CHANDRA KALYANIE PERERA AND ANOTHER
v.
CAPTAIN SIRIWARDENA AND OTHERS

SUPREME COURT
AMERASINGHE, J.
KULATUNGA, J. AND
WADUGODAPITIYA, J.
S.C. APPLICATION NO. 27/90
30 AND 31 JANUARY, 1991

Fundamental Rights – Illegal arrest – Illegal detention – Emergency Regulations 19(2), 18, 17, 24, 26, 27 and 28 – Excessive detention under Regulation 17 – Constitution, Articles 11, 13(1) and (2).

The 1st petitioner is a married woman with three male children. She was engaged in a transport business in Badulla District and owned several vehicles. Her husband is a processing engineer at Abu Dhabi.

The 1st petitioner was detained on 29.1.90 under Regulation 19(2) of the Emergency Regulations for alleged offences under Regulations 24, 27 and 28 at Beragala Army Camp (where 1st respondent Capt. Siriwardena was the Commander) until 12.03.90. Thereafter she was detained at the Badulla Police Station until 11.04.1990 on which date she was transferred to the Badulla Prison. All such detentions were imposed under Orders signed by the 6th respondent (Asst. Superintendent of Police). Later on, the police forwarded to the 8th respondent (Superintendent of Prisons, Badulla) a detention order under Regulation 17(1) of the Emergency Regulations signed by the Secretary to the State Minister for Defence bearing the date 01.04.1992. The 2nd petitioner who is the eldest son of the 1st petitioner had been arrested along with her but was released on 30.01.1990.

The events which culminated in the arrest of the petitioners are linked to the murder of one Ratnasiri, a former driver of the 1st petitioner on or about 07.02.90 by a gang led by one Jinadasa said to be a well-known member of the Janatha Vimukthi Peramuna (J.V.P.) and close associate of 1st petitioner, who it is alleged supported the subversive activities of the J.V.P. by providing funds. Ten days after the deceased driver Ratnasiri left the services of the 1st petitioner, her house was burgled and cash and jewellery worth Rs. 450,000/- stolen.

The first petitioner complains of being manacled, beaten with a hose, hung by her manacles and beaten until she confessed. In addition 1st respondent wanted to have sex with her.

The 1st respondent had left the army on 04.08.1990 and gone abroad.

The impugned arrest had been made under Regulation 18(1) of the Emergency Regulations.

Held:

(1) In terms of Article 13(1) of the Constitution, any arrest has to be "according to the procedure established by law" and the person arrested has to be informed of the reason for his arrest.

(2) The principles to be applied in determining the validity of an arrest are as follows:

(a) It is not the duty of the Court to determine whether on the available material the arrest should have been made or not. The question for the Court is whether there was material for a reasonable officer to cause the arrest.

(b) Proof of the commission of an offence is not required. A reasonable suspicion or a reasonable complaint of the commission of an offence suffices. The test is an objective one. A suspicion is proved to be reasonable if the facts disclose that it was founded or matters within the police officer's own knowledge or on the statements made by other persons in a way which justify him giving them credit.

(c) During a period of emergency, a wider discretion is vested in the police in the matter of arrest as it would otherwise inhibit them from the due prformance of their duties which ensure the safety of the State and the protection of the general public against armed attack or subversion.

The above principles would equally apply to an arrest by the army.

3. The 2nd petitioner was arrested because he had accompanied his mother the 1st petitioner when she showed her deceased driver to Jinadasa. He was however released on the next day, 30.01.1990. No order against the respondents in respect of his arrest is therefore necessary.

4. In justification of the arrest of the 1st petitioner, the State relies on the bare statements in the affidavit of the 6th respondent (Asst. Superintendent of Police, Badulla) that she was arrested for instigating the murder of her driver by the J.V.P. and for assisting subversive activities. They also rely on the statements of three persons, two of whom are self-confessed accomplices to the murder of the driver. These statements have been recorded after the filing of the present application and would not constitute objective criteria for justifying 1st petitioner's arrest.

The only material relevant to the arrest has been produced by the 9th respondent (one Mendis of Esco Tyre Traders, Bandarawela):

(i) the statement of the deceased driver's mother Julia Nona dated 20.2.89 to the effect that the 1st petitioner had shown the deceased driver to an unidentified man later identified as his killer;

(ii) the statement of one Kirthi dated 18.2.89, a former driver of the 1st petitioner to the effect that she offered him money to murder a Buddhist Monk (a professional charmer) with whom she had fallen out;

(iii) the statement of one Janaka dated 18.2.89, a former cleaner in the service of the 1st petitioner to the effect that she offered him money to kill the 9th respondent with whom she was angry;

(iv) the 1st petitioner's own statement which shows that she had more intimate knowledge of the man who killed her driver than she has disclosed in her petition.

