13). I cannot twist, stretch or pervert the language of the Constitution under the guise of interpretation. In *Moti Ram Deka and others v. General Manager, North East Frontier Railway*

and another (supra), after stating that the intention of the makers of the Constitution must be gathered from the words of the Constitution itself, Suba Rao, J. at p. 621 said :

> "It is also equally well settled that, without doing violence to the language used, a constitutional provision shall receive a fair, liberal and progressive construction, so that its true objects might be promoted."

In the matter of the Central Provinces and Berar Sales of Motor Spirits and Lubricants Act, 1938.(14) Chief Justice Gwyer at p. 4. said he conceived that "a broad and liberal spirit should inspire those whose duty it is to interpret" the Constitution,"but", his Lordship added, "I do not imply by this that they are free to stretch or pervert the language in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors." These words were quoted with approval by Chief Justice Kania in *A. K. Gopalan v. State of Madras,* (15).

As for the "spirit" of the Constitution, it is to be expected that arguments founded upon it are, as Das J. observed in *Keshavan Madhava Menon v. The State of Bombay,*(16) "always attractive" because they have a powerful appeal to sentiment and emotion. However, it has been held that the spirit of the Constitution is an "elusive and unsafe guide" (per Das. J. in *Rananjaya Singh v. Baijnath Singh and Others* 17 Cf. per Mahajan, J. in *State of Bihar v. Kameshwar Singh.* (13) In any event it cannot be invoked by a court for the purpose of altering the words of the Constitution. In *Keshawa Madhava Menon's case* (ibid.), Das, J. observed that "A court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support the view". The spirit of the Constitution cannot prevail against the plain language of its letter. (See *State of Bihar v. Kameshwar Singh (supra)* at p. 309 paragraph 201 per Mahajan, J. and at p. 315 paragraph 231 per Das, J.; *Rananjaya Singh v. Bajinath Singh* (supra) at p. 752 per Das, J.; *Ramakrishna Singh. Ram Singh and others v. State of Mysore and others,*(18) per Das Gupta, C. J ; *Kesavananda Bharati v. State of Kerala* 19. To hold otherwise would, as Cliford, J. observed in *Loan Association v. Topeka.*(20) (see also Bindra, *Interpretation of Statutes,* 7th Ed., at p.990), "make the courts sovereign over both the Constitution and the people and convert the Government into a judicial despotism."

Article 126 (2) of the constitution, construed according to the ordinary, grammatical, natural and plain meaning of its language, gives a right of complaint to the person affected or to his attorney-at-law and to no other person. That was the intention of the makers of the Constitution as expressed in that Article. If it is believed to be inadequate and works injustice, the appeal must be to Parliament and not to this Court. (Cf. per Das, J. in *Rananjaya Singh v. Bajinath Singh* (supra) at p. 752.

In the circumstances, I dismiss the petitioner's application without costs.

BANDARANAYAKE, J.

Objections were taken by Counsel both for the State and for the other respondents that this application must fail *in limine* as the petitioner was not a person recongnized by Article 126 (2) as entitled to invoke the exercise of fundamental rights jurisdiction of the Supreme Court as the alleged violation was not in relation to the petitioner's rights but of someone else's; Nor was the petitioner an Attorney-At-Law acting on behalf of the person complaining of an infringement of his rights. A full argument was heard on the petition including a reference to the facts in view of relief granted by this Court in a decision of this Court in *W.Ansalin Fernando v. Sarath Perera, O.I.C., Chilaw Police Station, et al.*(4) where the Petitioner was the mother of the person whose rights have been infringed. However, that case was decided without any objection being raised in regard to the standing of the petitioner.

I have had the opportunity of reading the judgements of both my brothers and I would respectfully agree with the interpretation of Article 126 (2) expressed by my brother Amarasinghe, J.. The objection accordingly entitled to succeed for the reason that the petitioner had no *locus standi*.

The application is dismissed without costs.

Kulatunga, J.

BY her application filed on 13.12.88 the petitioner complains of infringments of fundamental rights of her husband, the 4th respondent, secured by Articles 11 and 13 of the Constitution. She claims for a declaration accordingly and for damages against the 2nd and 3rd respondents in a sum of Rs. 25,000, in favour of the 4th respondent.

The alleged infringements consist of unlawful arrest and detention of the 4th respondent by the 2nd and 3rd respondents and an assault inflicted on him by police officers whilst he remained in police custody.

