SENTHILNAYAGAM AND OTHERS

v.

SENEVIRATNE AND ANOTHER

COURT OF APPEAL.
COLIN-THOME, P., RANASINGHE, J. AND ATUKORALE, J.
H.C. APPLICATIONS 10/81, 11/81, 12/81 and 13/81.
JULY 28 to 31, 1981; AUGUST 10 to 14, 1981.

Writ of Habeas Corpus—Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979—Detention Orders—Validity thereof—Interpretation (Amendment) Act, No. 18 of 1972, section 22.

Held

(1) The words "unlawful activity" as defined in section 31 of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979, extend to persons not only on the periphery of criminal liability but they also encompass any person whose acts "by any means whatsoever" are connected with "the commission of any offence under this Act", and that includes a person who has committed an offence under the Act.

(2) The detention orders marked 'X1' stated that the grounds for detention were "terrorist activity". The words "terrorist activity" are not only lacking in particularity but they also do not fall under the definition of "unlawful activity" in section 31 of the Act.

(3) The detention orders marked 'X_2' were valid ex facie inasmuch as the said orders specified an offence under the Act as the basis for detention.

(4) The objection that the detention orders 'X1' and 'X2' were defective as they did not name the custodian of the person detained on the face of the documents is purely technical. There is no requirement in section 9 of the Act that the custodian should be named in the order itself.

(5) The words "where the Minister has reason to believe or suspect" in section 9 (1) of the Act, mean that there must be objective grounds and a rational basis for belief or suspicion.

(6) The ouster clause in section 10 of the Act when read with the proviso to section 22 of the Interpretation (Amendment) Act, No. 18 of 1972, does not apply to the issue of a mandate in the nature of a writ of Habeas Corpus.

(7) A subsequent detention order can cure the defects of a prior detention order and a subsequent valid detention order which is in operation at the time of adjudication, can be accepted as justifying the continued detention of the corpus.

"These provisions (Article 13(1) of the Constitution and section 23 (1) of the Code of Criminal Procedure Act, No. 15 of 1979) are mandatory and any infraction of them is illegal and must be strongly condemned as a serious encroachment on the liberty of the subject guaranteed under the Constitution .....The claim that the corpus was severely assaulted appears to us to be exaggerated. However, the use of violence of whatever degree on a prisoner is illegal and is not only an offence under the Penal Code, it contravenes Article 11 of the Constitution."

Cases referred to

(1) *Christie v. Leachinsky, (1947) A.C., 573;(1947) 1 All E.R. 567.*
(2) *Liversidge v. Anderson, (1942) A.C., 206; (1941) 3 All E.R. 338.*
(3) *Ridge v. Baldwin (1964) A.C., 40 at 73, (1963) 2 All E.R. 66; (1963) 2 W.L.R. 935.*
(4) *Reg v. I.R.C., Ex. p. Rossminster, (1980) 2 W.L.R.1.*
(5) *R. v. Secretary of State for Home Affairs, Ex. p. O'Brien (1923) 2 K.B.D. 361.*
(6) *Padfield v. Minister of Agriculture, Fisheries and food (1968) A.C. 997; (1968) 1 All E.R. 694; (1968) 2 W.L.R. 924*
(7) *Secretary of State for Education v. Tameside Metropolitan Borough Council, (1976) 3 W.L.R., 641; (1977) A.C. 1014; (1976) 3 All E.R. 665.*
(8) *Nakkuda Ali v. Jayaratne, (1951) A.C., 66; (1950) 51 N.L.R. 457.*
(9) *In re Bracegirdle, (1937) 39 N.L.R. 193.*
(10) *Regina v. Governor Pentonville, Ex. p. Azam, (1973) 2 W.L.R. 949. (1973) 2 All E.R. 741.*
(11) *Ex parte Page, (1818) 1 B and Ald. 568.*
(12) *Athanassiadis v. Government of Greece, (1969) 3 All E.R. 293; (1969) 3 W.L.R. 544.*
(13) *R v. Governor of Brixton Prison, Ex parte Servini, (1914) 1 K.B. 77; 83 L.J.K.B. 212; 109 L.T. 986; 30 T.L.R. 35.*
(14) *R v. Richards, (1844) 5 Q.B., 926.*
(15) *Re Terraz, (1878) 39 L.T. 502, (1878) 4 Ex. D. 63; 48 L.J.Q.B. 214.*
(16) *Ex parte Dauncey, (1843) 12 M & W 271.*
(17) *Naranjan Singh Nathavan v. State of Punjab, (1952) 39 A.I.R. 106.*
(18) *Subodh Singh v. Province of Bihar, (1949) 36 A.I.R., Patna, 247.*
(19) *Basantachandra Ghose v. King Emperor, (1945) 46 Cr. L. J. 559.*
(20) *Godavari S. Parulcker v. State of Maharashtra, (1966) 53 A.I.R. Supreme Court, 1404.*

APPLICATIONS for Writs of Habeas Corpus.

V. S. A. Pullenayagam, with *Faiz Mustapha, S. C. Chandrahasan, Miss Mangalam Kanapathipillai* and *R. Ratnavel*, for the petitioner in H.C. No. 10/81.

H. L. de Silva, with *S. Mahenthiran* and *Surendran T. Packiyanathan*, for the petitioner in H.C. No. 11/81.

Dr. Colvin R. de Silva, with *L. A. T. Williams, S. Perimpanayagam* and *G. Kumaralingam*, for the petitioner in H.C. No. 12/81.

S. J. Kadirgamar, Q.C., with *K. Thevarajah, S. Navaratnam* and *H. Sirinivasam*, for the petitioner in H.C. No. 13/81.

Tilak Marapana, Deputy Solicitor General, with *S. Ratnapala*, State Counsel and *K. Kumarasiri*, State Counsel, for the State.

Cur. adv. vult.

September 10, 1981.

COLIN-THOME, P.