There was thus creditworthy material to arrest the 1st petitioner on suspicion of being involved in an offence under the Emergency Regulations even though such material may be insufficient to warrant a charge against her. Causing death to any person with any weapon is an offence under Regulation 24(1)(b); and even if the army failed to inform the 1st petitioner of such reason at the moment of her arrest, they made it known to her immediately upon her arrival at the army camp.

Therefore her arrest was lawful.

5. (a) Detention in terms of Regulation 19(2) can be justified only if it is for the purpose of search or further investigation. Even assuming the right to detain the 1st petitioner for instigating the offence under Regulation 24, there is no justification for detaining her for offences under Regulations 26, 27 and 28 which refer to sedition and incitement, display of slogans and distribution of leaflets respectively: Although she was detained under Regulation 19(2) for over two months the State has not furnished any evidence of investigations carried out during that period.

Even for the detention until 11.4.90, in the Badulla Police Station, the State has not produced proof of any investigations, during such detention. But the 1st petitioner's own statement shows that she had been closely examined on all matters relevant to the murder. This constitutes investigation and the detention under Regulation 19(2) can be justified.

Even though the detention can be justified, it is vitiated by the failure to produce the 1st petitioner before a Magistrate not later than 30 days from the arrest as

required by Regulation 19(1). Therefore the detention under Regulation 19(2) was unlawful and violative of Article 13(2) of the Constitution.

(b) Detention under Regulation 17(1) is to prevent the 1st petitioner from acting in any manner prejudicial to the national security or the mantenance of public order. No charges were framed against her presumably because there was no evidence to establish the commission of any offence by her and hence she was placed under preventive detention. Such detention can be validly imposed even if no offence is proved, nor any charge formulated. The essential concept of preventive detention is that the detention is not to punish the person for something he has done but to prevent him from doing it. The basis for detention is the satisfaction of the executive of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing so. A preventive detention order under Regulation 17(1) is made on the subjective satisfaction of the Secretary. However the power to make such an order is not unfettered. Where the order is challenged, the Court is competent to consider whether the Secretary did in fact form the requisite opinion by applying the test of reasonableness in the broad sense. To enable the Court to do so, the grounds for the order must be disclosed, even though the Court will not inquire into the sufficiency of such grounds.

Although the Secretary has filed no affidavit disclosing the grounds for his order, the affidavit of the 6th respondent and the other material indicate that the said order was made in view of the 1st petitioner's association with an alleged J.V.P. member who was responsible for her driver's murder. Hence the Secretary was competent to make the order.

(c) In terms of Regulation 17(5) it is the duty of the Secretary to afford the earliest possible opportunity to the detenue to make representations to the President against the order and to ensure that he is informed of his right to make representations to the Advisory Committee. Whilst there is no provision in Regulation 17 for serving on a detenu, a copy of the detention order at the time of his arrest, he should at least be informed of the fact of his arrest on such order except where the exigencies of the case preclude it and a copy of the order should be given to the detenu. In the instant case it is more probable this was not done. A person's liberty cannot be deprived of in this manner. The detention in such circumstances is unlawful.

Assuming the petitioner was lawfully detained from 1.4.90, her detention now exceeds one year and is excessive and unlawful. An order under Regulation 17 is liable to be reviewed for excessiveness.

The petitioner can no longer be regarded as a threat to national security or the maintenance of public order. Her continued detention is unlawful and violative of Article 13(2) of the Constitution.

6. There is no doubt that the 1st petitioner was subjected to severe interrogation and confrontation in the course of which she would have been treated roughly and even insulted. But the acceptable evidence does not go beyond and establish that degree of grave inhuman treatment which constitutes an infringement of Article 11 of the Constitution.