The 2nd respondent (an Inspector of Police) and the 3rd respondent (a Police Constable wrongly designated in the application as a Sergeant) headed by the 1st respondent (a Superintendent of Police) were, at the time of the impugned acts, members of a special unit sent from Colombo to investigate a triple murder of three young persons in Ratnapura. On 22.10.88 the victims of the murder appear to have been taken to the house of G. V. Punchinilame, the Chief Minister of the Provincial Council and tortured there after which they had been removed in a jeep and put to death in some other place.

Susantha Punchinilame, the Chief Minister's son and some police officers of the Ratnapura Police were suspects from the inception of investigations and the 4th respondent was, according to the police, a vital witness as he had been working as a servant at the Chief Minister's house.

Before considering the merits of this application, I have to consider two preliminary objections urged on behalf of the respondents. The learned Senior State Counsel for the 1st and 5th respondents submitted that this application is not properly constituted as it has been filed by the wife of the petitioner who has no *locus standi* to apply to this Court for relief under Article 126 (2) of the Constitution. Under that article the application can be filed only by the person himself whose rights are infringed or about to be infringed or by an Attorney-At-Law on his behalf. It was also submitted that this application is out of time. Mr. D. S. Wijesinghe, P.C for the 2nd and the 3rd respondents associated himself with the first objection that the petitioner has no *locus standi* to file this application but informed us that he is not pressing the objection that the application is out of time.

In reply to the first objection, the learned Counsel for the petitioner relied on the decision of this Court in *W. Ansalin Fernando v. Sarath Perera, O.I.C., Chilaw Police Station et al* SC Application No.18/87 SCM 21.05.90 in which relief was Granted to a detenu on the application of his mother. Counsel also requested us to adopt the practice in India of entertaining public interest petitions complaining against infringements of fundemental rights. In the case of Ansalin Fernando the objection as to *locus standi* was not raised. In this case

the point has been taken at the hearing before us. There is no reference to it in the objections of the respondents or in the written submissions loged on their behalf. Nevertheless I propose to decide the question as it goes to our jurisdiction to entertain this application.

I am of the view that having regard to the express provisions of Article 126(2) as to who may apply for relief thereunder, this Court cannot entertain complaints having the character of public interest petitions. However, in circumstances of grave stress or incapacity particularly where torture resulting in personal injury is alleged to have been committed, next-of-kin such as a parent or the spouse may be the only people able to apply to this Court in the absence of an Attorney-At-Law who is prepared to act as a petitioner ; and if such application is also supported by an affidavit of the detenu either accompanying the petition or filed subsequently which would make it possible to regard it as being virtually the application of the detenu himself this Court may entertain such application notwithstanding the failure to effect literal compliance with the requirements of Article 126(2).

When the Legislature enacted that a person who complains of an infringement of his fundamental rights may himself apply to this Court for relief could it be said that the Legislature thereby intended to shut out an application which is virtually that person's application because in the circumstances his next-of-kin has been compelled to submit his claim to this Court ? I think not. In another area of Public Law, writs of certiorari and mandamus are no longer subject to the narrow rules of *locus standi* but available to any public spirited citizen not being a mere busy body. *Wijesiri v.Siriwardana* (1982) 1 Sri L.R. 171, 175 ; Wade's article on 'unlawful administrative action' (1967) L.Q.R 499, 504; Wade Administrative Law (4th Ed.) 608. The wording of Article 126(2) would not permit such extention in the case of a fundamental rights application; yet in view of the provisions of Article 4(d) that fundamental rights shall be respected, secured and advanced by all organs of Government, I consider it legitimate to give a purposive construction to Article 126(2) subject however to the strict limitations indicated by me.

In the instant case, the application has been filed by the wife of the 4th respondent with an affidavit from the latter alleging that he had been stripped and assaulted by police officers; he was detained in the Mahara Prison, presumably subject to high security which is evident from the fact that the police had, according to their report to Court 2R1, requested the Magistrate, Ratnapura to provide special protection to

suspects, including the 4th respondent, in view of the security situation in the country consequent to the murders; the 4th respondent's affidavit shows that the case itself had been transferred from Ratnapura to Colombo. In that backgound it is quite possible that apart from being able to sign an affidavit, the 4th respondent may not have been free to give a proxy and instruct an Attorney-at-Law to file the application. It is apparent that soon after the murders there existed conditions in which, as the police themselves believed, there was some threat to the 4th respondent's personal safety. In view of the special circumstances, I am not prepared to refuse this application on the ground that the petition is not in the name of the 4th respondent; although it is in his wife's name it is accompanied by the 4th respondent's affidavit; the relief sought in the petition is in favour of the 4th respondent; and hence this application is virtually his application. I would, therefore, entertain this application notwithstanding the failure to effect literal compliance with Article 126(2) and reject the preliminary objection in that regard.