The main challenge in each of these four applications for an order in the nature of a writ of habeas corpus concerns:

(a) the legality of the arrest of the corpus;

(b) the averment in each of the applications that the corpus was severely tortured; and

(c) the validity of the detention orders made by the Minister of Internal Security.

The material before us consists of affidavits, counter-affidavits and certified documents.

Habeas Corpus Application No. 12/81

On 13.4.1981 a mixed party of police and army officers arrived, at forenoon, at the house of S. Arunagirinathan, the corpus in application No. 12/81. They searched his premises without a warrant and gave no reason for the search. Nothing incriminating was found. No assault took place on this occasion. On 19.4.1981 at 5 a.m. a mixed party of police and army officers arrived again at his house. They searched the premises without a warrant and nothing incriminating was found. They assaulted him, his wife and 11 year old son before taking him away under arrest. The affidavits of S. Senthilnayagam, the brother of the corpus, and Santhirathevi, his wife, affirmed on 29.4.1981, which stated the above facts do not aver that the reason for the arrest was not given. They complained to Mr. V. Yogeswaran, M.P. for Jaffna, about the arrest of the corpus two days later, on 21.4.1981. In Yogeswaran's affidavit there is no averment that he was informed that the corpus, his wife and son were assaulted or that the reason for his arrest was not disclosed. The next of kin, according to Yogeswaran, were anxious to ascertain, very understandably, where the corpus was detained.

The corpus in his affidavit, affirmed on 28.7.1981, stated that he was not told the reason for his arrest. He stated that he was taken to the Army Camp at Elephant Pass after his arrest and detained there for two weeks. He was interrogated several times and tortured. His testicles were tied with a string and tugged. He was severely hit on his knuckles, buttocks and knees with a thick wooden rod. He was forced to sign a statement to escape being tortured further.

Since 4.5.1981 he was detained at the Army Camp, Panagoda. He was informed that he was detained on the orders of the Minister only on 9.7.1981.

On 21.7.1981 he was taken before a Magistrate blindfolded. He made a statement to the Magistrate in the presence of an

Assistant Superintendent of Police and another officer of the Criminal Investigation Department, but he did not tell the Magistrate– "some of the incriminating false aspects" he was asked to state by his investigators. On the following day, as a reprisal, he was handcuffed by both wrists to high railings on a door and window and was forced to stand erect with arms outstretched. He was kept in this position for long periods except for short spells of 4 to 5 hours each night to enable him to sleep, to have his meals and to attend to his ablutions.

On 23.7.1981 he was forced to roll on the floor for a long time until his body ached. Thereafter, he was forced together with another prisoner to hold each other's ears and repeatedly squat and stand up for a long time until he could barely stand.

On 27.7.1981 he was taken handcuffed to meet his lawyer. After the interview he was manacled in a standing position until bedtime.

On 28.5.1981 he was examined by a doctor. He denied that he was a member of an organization whose aim was to establish a separate State of Tamil Eelam by means of armed struggle, violence and terrorism. He denied that he assisted in the concealment or disposal of the money that was robbed on 25.3.1981 or that he was connected or concerned in any way with any crime or unlawful activity.

B. M. N. Juranpathy, Assistant Superintendent of Police, in his affidavit, dated 16.6.1981, stated that the search on 13.4.1981 was made under the provisions of section 6 of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979. On 19.4.1981 he arrested the corpus under the same provisions. M. D. A. Rajapakse, Director of Criminal Investigations, and a Superintendent of Police, had on 15.4.1981 in writing authorised him to investigate terrorist activities and to take all necessary action specified under section 6. This authority was produced marked P15.

He stated that the corpus was a member of an organization whose declared aim was to establish a separate State called Eelam by means of armed struggle, violence and terrorism. Investigations revealed that the corpus had assisted in the concealment and

disposal of part of the Rs. 8.1 million robbed at Neervely on 25.3.1981.

Juranpathy denied that the corpus was assaulted, illtreated, tortured or harassed while he was detained at Elephant Pass. When he arrested the corpus on 19.4.1981 he informed the corpus of the reason for his arrest.

Captain W. M. S. Dharmaratne, officer-in-charge of the corpus at Elephant Pass from 17.4.1981 to 6.6.1981, denied that he was subjected to cruel, inhuman and degrading treatment. He also stated that the same diet that was given to the soldiers was given to the corpus and other detenus. They were permitted to take exercise and were provided with pipe-borne water, soap, tooth paste, 10 cigarettes per day and materials for correspondence with their families. They were never handcuffed inside the detention camp.

Second Lt. S. Dharmaratne, officer-in-charge of the detenus at the Army Camp, Panagoda, denied the allegations of torture, cruelty and inhuman treatment averred by the corpus. While detained at the Army Camp, Panagoda, the diet given to the detenus was identical to the diet provided for the soldiers both in quantity and quality. This was personally supervised by him. They were also provided the same facilities they had at Elephant Pass. He was aware that they regularly corresponded with their families.

Dr. M. S. L. Salgado, Judicial Medical Officer, Colombo South, examined the corpus on 28.5.1981 at his office in Colombo. As he did not know Tamil his conversation with the corpus was translated by Dr. K. Ratnavadivel, Deputy Judicial Medical Officer, Colombo South. He asked the corpus whether he had any complaints to make and was told that he had a swelling of the scrotum of 10 days duration for which he had been treated by the Army doctor. He stated that while he was at the Elephant Pass Camp, where he had been taken on 19.4.1981, he was assaulted on his buttocks, but since 24.4.1981 no violence had been inflicted on him He stated that he had been asked to hang on rails and that he had fainted once. His main complaint was that he was not receiving a sufficient quantity of rice for his meals.

The doctor examined the corpus and found that he had a swelling on the right side of his scrotum. This was due to hydrocele.

The corpus told him that the hydrocele was due to natural disease and not due to any traumatic event. He had it for a considerable time and during the last ten days there was an increase in size. There was no pain and it did not warrant any immediate surgical treatment.