Cases referred to:

1. *Wijewardena v. Zain* S.C. Application No. 202/87 - S.C. Minutes of 24.7.89.
2. *Withanachchi v. Cyril Herat, Leelaratne v. Cyril Herat* S.C. Nos 144-145/86 S.C. Minutes of 01.7.1988.
3. *Joseph Perera v. Attorney-General* (1992) 1 Sri LR 199.
4. *Gunasekera v. de Fonseka* 75 NLR 246.
5. *Muttusamy v. Kannangara* 52 NLR 324, 327.
6. *Yapa v. Bandaranayake* (1988) 1 Sri LR 63, 73, 75.
7. *Henry Perera v. Nanayakkara* (1985) 2 Sri LR 374.
8. *Edirisuriya v. Navaratnam* (1985) 1 Sri LR 100, 118.
9. *Rex v. Halliday* (1917) AC 260, 269.
10. *Vijaya Kumaranatunga v. Samarasinghe* FRD Vol. 2 p. 347
11. *Wickremabandu v. Cyril Herat* S.C. 27/88 S.C. Minutes of 6.4.90
12. *W. M. K. de Silva v. Chairman, Ceylon Fertilizer Corporation* (1989) 2 Sri LR 393, 400, 404, 405.
13. *Nallanayagam v. Gunatilleke* (1987) 1 Sri LR 293, 298.

APPLICATION for infringement of fundamental rights.

Ran Banda Seneviratne with *Miss Pushpa Waidyasekera* and *B. S. Amarasiri* for petitioners.

R. Arasacularatne, S.S.C. with *J. Jayasuriya, S.C.* for 4th, 5th, 6th, 7th, 8th and 10th respondents.

Peter Jayasekera with *Sarath Liyanage* and *Miss Shanthi Karunasekera* for 9th respondent.

Cur adv vu

11th March, 1991.
KULATUNGA, J.

The 1st petitioner is a married woman with three male children of whom the 2nd petitioner is the eldest son. At the time of her arrest by the army on 29.01.90 she was engaged in business in the Badulla district. She was a private bus owner. She also owned a lorry, a pick-up double cab, a van and a car. Her husband is employed in Abu-dhabi as a processing engineer in an oil installation. According to the affidavit of Captain Susantha Dhammika Attanayake (6R10) she was initially detained pending investigations into "alleged subversive connections".

The 1st petitioner was detained under Regulation 19(2) of the Emergency Regulations for alleged offences under Regulations 24, 26, 27 and 28. According to the respondents she was so detained at the Beragala army camp until 12.03.90. Thereafter, she was detained at the Badulla Police Station until 11.04.90 on which date she was transferred to the Badulla Prison. All such detentions were imposed under orders signed by the 6th respondent (Asst. Superintendent of Police). Later on, the police forwarded to the 8th respondent (Superintendent of Prisons, Badulla) a detention order under Regulation 17(1) of the Emergency Regulations signed by the Secretary to the State Minister for Defence bearing the date 01.04.90. She continued to remain in detention on this last order and at the time of the hearing of this application she had completed one year of detention. The 2nd petitioner who had been arrested along with the 1st petitioner was released on 30.01.90. The petitioners have since filed this application for alleged infringements of their fundamental rights under the Constitution.

It would appear that the events which culminated in the arrest of the petitioners are linked to the murder of one Ratnasiri who had been employed by the 1st petitioner as a driver, on or about 07.02.89 by a gang led by one Jinadasa said to be a well-known member of the Janatha Vimukthi Peramuna. It is alleged that the 1st petitioner was a close associate of Jinadasa and assisted the J.V.P. in subversive activities by providing funds. A few days prior to the murder, she had pointed out the house of the deceased to the murder suspect Jinadasa. According to the deceased's mother Julia

Nona (9R3), at about 12.30 a.m. on 07.02.89 an armed gang came home and removed the deceased. In the morning the deceased was found shot dead. The case for the respondents has been presented in this background. However, the case for the petitioners as set out by them is as follows.

In 1988, the petitioners were resident in Bandarawela. One day the deceased driver left his employment with the 1st petitioner but he used to visit her. Ten days after he left, her house was burgled by an armed gang. They removed cash and jewellery worth Rs. 450,000/-. This was generally understood to be the work of the J.V.P. This was in October, 1988. Later another person whom she identifies as a brother of a Buddhist priest in a nearby temple approached her and said he knew the burglars and that the deceased driver was an accomplice; he also said that he would try and retrieve the goods and wanted her to show the house of the driver. She says that "unsuspectingly" she showed the driver's house to the said person; and sometime thereafter several persons were found murdered in Bandarawela and among the dead bodies there was the body of the said driver; and that the killings were attributed to the J.V.P. and the cause was said to be burglaries committed by the dead in the name of the J.V.P.