I think that the contrary view which leads to a dismissal of this application for want of *locus standi* in the petitioner involves a strict construction of Article 126(2) which is not warranted all in the circumstances. If fundamental rights are to have any meaning particularly to the weak and the helpless person whose freedom to have prompt recourse to this Court by himself or by an Attorney-at-Law is impeded due to circumstances beyond his control, it is the duty of this Court to construe Article 126(2) purposively and not literally. This would not do violence to the intention of the Legislature; and even if there be a doubt in that regard I would resolve it in favour of the construction which would advance the remedy for violation of fundamental rights, provided by Article 17 of the Constitution.

As regards the objection that this application is out of time, I am inclined to the view that the delay which is about 10 days can be excused. The 4th respondent had signed his affidavit on 28.11.88 within time, his wife has signed the proxy in favour of her registered Attorney on 01.12.88 within time but the application itself has been filed on 13.12.88 which in the circumstances of this case could be attributable to the security situation prevailing during that period. I therefore excuse the delay in filing this application and reject the preliminary objection in that regard.

The facts of this on which the alleged violations of rights have to be determined are referred to in the affidavit of the 4th respondent and in the counter affidavits of the respondents and a copy of the notes of investigations which have been produced for the information of this Court. There are also two medical reports marked X1 & X2 which were filed on 21.08.90 in support of the allegation of assault. Prior to that, there is a motion by the Attorney-at-Law for the petitioner, filed on 30.06.89 for a direction calling for the reports of Dr. J. A. B. S. Jayakody and Dr. Pushpa Nayana Kumari of Mahara Prison regarding the examination and treatment of the 4th respondent at the Prison Hospital in November 1988. This is followed by a motion on 13.08.90 giving the new address of Dr. Jayakody as Base Hospital, Gampaha. By the time this application came up for hearing this Court had not made any order on these applications perhaps for the reason that the Attorney-at-Law for the petitioner had not moved to support these applications in open Court. In the circumstances, this Court is left with the reports X1 and X2 which the petitioner has procured directly from the doctors concerned. In X1 dated 20.08.90 Dr. Jayakody states that according to the records in the prison he had treated the 4th respondent on 28.11.88 for contusions. In X2 of the same date Dr. K. Nayana Pushpa states that she had given O.P.D treatment to the 4th respondent at the Mahara Prison Hospital on 03.12.88. There is, however, no reference to the condition for which he was treated by her.

It is alleged that the petitioner was arrested on 30.11.88 by the 2nd and 3rd respondents at the house of one Jinadasa Guruge in Colombugama at about 9.00 p.m.. He was not informed of the reason for his arrest; thereafter he was taken to the upstairs of the house of one Wettesinghe in Ratnapura; there he was stripped; his hands and legs were tied together; and he was assaulted by police officers. He was shown his son Jayasuriya and threatened to comply with police orders on pain of losing his son. He was detained there until he was produced in Court and made to sign a statement on 02.11.88.

According to the 2nd respondent, the 4th respondent's name transpired in the course of investigations as a vital witness and he was required to attend the Ratnapura Police. Accordingly, he reported to the Ratnapura Police on 01.11.88 along with Police Sergeant 10557 Wijedasa. The 4th respondent was in hiding through fear at a place in Colombugama in the Ratnapura District. As several police officers attached to the Ratnapura Police were suspects the investigations were

conducted in a separate building a few yeards away from the Ratnapura Police Station. The statement of the 4th respondent was recorded on 02.11.88 at 1.10 a.m.. As he had revealed details of certain important incidents relating to the commission of the offence, the 4th respondent was afraid to leave the premises and sought the 2nd respondent's protection to escape the wrath of interested parties; he was permitted to stay in the same premises when on the basis of further statements recorded it became apparent that he had to be treated as a suspect; whereupon he was formally informed of the allegation against him and placed under arrest on 04.11.88. On the same day he was produced before the Magistrate along with two other suspects on a B Report (2R1).

The 3rd respondent denies that he took part in the alleged arrest and detention of the 4th respondent. The 1st respondent too has filed an affidavit with a supporting affidavit (1R1) from PS Wijedasa who traced the 4th respondent at Colombugama. Each of the respondents denies the allegation of unlawful arrest, detention and assault contained in the petition.