There was an old contusion 2"x1/4"x1/3" on each side of the buttocks. There was no pain or tenderness over these sites. The area of contusion on the buttocks was consistent with his history of having been beaten on the buttocks with a blunt weapon like a baton. This injury was non-grievous. Apart from the scrotal swelling the corpus was in a satisfactory state of health.

Under section 6(1) of Act No. 48 of 1979:

"Any police officer not below the rank of Superintendent or any other police officer not below the rank of Sub-Inspector authorized in writing by him in that behalf may, without a warrant and with or without assistance and notwithstanding anything in any other law to the contrary—

(*a*) arrest any person;

(*b*) enter and search any premises;

(*c*) stop and search any individual or any vehicle, vessel, train or aircraft; and

(*d*) seize any document or thing,

connected with or concerned in or reasonably suspected of being connected with or concerned in any unlawful activity."

As Juranpathy was authorised in writing by M. D. A. Rajapakse, Superintendent of Police, to investigate terrorist activities and to take all necessary actions under section 6 he had the power to search the premises of the corpus and to arrest him without a warrant if he reasonably suspected the corpus of being connected with or concerned in any unlawful activities. Juranpathy stated in his affidavits the reasons for his suspicion.

The corpus in his affidavit has stated that he was not told the reason for his arrest. On the other hand, Juranpathy in his affidavit has stated that at the time of the arrest he informed the corpus of the reason for his arrest.

Under Article 13 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka–

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

Under section 23 (1) of the Code of Criminal Procedure Act, No. 15 of 1979, a person making an arrest–"shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested."

Lord Simonds has succinctly stated the basis for this important legal requirement in *Christie v. Leachinsky* (1) at 592:

> 'Arrested with or without a warrant the subject is entitled to know why he is deprived of his freedom, if only in order that he may, without a moment's delay, take such steps as will enable him to regain it."

These provisions are mandatory and any infraction of them is illegal and must be strongly condemned as a serious encroachment on the liberty of the subject guaranteed under the Constitution. However, on the material placed before this Court by way of affidavit and counter-affidavit it is not possible to state affirmatively that these provisions had not been observed by the police on 19.4.1981.

With regard to the allegations of torture, we have perused the reports of the Judicial Medical Officers Dr. Salgado and Dr. Ratnavadivel. The authenticity of these reports and the integrity of Dr. Salgado and Dr. Ratnavadivel have not been challenged. Dr. Salgado examined the corpus on 28.5.1981. The corpus told him that he had been asked to hang on rails until he fainted prior to 28.5.1981, presumably at Elephant Pass, but in his affidavit the corpus averred that this torture took place at the Army Camp, Panagoda, from the 22nd July, 1981, the day after he was taken before a Magistrate. Another blemish in the affidavit of the corpus is that he claimed that he was tortured by a string being tied to his testicles and tugged. However, he had made no such complaint to Dr. Salgado and had told the doctor that his hydrocele was due to natural disease and not due to any traumatic event. He was the only detenu to claim he was tortured in this manner. We reject these averments in the affidavit of the corpus.

However, the corpus had two non-grievous contusions on his buttocks and there is no doubt that these indicated that he had been beaten by a blunt weapon.

The corpus in his second affidavit, dated 30.7.1981, alleged that after he was taken from the Court back to the camp at Panagoda, on the previous day, he was intimidated by an army officer, who pulled him by his verty and threatened to assult him severely for disclosing to Court that he was tortured. The following morning at Army Headquarters he was threatened by some Army officers, who told him that 1,000 soldiers were being sent to Jaffna and that their relatives would suffer dire consequences. The corpus stated that he was threatened in Sinhala, a language he did not claim to understand. We also note that the other three detenus who were in custody with Arunagirinathan did not swear affidavits supporting him. We attach little weight to his allegation.

Habeas Corpus Application No. 10/81:

K. T. Chelliah, the father of corpus Chelliah Kulasegararajasingham in Application No. 10/81, filed petition and affidavit stating that on 6.4.1981, D. I. P. Baranage, Inspector of Police, with other police officers, came to his house at 10.30 a.m., and arrested the corpus without a warrant stating that he was wanted for questioning by P. Mahendran, Deputy Inspector-General of Police, Northern Range, Jaffna. There was no allegation of assault on the corpus. The corpus had earlier been arrested on 11.10.1980 on an allegation that he had committed mischief by fire or explosive on an Avro Aircraft. He was later acquitted of this charge at a trial in the High Court.

P. Mahendran, in his affidavit, dated 12.5.1981, stated that on 6.4.1981, the corpus was arrested on his orders and brought to the Jaffna Range Police for interrogation. He informed the corpus that he would be taken to Colombo for questioning in connection with unlawful activity within the meaning of section 31 of Act No. 48 of 1979. The corpus was detained at the Army Camp, Panagoda, under a detention order made by the Minister of Internal Security. He denied that the corpus was subjected to torture.

On 27.3.1981, the house of the petitioner was searched on a suspicion that money belonging to the People's Bank robbed at

Neervely on 25.3.1981 was concealed in or around the petitioner's house. He averred that the petitioner was a member of an organization whose declared aim was to establish a separate State of Tamil Eelam by means of armed struggle, violence and terrorism.

On 5.4.1981 three persons were apprehended at Point Pedro when attempting to leave the country by boat. They had in their possession a portion of the money robbed at Neervely. Two of these persons were seen in the vicinity of the house of the corpus and during the same night the corpus was visited by a number of other members of the said organization, whose members were known to have planned or participated in the robbery at Neervely. The investigations gave rise to a strong suspicion that the corpus had abetted or conspired in the commission of the robbery.

The corpus in his affidavit, dated 28.7.1981, admitted that on 6.4.1981, when he was arrested he was told that he was wanted for questioning by Mahendran and on the same day he was taken to the Army Camp, Panagoda. He has not contradicted Mahendran's averment that he was informed that he would be taken to Colombo for questioning in connection with unlawful activity within the meaning of section 31 of Act No. 48 of 1979.