The 1st petitioner said thereafter she left Bandarawela and settled in Badulla being apprehensive of the repetition of the incidents which occurred, viz. the burglary and the murders; she also says that she feared the 9th respondent an ex-army officer and the owner of a tyre shop who had become her enemy due to her refusal to accede to his requests for intimacy and threatened to create trouble using his connections. At Badulla she continued to ply her buses and attended to her other business.

At about 10.30 p.m. on 29.01.90 when she returned home she found that her house has been surrounded by a group of army men led by the 1st, 2nd and 3rd respondents. They arrested her and took her along with the 2nd petitioner to the Bandarawela army camp. They also removed her car, 16 Sri 6612 Toyota Corolla wagon. On the morning of 30.01.90 the said three respondents abused the petitioners calling them murderers and questioned the 1st petitioner

about involvement in the murder of the driver. The 1st respondent said that he had learnt from the 9th respondent that the 1st petitioner had hired an assassin for Rs. 6000/- to murder the driver, which she denied. They began assaulting her. The 2nd petitioner was also assaulted and was released and was allowed to go home. She was manacled, beaten with a hose, hung by her manacles and beaten until she agreed to confess. She was bleeding. She was then brought down and her confession was recorded. That night the 1st respondent took her and left her at the Bandarawela Police Station where she told the police matron about her ill-treatment by the army and showed the injuries to Sub-Inspector Mahanama.

Until 04.02.90 the 1st petitioner was being taken to the army camp for the day and brought to the Police Station for the night. The 1st respondent suggested to her from time to time that she has sex with him promising to end her suffering; this she refused. On 05.02.90 she was brought to the Beragala army camp where the 9th respondent visited several times. Whilst she was there one Corporal Kapila apprehended the alleged murderer of her driver and brought him to the camp. He made a confession but denied any involvement of the 1st petitioner in the murder.

On 01.03.90 the mother of the deceased came to the Beragala camp and there at the instigation of the 1st respondent assaulted the 1st petitioner with a slipper all over her body; she developed a fever and was taken to the Haletathenna hospital where she was treated by a doctor. On instructions given at the camp she told the doctor that she had fallen from a staircase and sustained injuries. About three days thereafter she was taken to the "torture chamber" of the camp where she saw the murder suspect hung with his head shaven; he was manacled and was dripping with blood; the 1st respondent beat him with a hose and asked him to say that the 1st petitioner paid him Rs. 6000/- to kill the driver but the suspect said that the driver was killed as he engaged in burglaries in the name of the J.V.P. and that the 1st petitioner had nothing to do with. Ultimately the 1st respondent slapped her and sent her back.

The petitioners also allege that while the 1st petitioner was in detention the 1st respondent with his men visited her house,

threatened the caretaker one Mohideen and removed valuable articles and two vehicles belonging to her, L 300 Delica van (unregistered) and Datsun pick-up truck No. 27 Sri 420. An affidavit from Mohideen (P4) has been produced in support of this allegation. As per documents P1a, P1b and P1c, the vehicle No. 27 Sri 420 has been returned by the army on 26.06.90. According to the affidavit of the 1st petitioner's husband filed on 30.07.90 the L 300 Delica van is presently unusable and is lying in the Diyatalawa army camp whilst the Toyota Corolla wagon No. 16 Sri 6612 (which was taken at the time of the petitioners' arrest) is being used by Brigadier Abeyratne at Diyatalawa.

Captain Attanayake in his affidavits (6R10, 6R12) states that the 1st respondent (Captain Siriwardena) who was the Commanding Officer of the Beragala camp during the relevant period left the army on 04.08.90. As regards the 2nd and 3rd respondents he states that there were no persons answering to their descriptions attached to the Beragala army camp. At the hearing of this application the learned Senior State Counsel complained that the 1st respondent left the country on 28.08.90; he has gone to Switzerland; and hence the only person who could speak to the arrest is not available. However, notice of this application had been despatched to the 1st, 2nd and 3rd respondents by registered post through the 4th respondent (The Commander of the Army) on 25.07.90; the matter was fixed for 29.08.90 for argument; and no reason has been given as to why he has failed to file his objections before he left the country. Even thereafter it could not have been beyond the resources of the State to have traced him but the State does not appear to have made any attempts thereat; instead they have relied upon Captain Attanayake (who was the second in command at the Beragala army camp during the relevant period) to answer the allegations. As such, I see no merit in the explanation of the S.S.C.