The notes of PS Wijedasa support the position that during the night of 01.11.88 the police had searched for the 4th respondent as a witness in the course of investigations in to the triple murder. This officer was accompanied by PS Dharmasena and Jayasuriya son of the 4th respondent who knew the place where the 4th respondent stayed which appears to be within the area of jurisdiction of the Nivitigala Police. Along with PS Jayawardena of the Nivitigala Police, they visited the house of one N. G. K. Jinadasa in Colombugama at 9.45 p.m. on 01.11.88 and traced the 4th respondent there. The purpose of the police visit was explained whereupon the 4th respondent said that he was aware of the circumstance of the murder and the abduction of the victims and agreed to accompany the police.

The police party with the 4th respondent reached Ratnapura at 12.50 a.m. on 02.11.88. He was then taken to the place where the investigations were being conducted situated close to the house of Mr. Wettasinghe, Attorney-at-Law. After questioning him, his statement was recorded in the presence of his son Jayasuriya, commencing at 1.10 a.m.. In the course of a long statement he disclosed the details of events which occured on 22.10.88 at the house of the Chief Minister Punchinilame and described how three persons were brought there in a jeep blind folded and hands tied, at about 12.30 p.m. and how they

were subjected to torture in a room in the course of which they shouted "Budu Ammo". Susantha Punchinilame, son of the Chief Minister and police officers Kotalawala and Weerasekera were involved in this transaction. They went about armed with a pistol, guns and hand grenades. At about 6.00 p.m., Weerasekera and Kotalawala took the three persons away in the jeep whilst Susantha Punchinilame stayed back. When he told his wife about the incident she advised him to leave the village whereupon he left for Colombugama on 31.10.88 where he stayed until the police traced him.

An event of some significance which is relevant to this case occured as the 4th respondent was concluding his statement. At that stage his son Jayasuriya, a boy of 14 years of age escaped through a window and ran away. The police made some search but failed to find him. This lends support to the allegation that the 4th respondent's son was kept by the police as a hostage, even if initially they had taken him along for the purpose of tracing the 4th respondent ; and that the 4th respondent's stay with the police after 02.11.88 was not so voluntarily.

The police next recorded the statement of one Madanasinghe commencing at 11.30. a.m. on 02.11.88. This witness who is a home guard attached to the Chief Minister's household said that on the day three persons were tortured in that house, he saw the 4th respondent seated on the back of one of them and dealing seven to eight blows on him. This is the only witness who implicated the 4th respondent and on whose statement the police treated him as a suspect.

It is on the basis of this material that a determination has to be made on the allegations contained in the petition. As regards the alleged infringement of Article 11, the petitioner states that the 4th respondent was subjected to inhuman treatment. Whilst it is clear that the petitioner was under great pressure by the police, I am constrained to conclude that the available evidence is not sufficiently cogent to establish the alleged assault and inhuman treatment. There is no evidence oral or documentary other than the affidavit of the 4th respondent. The medical report X1 speaks of his being treated for contusions on 28.11.88, in the prison to which he had been remanded on 04.11.88. It gives no details of injuries and contains no opinion as to how such contusions could have been caused. The report X2 does not specify the condition for which he was treated on 03.12.88. As such the alleged violation of Article 11 fails.

As regards the alleged infringement of Article 13(1) the petitioner's complaint is that the 4th respondent was not informed of the reason for his arrest, whether such arrest took place on 30.10.88 which is the date given by the petitioner or on 01.11.88 which is the date given by the respondents. Counsel for the respondents argue that the 4th respondent was not arrested in that he came with the police voluntarily. Mr. Wijesinghe, PC cited the decision in *Piyasiri v. Fernando, A.S.P.* (1988) 1 Sir L. R. 173 in support of this submission. The petitioner's Counsel submits that the 4th respondent was forcibly taken from the house of Jinadasa and as such he was arrested. According to Sergeant Wijedasa's notes, the 4th respondent came with the police voluntarily ; however, in his affidavit he states that he took the 4th respondent for questioning and brought him to Ratnapura. This suggests that the 4th respondent had no option to come or refuse. The 1st respondent states that the 4th respondent was "arrested" on 01.11.88. In all the circumstances, it is more probable that the 4th respondent was taken in circumstances in which there was a deprivation of liberty.

However, I am of the view that deprivation of liberty by itself 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. Thus Section 23 of the Code of Criminal Procedure Act, No. 15 of 1979 provides –

> "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".