From Panagoda he was taken to the Elephant Pass Army Camp on 17.4.1981, and was detained there by police and army officers until 6.5.1981. At Elephant Pass they assaulted him on his heels and buttocks with batons and rods and with fists on his chest, stomach, back and face and he was not given food or water for long spells.

On 6.5.1981 he was brought to Colombo and kept in the Army hospital for two days. On 7.5.1981 he was examined by Dr. Ratnavadivel. He was threatened by an Army Officer not to reveal to the doctor that he was assaulted by Army Officers but he told the doctor where he had pain and where he was assaulted. On 8.5.1981 he was taken back to the Elephant Pass Army Camp and was severely assaulted for revealing to the doctor that he was assaulted.

The police officers recorded a statement from him and for days he was assaulted. He was brought back to the Panagoda Army Camp on 21.5.1981.

Juranpathy, A.S.P., Senior Police Officer at the Elephant Pass Camp, in his affidavit, dated 12.8.1981, denied that the corpus was assaulted or tortured at the Elephant Pass Camp.

Dr. K. Ratnavadivel, in his report, stated that he examined the corpus on 7.5.1981 at the Military Hospital, Colombo, in the presence of Major C. L. Algama. The corpus appeared to be in a good state of nutrition but he showed some degree of anxiety in answering questions about ill treatment. He complained of pain in the right elbow, left knee region and left side of the chest. A contusion ¾" in diameter was present on the right chest below the elbow. He did not tell the doctor that he had pain on his heels and buttocks. The doctor ended his report with the euphemism—"there is no evidence of any unreasonable harsh force being used to amount to torture."

There is, no doubt, however, that violence had been used on him at the Elephant Pass Camp and we reject the denials of his custodians that he was not assaulted.

Habeas Corpus Application No. 11/81:

Jayamalar Murugaiah, wife of the corpus S. Murugaiah, in application No. 11/81, filed petition and affidavit on 30.4.1981. She stated that on 28.4.1981, at 5.45 a.m. a mixed party of police and army personnel arrived at her house and searched it without a warrant and they also assaulted her husband severely with sticks. Thereafter, they assaulted her and her 11 year old daughter. They arrested her husband without informing him of the reason for his arrest.

R. C. N. Gunasinghe, A. S. P., in his affidavit, dated 16.6.1981, stated that the house of the corpus was searched on 28.4.1981 and the corpus was arrested under the provisions of section 6. The corpus was informed of the reason for his arrest. The corpus was a member of an organization, the declared aim of which was to establish a separate State of Tamil Eelam by means of armed struggle, violence and terrorism. There was material that the corpus harboured and concealed N. Thangavel *alias* Thangathurai knowing that he had committed an offence under Act No. 48 of 1979 and had also failed to report to a police officer that he had committed such an offence. There was material that the corpus had been concerned in collecting explosives without lawful

authority. Gunasinghe was authorised in writing on 24.4.1981 by M. D. A. Rajapakse under section 6 to search the premises and to arrest the corpus. The authority was produced marked P16.

The corpus in his affidavit, dated 30.7.1981, stated that the C.I.D. officers and army personnel had no arrest or search warrant and that no reasons were given for his arrest. He was taken to the Army Camp at Elephant Pass where he was detained till 5.5.1981.

At Elephant Pass he was questioned several times and tortured by being beaten by thick rods on the soles of his feet and buttocks, which caused him unbearable pain. He was also assaulted on his shoulders and stomach. He denied harbouring any criminal offenders and denied collecting explosives. He denied being a member of any organization whose aim was to establish a separate State by means of armed struggle, violence or terrorism. He was forced to sign a statement in order to escape further torture.

On 5.5.1981 he was moved to the Army Camp at Panagoda. He was not informed of the reason for his detention. He stated that he was not given proper meals and could not have regular baths. He was not given a change of clothes for a long time. He was not given any reading material and had not been able to have a shave up to date.

On 28.5.1981 he was examined by a doctor. On 27.7.1981 he was taken handcuffed to be interviewed by his lawyers. This allegation was denied by 2nd Lt. Sunil Dharmaratne who was in charge of the corpus at the Army Camp, Panagoda.

Juranpathy, A,S.P., in his affidavit, dated 12.8.1981, denied that the corpus was assaulted at his house on 28.4.1981. He was informed of the reason for his arrest. He was not illtreated and tortured at the Elephant Pass Camp.

According to Dr. Salgado, who examined the corpus on 28.5.1981 at the office of the J.M.O., Colombo, assisted by Dr. Ratnavadivel, the corpus complained that on 28.4.1981 he was assaulted with a stick on his arms and legs. He was not seriously injured. Since then no physical violence was inflicted upon him. He complained of a back ache on and off and a swelling on the left side of the lower abdomen. He had these ailments prior to his detention. The corpus was quite calm and collected. On the

right inguinal region there was an old scar of a surgical wound indicating an operation for hernia. On the left side there was a small inguinal hernia. There were no injuries or places of tenderness on his body. There were no scars or healed wounds on his arms and legs. There was no evidence of any physical violence upon his person—recent or past.

On the material averred in the affidavits we hold that the arrest and search of the premises without a warrant were carried out under the provisions of section 6 of Act No. 48 of 1979. We are not in a position to decide whether the reason for the arrest was given or withheld.

With regard to allegations of torture and assault the corpus told Dr. Salgado that he was assaulted with sticks only on 28.4.1981 and not thereafter. He did not tell Dr. Salgado that he was severely assaulted at Elephant Pass.

Habeas Corpus Application No. 13/81:

S. Vallipuram, father of the corpus, B. Sivaselvam, in application No. 13/81, filed petition and affidavit on 30.4.1981 stating that on 13.4.1981, at 1.30 p.m. police and army officers came to his house and inquired for Arulchelvam. On being informed that there was no such person in the house they left. No allegation of assault was made.