Leave to proceed was granted to the petitioners for alleged infringements of Articles 11 and 13 of the Constitution. I shall first consider the validity of the arrest. The petitioners have failed to file this application within one month of the arrest but the Counsel for the State very properly did not object to it on the ground of the bar under Article 126(2) of the Constitution in view of the fact that having regard

to the conditions of the 1st petitioner's detention, they were not free to have recourse to this Court until the filing of this application. It is clear from the detention orders 6R2, 6R3 and 6R4 that the impugned arrest had been made under Regulation 18(1) of the Emergency Regulations which provides *inter alia* that any member of the Sri Lanka Army may arrest without a warrant any person whom he has reasonable ground for suspecting to be concerned in or to have committed any offence under Emergency Regulations. In terms of Article 13(1) of the Constitution any arrest has to be "according to the procedure established by law" and the person arrested has to be informed of the reason for his arrest.

In *Wijewardena v. Zain*[1] the principles to be applied in determining the validity of an arrest under Regulation 18(1) have been summarised thus:

> "As held in *Withanachchi v. Cyril Herat, Leelaratne v. Cyril Herat*[2] it is not the duty of the Court to determine whether on the available material the arrest should have been made or not. The question for the Court is whether there was material for a reasonable officer to cause the arrest.
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> Proof of the commission of the offence is not required; a reasonable suspicion or a reasonable complaint of the commission of an offence suffices. The test is an objective one. *Joseph Perera v. Attorney-General*[3] *Gunasekera v. de Fonseka*[4]. A suspicion is proved to be reasonable if the facts disclose that it was founded on matters within the police officer's own knowledge or on the statements made by other persons in a way which justify him giving them credit *Muttusamy v. Kannangara*[5]. See also *Yapa v. Bandaranayake*[6] ".

There is also the consideration that during a period of emergency a wider discretion is vested in the police in the matter of arrest as it would otherwise inhibit them from the due performance of their duties which ensure the safety of the State and the protection of the general public against armed attack or subversion – *Joseph Perera v. Attorney-General* (*supra*) per Wanasundera, J. The above principles would equally apply to an arrest by the army.

Now the allegation is that the army arrested both petitioners. The 6th respondent in his affidavit which is supplemented by several annexes including an affidavit of Captain Attanayake admits the arrest of the 1st petitioner. He denies the allegation of torture but does not deny the arrest of the son, the 2nd petitioner. I therefore regard his arrest as proved. Neither the police nor the army has preferred any allegation of subversive connections against him. However, in 9R4, the statement of Julia Nona dated 20.02.89 produced by the 9th respondent (Mendis), there is reference to the 1st petitioner's eldest son as having accompanied her on the day she showed the deceased driver to the suspect Jinadasa. It is possible that the said information was available to the army and this led to the arrest of the 2nd respondent. However, he was released forthwith, there being no material to justify further proceedings against him. In the circumstances, I do not think it necessary to make any order against the respondents on account of his arrest.

In justification of the arrest of the 1st petitioner, the State relies on the bare statements in the affidavit of the 6th respondent that she was arrested for instigating the murder of her driver by the J.V.P. and for assisting subversive activities. They also rely on the statements of three persons. Two of them are self-confessed accomplices to the murder of the driver who claim to have heard from the killer Jinadasa that the murder was committed at the request of the 1st petitioner. The other person states that he accompanied the 1st petitioner on the day she took the killer and showed him the driver. All these statements have been recorded after the filing of this application and hence would not constitute objective criteria for justifying the 1st petitioner's arrest.

Quite ironically, the only material relevant to the arrest has been produced by the 9th respondent, Mendis defending himself against the allegation that he was responsible for the impugned arrest and detention. This consists of –

(a) 9R4, the statement of Julia Nona dated 20.02.89 referred to above to the effect that the 1st petitioner had shown the deceased driver to an unknown man later identified as his killer;

(b) 9R5, the statement of one Kirthi dated 18.02.89. He had been employed as a driver in the transport service of the 1st petitioner and says that she offered him money to murder a Buddhist monk (a professional charmer) with whom she had fallen out;

(c) 9R6, the statement of one Janaka dated 18.02.89. He had been employed as a cleaner under the 1st petitioner and says that she offered him money to kill the 9th respondent with whom she was angry.

These statements have been recorded by the Bandarawela Police in the course of investigations into the murder of the driver.