Piyasiri's case (Supra) and the authorities cited therein refer to the arrest of a suspect. That decision itself concerns the arrest of a number of Customs officers on suspicion of soliciting and accepting bribes which is an offence under the Bribery Act. The decision of the House of Lords in *Christie v. Leachinsky* (1947) AC 573 also confirms this position. Lord Simonds said (p. 593) –

> "This I think is the fundamental principal *viz*., that a man is entitled to know what, in the apt words of Lawrence L. J., are 'the facts which are said to constitute a crime on his part'" (1946) K. B. 124, 147).

It was held in *Wickremabandu v. Cyril Herat et al* SC Application No. 27/88 SCM 06.04.90, as a matter of principle the requirement in Article 13(1) that an arrested person shall be imfomed of the reason for

his arrest may no longer be limited to a person accused of a crime and that it can extend to a person arrested under any law for preventive detention. In the case before us, the 4th respondent was taken as a witness ; hence there is no arrest in the contemplation of the law and as such the requirement to give the reason for his arrest in terms of Article 13(1) has no application to the 4th respondent. If, however, he can establish that he was forcibly taken in circumstances amounting to the offence of abduction the officer who is responsible may become liable to a prosecution ; it may also give rise to civil liability ; but he cannot complain of an infringement of his rights under Article 13(1).

It is then alleged that there has been an infringement of the 4th respondent's rights under Article 13(2) in that the police failed to produce him before a Court after his arrest as required by Sections 36 and 37 of the Code of Criminal Procedure Act. A person arrested without a warrant on suspicion of an offence must be brought before a Magistrate having jurisdiction in the case, without unnecessary delay (S.36). The police shall not detain him in custody for a period than under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate (S.37). In the light of these provisions the vital issue on which the decision regarding the violation of Article 13(2) has to made is, when was the 4th respondent arrested?

The full concept of arrest is brought out in a citation from an article of Dr. Granwille Williams in Piyasiri's case (Supra) which is as follows :–

"Dr. Granwille Williams in his article on 'Requisites of a valid arrest (1954) Criminal Law Review 6 at page 8 et. seq. states –

"An infringement or deprivation of liberty, is a necessary element in an arrest ; but this does not mean that there need be an accute confinement. 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 and the other submits ....."

"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. ...."

"..... 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"" (1988 1 Sri L.R. 176,180).

I have earlier held that the 4th respondent had not been arrested on 01.11.88 or on any earlier date, because he was taken as a witness and not a suspect. He remained in police custody in the same capacity upto the time he was implicated by witness Madanasinghe on 02.11.88 at which point he became a suspect. It appears to be the contention of the petitioner's Counsel that the 4th respondent was under arrest, in any event from 02.11.88 ; Counsel submits that the police were obliged to have produced him before a Magistrate soon thereafter and within the prescribed period, which would have terminated on 03.11.88 ; and that the failure of the police to do so infringed Article 13(2).

As stated elsewhere in this judgment, the case for the respondents is that after making his statement on 02.11.90 the 4th respondent stayed with the police at his own request to escape the wrath of interested parties ; that (despite the statement of Madanasinghe) it was only on the basis of further statements recorded that it became apparent that he had to be treated as a suspect ; that whereupon he was formally informed of the allegation and placed under arrest on 04.11.88. According to the notes of investigations he has been so informed on 04.11.88 at 8.00 a.m.. He denied the allegation whereupon at 9.00 a.m. a second statement was recorded in the course of which the allegation that he had dealt several blows on the three persons who had been brought to the house of the Chief Minister on 22.10.88 was put to him. This he denied. Thereafter at 11.00 a.m., he was produced before the Magistrate who remanded him to Fiscal Custody.

Even if the 4th respondent may have been kept by the police under compulsion, after he was brought to Ratnapura, the possibility that he

was frightened to leave the police after his statement on 02.11.88 cannot be altogether discounted in view of the disclosures he made implicating the other suspects including Susantha Punchinilame ; and it does not appear improper if, in the course of investigations by the special unit, the police took a little time before deciding to formally arrest the 4th respondent and to subject him to the criminal process, which they did on the morning of 04.11.88. In this view of the matter, there was no unlawful detention violative of the 4th respondent's rights under Article 13(2). In reaching this conclusion, I am mindful of the safeguard which the explanation to Section 23 provides to persons in custody, which is in the following terms –

> "Keeping a person in confinement or restraint without formally arresting him or under the colourable pretention 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".

I am of the view that in all the circumstances, the safeguard provided by Section 23 has not been denied to the 4th respondent.

For the foregoing reasons, I dismiss the application of the petitioner but without costs.

Application dismissed.