On 19.4.1981, at about 6.15 a.m. another mixed party of police and army officers came to his house and searched the premises. Nothing incriminating was found. However, they took the corpus into custody. A group of officers surrounded him and mercilessly assaulted him. No reason was given for his arrest. Nor were they told where they were taking him.

Juranpathy, A.S.P., in his affidavit, dated 16.6.1981, stated that on 13.4.1981, the petitioner was questioned regarding the whereabouts of his son Arumaichandran. The petitioner denied that such a person lived in his house. On 19.4.1981 the petitioner's house and premises were searched on information received that part of the money belonging to the People's Bank, Jaffna, robbed on 25.3.1981 was concealed on the premises. He stated that when the corpus was taken into custody the petitioner and the corpus were both informed that the corpus was arrested under the provisions of section 6 of Act No. 48 of 1979. According to police

investigations the corpus was a member of an organization whose declared aim was to establish a separate State of Tamil Eelam by means of armed struggle, violence and terrorism. There was material to indicate that the corpus had assisted in the concealment of part of the money robbed on 25.3.1981. When making the arrest on 19.4.1981 he had written authority to do so given to him by M. D. A. Rajapakse, S.P. The authority dated 15.4.1981 was produced marked P15.

Juranpathy in his affidavit, dated 4.8.1981, stated that there was material which disclosed that the corpus was a very close associate of Sri Sabaratnam a person whose finger prints were found at the scene of the robbery. Several other suspects in their confessions revealed that the corpus has assisted in the concealment and disposal of money stolen in the bank robbery. The corpus had also confessed that he assisted Sabaratnam in the concealment and disposal of money taken during the robbery. He denied that the corpus was assaulted, tortured or harassed while at Elephant Pass.

The corpus in his affidavit, dated 31.7.1981, stated that no reason was given for his arrest on 19.4.1981 and that there was no warrant for his arrest. He stated that he was severely assaulted by the C.I.D. officers before he was taken away. He was taken to the Army Camp at Elephant Pass and kept there for about two weeks. During this period he was severely assaulted. No regular meals of any quality or quantity or water were given to him and he was kept more or less at the point of starvation. He was forced to make a statement to avoid further assault.

Later he was taken to the Panagoda Army Camp and kept there till the hearing of this application. On 28.5.1981 he was produced before the J.M.O., in the presence of an army and a police officer. He denied that he was a member of an organisation whose aim was to establish a separate State by armed struggle, violence and terrorism. He denied that he assisted in the concealment and disposal of the money robbed at Neervely on 25.3.1981.

On 28.5.1981 the corpus was examined by Dr. Salgado at the office of the J.M.O., Colombo, assisted by Dr. Ratnavadivel. The officers responsible for his custody were within sight but out of hearing.

The corpus told the doctor that on 19.4.1981 he had been assaulted on the chest, but that since then he had not been

assaulted except on one occasion on 3.5.1981 when someone assaulted him with hands. Dr. Salgado examined him and although the corpus appeared apprehensive and anxious there was no injury on his chest. The pain and tenderness on his abdomen were probably the result of a colic, and not related to any violence which the corpus himself said did not take place.

On the material available it is not possible to state whether or not the reason for the arrest of the corpus was disclosed to him at the time of arrest. The reasons for a search and arrest by a mixed group of police and army personnel in the present situation in the north must be so obvious that the person arrested, from the circumstances of his arrest, may know the general nature of the offence for which he is detained. This, of course, does not absolve a police officer from informing any person arrested the reason for his arrest. The person arrested, however, cannot complain if he himself produces a situation which makes it practically impossible to inform him, e.g., by immediate counter-attack or running away. Even so it is the duty of the police officer to give the reason for arrest at the first reasonable opportunity. The failure to observe this strict procedure will make a police officer liable to be convicted under the Penal Code for assault and wrongful confinement.

The claim that the corpus was severely assaulted appears to us to be exaggerated. However, the use of violence of whatever degree on a prisoner is illegal and is not only an offence under the Penal Code, it contravenes Article 11 of the Constitution: "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

S. Arunagirinathan (corpus in Habeas Corpus Application No. 12/81) was arrested on 19.4.1981 and taken to the Army Camp at Elephant Pass on 20.4.1981. The Minister of Internal Security made the following detention order (X1):

"PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT No. 48 OF 1979

Order under section 9 (1)

By virtue of the powers vested in me by section 9 (1) of the Prevention of Terrorism (Temporary Provisions), Act No. 48

of 1979, I, Tikiri Banda Werapitiya, Minister of Internal Security, having reason to suspect that Sivasubramaniam Arunagirinathan of Kokuvil is connected with or concerned in Terrorist activity, do hereby order that the abovenamed Sivasubramaniam Arunagirinathan be detained at the Army Camp, Panagoda, for a period of three months from the date of this Order subject to the conditions set out in the schedule hereto.

Sgd. T. B. Werapitiya,
Minister of Internal Security.

Colombo, 20th April, 1981."

In the schedule attached to this order in paragraph 2 it was stipulated that:

"The suspect may for the purposes of investigation or interrogation be taken from the place of detention by any person authorized by me to such place or places and for such periods as are approved by me."

'X1' stated that the place of detention was the Army Camp, Panagoda, for a period of three months from the date of the order. On 30.4.1981 the Minister sent a letter to the Army Commander stating that, in confirmation of the verbal instructions already given, the suspects S. Arunagirinathan, Vallipuram Sivaselvam and Chelliah Kulasekerarajasingham "be moved to Elephant Pass and held in Army custody at the Elephant Pass Rest House" (P17). So that although X1, dated 20.4.1981, stipulated that the place of detention was the Army Camp, Panagoda, on that very day he was moved to Elephant Pass. The written authority authorizing this move appeared very belatedly on 30.4.1981. This letter did not state for how long the suspects were to be detained at Elephant Pass and when they were to be moved to Panagoda.