The 9th respondent admits the existence of enmity between him and the 1st petitioner but denies that he instigated her arrest. He alleges that she was out to harm him. It is his case based on the above statements that she is a person of violent disposition. In confirmation he has also produced 9R7, the 1st petitioner's own statement dated 25.03.90 recorded by the Bandarawela Police. 9R7 shows that she had a more intimate knowledge of the man who killed her driver which she has failed to disclose in her petition. She told the police that he is the brother of Reverend Nandawimala of Asokaramaya; that on the request of the monk she met him at a place close to his boutique in Karagahawela when he promised to help her to recover the valuables which were burgled from her house; and that at the Beragala army camp she learnt that he is one Jinadasa.

It is probable that sooner or later such information surrounding the murder of the 1st petitioner's driver had reached the army who were engaged in anti-subversive activities in the area. Their conduct in treating the 1st petitioner as a "murderer" from the moment of her arrest confirms this. It therefore seems to me that there was credible material to arrest the 1st petitioner, on suspicion of being concerned in an offence under Emergency Regulations even though such material may be insufficient to warrant a charge against her. Causing death to any person with any weapon is an offence under Regulation 24(1)(b); and even if the army failed to inform the 1st petitioner of such reason at the moment of her arrest, they made it known to her

immediately upon her arrival at the army camp. In these circumstances, I hold that her arrest is lawful and is not violative of Article 13(1) of the Constitution.

The next question is the validity of the impugned detention. It is the respondent's position that until 11.04.90 she was detained first at the Beragala army camp and thereafter at the Badulla Police Station on orders made by the 6th respondent in terms of Regulation 19(2) for offences under Regulations 24, 26, 27 & 28. However, the petitioner states that until 05.02.90 she was kept at the Bandarawela army camp by day and Police Station by night. Even if this were not correct, the more relevant question is whether her detention for the alleged offences is justified. Such detention can be justified only if it is for the purpose of search or further investigation. *Henry Perera v. Nanayakkara*[7]. In view of the murder of the driver the invocation of Regulation 24 can be justified. The said murder had occurred on 07.02.89 and hence the police had ample time to investigate it or to make an arrest. Nevertheless, I shall, in all the circumstances, assume the right of the law-enforcing officers to arrest and detain the 1st petitioner even at a later stage, for investigating the offence under Regulation 24. However, I see no justification for detaining her for offences under Regulations 26, 27 and 28 which refer to sedition and incitement, display of slogans and distribution of leaflets respectively.

Although she was detained under Regulation 19(2) for over two months the State has not furnished any evidence of investigations carried out during that period. As regards her detention upto 12.03.90 at the Beragala army camp, the only available information furnished by the State is the bare statement of Captain Attanayake that she was so detained pending investigations into "subversive connections". However, the 1st petitioner gives an account of what transpired in that camp in support of which she relies on the affidavits of Lurdu Mary (Matron) and Nandawathie another detainee (P4, P5). According to her, she had been questioned regarding the murder of her driver. Thereafter, she was transferred to the Badulla Police Station where she remained until 11.04.90, on which date she was transferred to the Badulla Prison. Once again, the State has not produced proof of any investigations during such detention. However, it is clear from her statement 9R7 that during that period she had

been closely examined on all matters relevant to the murder. This constitutes investigation. As such the detention under Regulation 19(2) can be justified.

Even though the said detention can be so justified, it is vitiated by the failure to produce the 1st petitioner before a Magistrate not later than thirty days from the arrest as required by Regulation 19(1). As Wanasundera, J. said in *Edirisuriya v. Navaratnam*[8].

> "Such a requirement is always considered a salutary provision to ensure the safety and protection of arrested persons. It is more than a mere formality or an empty ritual, but is generally recognised by all communities committed to the Rule of Law as an essential component of human rights and fundamental freedoms".

The learned Counsel for the petitioners complained without contradiction by the State that the 1st petitioner was never produced before a Magistrate. Accordingly, I hold her detention under Regulation 19(2) to be unlawful and violative of Article 13(2) of the Constitution.

According to the 6th respondent, the detention orders made by him was followed by a detention order under Regulation 17(1) made on his recommendations. This was to prevent the 1st petitioner acting in any manner prejudicial to the national security or the maintenance of public order. No charges were framed against her presumably because there was no evidence to establish the commission of any offence by her and hence she was placed under preventive detention. Such detention can be validly imposed even if "no offence is proved, nor any charge formulated" *Rex v. Halliday*[9]. Shukla in "The Constitution of India" 7th Ed. 134 states –

> "The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it. The basis for detention is the satisfaction of the executive of a reasonable probability of

the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing so".