This detention order X1 was made on the basis that the Minister had "reason to suspect" that S. Arunagirinathan was "connected with or concerned in *terrorist activity.*" In the case of the other three corpora detention orders, also marked X1, were made by the Minister in identical language stating that he had "reason to suspect" that the corpus was "connected with or concerned in terrorist activity."

Detention orders dated 20.4.1981 were served by O. Wimaladasa, Sub-Inspector of Police, on S. Arunagirinathan and V. Sivaselvam

on 22.4.1981 at the Army Camp, Elephant Pass (P19).

B. S. Amunugama, Inspector of Police, served the detention order (P20) dated 6.4.1981 on C. Kulasekerarajasingham at the Army Camp, Panagoda on the same date. By an error the name was stated as "Rajasekeram", but this was subsequently rectified to Rajasingham.

The detention order dated 30.4.1981 (P21) was served by Inspector Wimaladasa on S. Murugaiah at the Army Camp, Elephant Pass, on 1.5.1981.

Arunagirinathan was the only corpus to aver in his affidavit that he was served with a detention order belatedly on 9.7.1981. Earlier he had instructed his counsel that he was not aware of the Minister's detention order until he was brought to Court on 27.7.1981.

The Minister of Internal Security later made fresh detention orders. These were marked X2. In the case of C. Kulasegararajasingham, X2 was made on 14.5.1981; in the cases of S. Arunagirinathan and V. Sivaselvam, the detention orders X2 were made on 26.5.1981. X2, unlike X1, referred to "unlawful activity" and specifically to offences under the Act. In the cases of S. Arunagirinathan, C. Kulasegararajasingham and V. Sivaselvam the relevant part of X2 stated that:

> "The Minister of Internal Security having reason to suspect that (Name of suspect) is connected with or concerned in an *unlawful activity, to wit:* the abetment and conspiracy of the robbery of property of the People's Bank, Neervely on 25th March, 1981."

In the case of S. Murugaiah X2 stated that he was being detained as:

> "The Minister of Internal Security having reason to suspect that S. Murugaiah is connected with or concerned in unlawful activity, to wit: harbouring and concealing Nadarajah Thangevel *alias* Thangathurai knowing that he had committed an offence under the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979; failing to report to a Police officer that such person has committed such offence and collecting explosives without lawful authority."

All the suspects were ordered to be detained at the Army Camp, Panagoda. In the case of Arunagirinathan and V. Sivaselvam X2 was to be operative till 29.7.1981. In the case of Murugaiah X2 was to be operative till 29.7.1981. In the case of Chelliah Kulasegararajasingham X2 was to be operative for three months from the date of the order which was 14.5.1981.

The main submission of learned counsel for the petitioners was that the detention orders X1 and X2 were not valid operative orders made under section 9 and therefore, the *corpora* were illegally detained *ab initio.* It was submitted that the reasons for the detention order stated in both the orders X1 and X2 were not covered by the definition of "unlawful activity" in section 31 of Act No. 48 of 1979.

Section 31 of the Act defines "unlawful activity" as follows:

"31 (1) In this Act, unless the context otherwise requires—

"unlawful activity" means any action taken or act committed by any means whatsoever, whether within or outside Sri Lanka, and whether such action was taken or act was committed before or after the date of coming into operation of all or any of the provisions of this Act in connection with the commission of any offence under this Act or any act committed prior to the date of passing of this Act, which act would, if committed after such date, constitute an offence under this Act."

Learned counsel submitted that the words—"unlawful activity" merely extended to—"any action taken or act committed" which *per se* was *not* an offence under the Act and was only on the outskirts of criminal liability, although connected with the commission of any offence under the Act.

It is now settled law that the totality of an Act, from the title to the interpretation clause, may be referred to for the purpose of ascertaining its general scope, and of throwing light upon its construction. Consideration of the "mischief" or object of the enactment is common, and will often provide the solution to a problem of interpretation. "It is said to be the duty of the Judge to make such construction of a statute as shall suppress the mischief and advance the remedy. To this end, a certain extension of the letter is not unknown, even in criminal statutes": Maxwell on "The Interpretation of Statutes", 12th Edn., 96.

What is the mischief aimed at by this Act? Everybody knows that this Act is intended to rid this country of terrorism in all its recent, sophisticated manifestations. To achieve this end the Legislature has invested extreme powers in the Courts, the executive and the police, which they do not have in normal times, in the interests of national security and public safety. Conscious that these powers are of an extreme nature the Legislature has laid down that this Act, certified on 20th July, 1979, "shall be in operation for a period of three years from the date of its commencement" (Section 29). The Minister by virtue of his powers under section 1 appointed July 24, 1979, as the date on which all the provisions of the Act, other than section 30, came into operation: See Gazette Extraordinary No. 46/7–24.7.1979.

Section 6 deals with the powers conferred on a Superintendent of Police or an authorized police officer, of entry, search and arrest of any person, without a warrant, "connected with or concerned in or reasonably suspected of being connected with or concerned in any unlawful activity."

Section 7 (1) reads:

"Any person arrested under subsection (1) of section 6 may be kept in custody for a period not exceeding seventy-two hours and shall, unless a detention order under section 9 has been made in respect of such person, be produced before a Magistrate before the expiry of such period and the Magistrate shall, on an application made in writing in that behalf by a police officer not below the rank of Superintendent, make order that such person be remanded until the conclusion of the trial of such person."

Section 9 (1) reads:

"Where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity, the Minister may order that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister, and any such order may be extended from time to time for a period not exceeding three months at a time:

Provided, however, that the aggregate period of such detention shall not exceed a period of eighteen months."

Sections 6, 7 and 9 deal with any arrested person who is "connected with or concerned in or reasonably suspected of being connected with or concerned in any unlawful activity." After a person is arrested under section 6 there are two alternatives open to a police officer. Firstly, within a period of 72 hours he may produce a suspect before a Magistrate and have him remanded until the conclusion of his trial. A police officer will adopt this procedure only when there is *prima facie* evidence to support a charge under section 2 or 3 or 5. The other alternative is that when a police officer has a reasonable suspicion that a person is connected with or concerned in any unlawful activity and the 72 hours period is inadequate for concluding his investigations he may move for a detention order from the Minister under section 9.

The words—"has reason to believe or suspect" in section 9 also envisage two categories of suspects:

(*a*) Where the Minister has reason to believe that any person is connected with or concerned in any unlawful activity; and

(*b*) Where the Minister has reason to suspect that any person is connected with or concerned in any unlawful activity.

The primary purpose of detention under section 9 is to facilitate further investigation and interrogation of both categories of persons and their confederates in order to achieve the object of eradicating terrorism. Section 9 is not intended merely as a negative form of preventive detention nor is it intended to be a punishment. "Unlawful activity," as defined in section 31, extends to persons not only on the periphery of criminal liability, but it also encompasses any person whose acts "by any means whatsoever" are connected with "the commission of any offence under this Act," and that, we hold, includes a person who has committed an offence under Act No. 48 of 1979.

The detention orders X1 stated that the grounds for detention were "terrorist activity". The words "terrorist activity" are not only lacking in particularity they do not fall under the definition of "unlawful activity" in section 31 of the Act. We hold, therefore, that the detention orders X1 were invalid *ab initio.*

As we have held that "unlawful activity" includes an offence under the Act No. 48 of 1979, the specifying of an offence under the Act, as has been done in the detention orders X2, as the basis

for detention, does not invalidate the detention order. Therefore, we hold that the four detention orders X2 are valid *ex facie*.

The objection that the detention orders X1 and X2 were defective as they did not name the custodian of the person detained on the face of the documents is purely technical. Section 9 stipulates that the Minister may order the detention of any person "in such place" determined by the Minister. There is no requirement in section 9 that the custodian should be named on the order itself. This may be done by a covering letter to the custodian of the detenu. Although the learned Deputy Solicitor General stated that covering letters from the Minister to the Army Commander, connected with the detention orders, were available and would be produced, we were later informed that they could not be traced. However, the detention orders X1 and X2 specified that the place of detention was the "Army Camp, Panagoda." Letters from the Minister to the Army Commander authorizing the moving of the suspects from the Army Camp, Panagoda, to the Army Camp, Elephant Pass, were also produced. There is no doubt, therefore, about the identity of the custodian of the detenus named in the detention orders.

Learned counsel for the petitioners submitted that the bare particulars in the affidavits of the officers who arrested the corpora cannot be the basis for reasonable belief or suspicion by the Minister when making the detention orders. Learned counsel submitted that under section 9 (1) "where the Minister has reason to believe or suspect" means that there must be objective grounds and a rational basis for belief or suspicion. Learned counsel also submitted that the Court ought to examine the material on which the Minister based his order to ascertain whether the Minister had misconstrued his powers.

The learned Deputy Solicitor General agreed with these submissions and stated that he had no objection to the examination of the material considered by the Minister when making the detention orders. The ouster clause in section10 when read with the proviso to section 22 of the Interpretation (Amendment) Act, No. 18 of 1972, does not apply to the issue of a mandate in the nature of a writ of *habeas corpus*.

In *Liversidge v. Anderson* (2), where the Secretary of State, acting in good faith made an order under Regulation 18B of the

Defence (General) Regulations, 1939, in which he recited that he had reasonable cause to believe a person to be of hostile associations and that by reason thereof it was necessary to exercise control over him and directed that that person be detained, the majority of the House of Lords held that a Court of Law cannot inquire whether in fact the Secretary of State had reasonable grounds for his belief. The matter was one in the executive discretion of the Secretary of State. The production by the Secretary of State of an order of detention made by him and *ex facie* regular and duly authenticated, constituted a defence to an action for damages for false imprisonment unless the plaintiff discharged the burden of establishing that the order was invalid.

Lord Atkin in his celebrated dissent observed that the words—"if the Secretary of State has reasonable cause" did not mean "if the Secretary of State thinks that he has reasonable cause." It was never the intention of Parliament to invest such an absolute power in the executive. The plain and natural meaning of the words "has reasonable cause" imports the existence of a fact or state of facts and not the mere belief by the person challenged that the fact or state of fact existed. The words—"reasonable cause" have always been treated as an objective fact to be proved by one or other party and to be determined by the appropriate tribunal.

Lord Atkin observed:

> "I view with apprehension the attitude of Judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive."

He added:

> "The Home Secretary has not been given an unconditional authority to detain....., the appellant's right to particulars, however, is based on much broader ground, a principle which again is one of the pillars of liberty in that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act."

In recent years the majority decision in *Liversidge* v. *Anderson (supra)* has been avoided and the objective test advocated by Lord

Atkin has received belated approval: See S. A. de Smith "Judicial Review of Administration" 253: "Wartime and immediate post-war decisions ought not to be treated with reverence;" Wade, "Administrative Law" 88, says that the leading war time case shows "..... how strongly, in exceptional circumstances, the ordinary train of judicial reasoning may be deflected." In *Ridge* v. *Baldwin* (3) at 73, Lord Reid, stated: "In many regulations there was set out an alternative safeguard more practicable in war time – the objective test that the officer must have reasonable cause to believe whatever was the crucial matter. (I leave out of account the very peculiar decision of this House in *Liversidge* v. *Anderson.)*" and at page 78: "I would agree that in this or other Defence Regulation cases the legislature has substituted an obligation not to act without reasonable grounds for the ordinary obligation to afford to the person affected an opportunity to submit his defence."

In *Regina* v. *I. R. C., Ex. p. Rossminster* (4) at 49, Lord Diplock observed: "For my part I think the time has come to acknowledge openly that the majority of this House in *Liversidge* v. *Anderson* were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right."