(See also *Vijaya Kumaranatunga v. Samarasinghe*[10] FRD(2) 347, *Yapa v. Bandaranayake* (*supra*)

A preventive detention order under Regulation 17(1) is made on the subjective satisfaction of the Secretary. However, the power to make such order is not unfettered. Thus where the order is challenged the Court is competent to consider whether the Secretary did in fact form the requisite opinion by applying the test of reasonableness in the broad sense. To enable the Court to do so, the grounds for the order must be disclosed, even though the Court will not inquire into the sufficiency of such grounds. *Wickremabandu v. Cyril Herat*[11].

In the instant case, there is no affidavit from the Secretary disclosing the grounds for his order. However, the affidavit of the 6th respondent and the other material indicate that the said order was made in view of the 1st petitioner's association with an alleged J.V.P. member who was responsible for her driver's murder. I am therefore satisfied that the Secretary was competent to make the order; but the learned Counsel for the 1st petitioner, relying on certain official entries on the detention order, alleges that there was no such order at the place of detention and the 1st petitioner was not shown any such order; that it has been sent there after the filing of this application on 06.07.90. On that basis, he submits that the 1st petitioner's detention is unlawful. This is a serious allegation which the Court must consider. The following facts are relevant in this connection.

(a) The order 6R7 is dated 01.14.90. However, the 8th respondent informed this Court on 17.07.90 that the 1st petitioner was first produced before the Prison Authority by the Badulla Police on 11.04.90 along with the order 6R4 made by the 6th respondent; and that later the police sent the order 6R7. The 8th respondent has not filed any affidavit in particular for clarifying the actual date on which the said order was received; nor is there any explanation in the matter either from the 6th respondent or from the Secretary.

(b) There appears on the face of 6R7 an official date stamp for 09.07. It has the words "ශ්‍රී ලංකා බන්ධ" which indicates its receipt at the prison on 9th July.

(c) In her affidavit, the 1st petitioner states that she was never shown the detention order. The 6th respondent denies this but has not adduced any proof that the order was shown to her.

In terms of Regulation 17(5) it is the duty of the Secretary to afford the earliest possible opportunity to the detenu to make representations to the President against the order and to ensure that he is informed of his right to make representations to the Advisory Committee. Particularly for that reason this Court has, in the case of *Wickremabandu v. Cyril Herat* (*supra*), expressed the view that whilst there is no provision in Regulation 17 for serving on a detenu a copy of the detention order at the time of his arrest, the detenu should at least be informed of the fact of his arrest on such order except where the exigencies of the case preclude it; and that a copy of the order should be given to the detenu. In the instant case, it is more probable than not that this has not been done; I am satisfied that the order was not sent to the prison until 09.07.90. I do not think it to be the law that a person's liberty can be deprived of in that manner. I therefore hold that the 1st petitioner's detention in such circumstances is unlawful.

Assuming that the 1st petitioner was lawfully detained from 01.04.90 on 6R7, I am of the view that her detention which now exceeds one year is excessive and hence unlawful. Her detention has been continued from month to month by virtue of the provisions of S.2A of the Public Security Ordinance (Cap. 40) which provides that where a further proclamation is made under S.2(2) *inter alia* every order made under any Emergency Regulation and in force prior to such regulation "shall be deemed to be in force" with the coming into operation of such further proclamation.

An order under Regulation 17 is liable to be reviewed by this Court for excessiveness. *Wickremabandu v. Cyril Herat* (*supra*). On the basis of the available material, it seems to me that the 1st petitioner's association with Jinadasa who is alleged to be a member of the J.V.P.

was motivated more by her anxiety to recover the property burgled from her house than any desire to assist subversive activity. She was herself a victim of the unsettled conditions in the area. She is a business woman. There is no evidence of any political or ideological links between her and the subversive movement. Viewed in that light her motive for flirting with Jinadasa is very much personal. The only statements which allege general support by her to the J.V.P. are those of two self-confessed assassins recorded after the filing of this application. Even they do not speak from personal knowledge but repeat remarks attributed to Jinadasa their leader that she had funded the J.V.P. Further, no explanation has been given for the delay in recording the statements under reference. As such, I am unable to rely on these statements.