It is accepted now that expressions like – "has reasonable cause to believe" impose an objective condition precedent of fact on which a person detained would be entitled to challenge the grounds of the executive's honest belief. There is no unfettered power vested in the Minister and no unconditional authority to detain a person. The Courts have been jealous of any infringment of personal liberty and care is not to be exercised less vigilantly, because the subject whose liberty is in question may not be particularly meritorious: *Rex* v. *Secretary of State for Home Affairs, Ex. p. O'Brien* (5) at 362 per Scrutton L.J., and *Padfield* v. *Minister of Agriculture, Fisheries and Food* (6) at 1030.

This construction has been extended to words like – "If the Secretary of State is satisfied." In *Secretary of State for Education* v. *Tameside Metropolitan Borough Council* (7) at 665, it was held by the House of Lords that the words "if the Secretary of State is satisfied" did not confer an absolute discretion on him, and that accordingly the Court should exercise its judgment as to whether grounds existed which were capable of supporting the Secretary

of State's decision. The Court must inquire whether those facts exist and have been taken into account. In *Regina* v. *I. R. C., Ex. p. Rossminster (supra)* at 37, Lord Wilberforce stated: "Parliament, by using such phrases as 'is satisfied', 'has reasonable cause to believe' must be taken to accept the restraints which courts in many cases have held to be inherent in them." See also *Nakkuda Ali* v. *Jayaratne* (8) and *In re Bracegirdle* (9). The burden is on the executive who detains to make a return justifying it: *Regina* v. *Governor Pentonville, Ex. p. Azam* (10) at 961.

In view of the statements made by learned counsel for the petitioners and the learned Deputy Solicitor General regarding the perusal of the material we ordered that the material considered by the Minister before making the detention orders X1 and X2 be submitted for examination by Court. We have examined this material and we hold that on this material the Minister could have made a valid detention order under section 9 (1) of the Act.

A further question to be considered is whether a subsequent detention order can cure the defects of a prior detention order and also whether a subsequent valid detention order which was in operation at the time of adjudication could be accepted as justifying the continued detention of the corpus.

In *Ex parte Page* (11), it was held that after the issue of a writ of habeas corpus and before the return of it, the Commissioners of Bankrupts may, if necessary, make a fresh warrant, stating more fully the cause of detaining the bankrupt in custody, and that such warrant may by words of reference incorporate the formal parts of the first warrant. Held also, that if both warrants are defective in form, the Court will, if a substantial cause of commitment appears re-commit the bankrupt ex officio.

In *Athanassiadis* v. *Government of Greece* (12) at 297, Viscount Dilhorne quoted Bailache, J. with approval in *R.* v. *Governor of Brixton Prison, Ex. parte Servini* (13) "that the writ ought not necessarily to issue where the Court is satisfied that although the applicant may not be quite regularly in custody, yet substantially on the merits he is detained in custody." See also *R* v. *Richards* (14), where it was held that a good warrant can rectify a defective warrant; *Re Terraz* (15); *Ex parte Dauncey* (16); and *Sharpe*—"Law of Habeas Corpus" 176: "The rule that it is only the present circumstances of the restraint which are relevant (i.e.,

at the time of adjudication) has meant that the Courts are always prepared to allow for a substituted warrant which corrects a defect in the first committal. It will be permissible for there to be a substituted warrant even if the writ is issued and served. Indeed, it has been held that it is possible to amend the return to the writ or to supply a new and better cause for the detention as the Court commences hearing. It would seem that so long as the material preferred tends to show present justification, it will be accepted by the Court at any stage of the proceedings."

The principle that a good warrant can rectify a defective one has been accepted in India as well. In *Naranjan Singh Nathavan* v. *State of Punjab* (17) at 107, it was held that once it is conceded that in habeas corpus proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to date of the institution of the proceedings, it is difficult to hold, in the absence of proof of bad faith that the detaining authority cannot supersede an earlier order of detention challenged as illegal and make a fresh order wherever possible which is free from defects and duly complies with the requirements of the law in that behalf.

In *Sobodh Singh* v. *Province of Bihar* (18) at 249, it was held approving the decision in *Basantachandra Ghouse* v. *King Emperor* (19) that if at any time before the Court directs the release of the detenu, a valid order directing his detention is produced the Court cannot direct his release, merely on the ground that at some prior stage there was no valid cause for detention.

In *Godavari S. Paruleker* v. *State of Maharashtra* (20) at 1407, it was held that if the Government considers an order of detention, which is the subject matter of challenge, to be invalid, there is no reason why it should not pass a valid order.

We are in agreement with the dicta in the above cases, and hold that in the instant applications the detention orders X2 rectify the defects in the earlier detention orders X1 made by the Minister of Internal Security.

The detention orders X4 and X5, both dated 17.7.1981, signed by the Acting Minister of Internal Security extending the period of detention of S. Arunagirinathan and S. Sivaselvam for a period

of three months, have been served on the detenus. The Acting Minister has submitted an affidavit that he considered the material available in each case before signing the detention orders. On 22.7.1981 the Minister signed the detention order X7 extending the period of detention of S. Murugiah, operative from 29.7.1981. We hold that these orders X4, X5 and X7 are also valid orders made under section 9. The detention order X2 in the case of C. Kulasegararajasingham was in force at the time of adjudication.

For the reasons stated we refuse the four applications for an order in the nature of a writ of habeas corpus.

We have considered, at the request of counsel for the petitioners, whether the four detenus in the applications under consideration should be remanded in Fiscal's custody. We think, however, that it is not in their interest in view of recent disturbances to incarcerate them with other prisoners. In their own interest we think that they should continue to be detained at the Army Camp, Panagoda. We direct, however, that their lawyers should have access to them at the Army Camp, Panagoda. We also direct that the Judicial Medical Officer of Colombo or a Deputy Judicial Medical Officer should examine each of these four detenus once a week at the office of the Judicial Medical Officer in Colombo.

RANASINGHE, J. – I agree.

ATUKORALE, J. – I agree.

Applications refused.