Thus it is on the basis of her limited involvement with an alleged J.V.P. man that the 1st petitioner's detention may be justified. In the meantime her Bandarawela residence had been burgled. She says that her Badulla residence was ransacked and vehicles removed. She has languished in prison long. I do not think that she could longer be regarded as being a threat to national security or the maintenance of public order and be detained on that ground. Accordingly, I determine her continued detention to be unlawful and violative of Article 13(2) of the Constitution.

The next question is the alleged infringement of Article 11. The 1st petitioner's statement 9R7 produced by the 9th respondent substantially corroborates her version on all matters except on the alleged involvement of the 9th respondent and the nature of the ill treatment by the army. It supports her position that the suspect Jinadasa had been apprehended and was brought to the army camp where he was tortured. I accept her statement that Jinadasa had been arrested and brought to the camp and that he was interrogated there. It is difficult to accept the respondent's version that Jinadasa who appears to be a well-known man was not arrested.

In support of the allegation of inhuman treatment, the 1st petitioner produced an affidavit from the matron Lurdu Mary and Nandawathie,

a J.V.P. detainee. In a subsequent affidavit which Lurdu Mary has given to the respondents she has gone back on the first affidavit. I am unable to rely on Nandawathie's affidavit in view of her antecedents. The 1st petitioner's own statement 9R7 only states that the army assaulted her during the interrogation. No further details of the alleged inhuman treatment appear. She also states that the deceased driver's mother slapped her in the presence of Captain Siriwardena. It is possible that such assault was inflicted by an enraged mother on her own and not necessarily at the behest of Captain Siriwardena. There is no doubt that the 1st petitioner was subjected to severe interrogation and confrontation in the course of which she would have been treated roughly and even insulted; but the acceptable evidence does not go beyond and establish that degree of grave inhuman treatment which constitutes an infringement of Article 11 of the Constitution. See *Mrs. W. M. K. de Silva v. Chairman, Ceylon Fertilizer Corporation*[12]. I hold that the alleged infringement of Article 11 has not been established.

Finally I turn to the alleged taking of the 1st petitioner's vehicles by the army. The petitioners state that the car No.16 Sri 6612 was taken on 29.10.90. L 300 Delica van (unregistered) and vehicle No. 27 Sri 420 were removed while she was in detention. The last of three vehicles has been returned by the army. However, the other two vehicles are still with the army. The respondents have not denied these allegations; nor have they sought to justify the requisitioning of these vehicles. I am therefore satisfied that the army had removed them and that the 1st petitioner is entitled to recover the same.

The allegation that the 9th respondent instigated the arrest and detention of the 1st petitioner has not been established. Accordingly an order against him is not justified. The application against him is accordingly dismissed without costs.

On the question of relief arising upon the infringement of Article 13(2), in one case where the unlawful detention was under Regulation 19(2) of the Emergency Regulations, this Court granted a sum of Rs. 5,000/- for three days of unlawful detention. *Nallanayagam v. Gunatilleke*[13].

"Article 13(2) embodies a salutary principle safeguarding the life and liberty of the subject and must be exactly complied with by the executive. In our view this provision cannot be overlooked or dismissed as of little consequence or as a minor matter".

In *Withanachchi v. Cyril Herat, Leelaratne v. Cyril Herat* (*supra*), another case of unlawful detention under Regulation 19(2) there were two detainees. One of them who had been detained for 46 days was granted Rs. 10,000/- whilst the other who had been detained for 46 days was granted Rs. 25,000/-.

In *Wickremabandu v. Cyril Herat* (*supra*), the detention was under Regulation 17(1). This Court held that a period of 4 months detention was excessive and granted Rs. 15,000/- as compensation taking into consideration the fact that *inter alia* the impugned detention had been affected in the background of a widespread insurrection.

The question of relief would depend on the facts and circumstances of each case. In the instant case, I have held the detention to be unlawful in respect of orders made under Regulations 17(1) and 19(2). I take into consideration the suffering the 1st petitioner had to undergo during her incarceration for over one year which is vitiated by serious non-compliances. The 6th respondent is responsible for such non-compliances for which the State becomes liable. I think it just and equitable to grant her compensation in a sum of Rs. 20,000/- (Rupees Twenty Thousand) and a further sum of Rs. 2000/- (Rupees Two Thousand) as costs, payable by the State. I direct that the payment be made accordingly. I also direct the 8th respondent to release the 1st petitioner from detention and the 4th respondent to return to her the two vehicles which are with the army.

AMERASINGHE, J. – *I agree.*

WADUGODAPITIYA, J. – *I agree.*

Application allowed.