

**KAPUGEEKIYANA**  
v.  
**HETTIARACHCHI AND TWO OTHERS**

SUPREME COURT.

SAMARAKOON, C.J., WIMALARATNE, J. AND COLIN-THOMÉ, J.

S.C. No. 80/84.

AUGUST 2, 3, 6, 7 AND 8, 1984.

*Fundamental rights – Violation – Illegal arrest and illegal detention – Torture, cruel, inhuman and degrading treatment – Right to be defended by an attorney-at-law – Freedom to engage in lawful occupation, profession and business – Articles 11, 12(1) 13(1), (2) and (3) and 14(1) (g) of the Constitution – Sections 32(1) (b), 36, 37, 115(4) of the Code of Criminal Procedure Act No. 15 of 1979 – Section 41(1) of the Judicature Act No. 2 of 1978.*

The petitioner, a suspect in a murder case complained that about 6.00 a.m. on 13.6.1984 the 1st and 2nd respondents entered his house, searched it and took into custody documents and files belonging to him without a search warrant. Thereafter without a warrant of arrest they arrested him and took him to the 4th Floor of the C.I.D. Office, Colombo 1. There they subjected him to harassment, assault, torture, duress,

humiliation and cruel, inhuman, degrading and barbaric treatment. He was not given a meal until the afternoon of 14th June and he was held incommunicado until the afternoon of 17th June when he was permitted to speak to his brother over the telephone in the presence of the C.I.D. officers. About 2.00 p.m. on 17th June he was taken in a police vehicle to the residence of the Acting Magistrate who remanded him until the 19th of June. On 19th June the petitioner was produced before the Joint Magistrate's Court in Case No. 1767 on a B report filed by the 2nd respondent. While in the dock the petitioner handed his Counsel a written note of instructions. The 1st respondent demanded that he be shown this note but Counsel refused to show it. The Magistrate ordered him to be remanded till 22nd June 1984.

The petitioner filed the present application complaining of infringement of his fundamental rights guaranteed by Articles 11, 13(1), 13(2), 13(3) and 14(1) (g) of the Constitution in that he was –

- (i) subjected to torture and/or cruel and/or inhuman and/or degrading treatment.
- (ii) arrested contrary to procedure established by law and not informed of the reason of his arrest.
- (iii) held in custody, detained or otherwise deprived of his personal liberty contrary to law and not produced before the Judge of the nearest competent Court within 24 hours as required by the procedure established by law.
- (iv) subjected to an attempt to deny him his unfettered right to be freely defended by an attorney-at-law.
- (v) denied the freedom to engage in his lawful occupation, profession and business.

**Held–**

- (1) Even a person on the blackest of criminal charges is entitled to his fundamental rights.
- (2) No violation of the provisions of Article 13(1) of the Constitution in the matter of the arrest itself has been established.
- (3) The petitioner was arrested on the 13th June at about 9.00 a.m. and illegally detained on the 4th Floor of the C.I.D. for three days till 17th June in violation of Article 13(2) of the Constitution.
- (4) The allegation of torture, cruel, inhuman and degrading treatment has not been established.
- (5) The conduct of the 1st respondent in demanding to see a written communication of the petitioner to his Counsel was reprehensible but as the 1st respondent's attempt did not succeed it did not impede a fair trial.
- (6) (Samarakoon, C. J. dissenting) : The allegation that there has been a violation of the right conferred by Article 14 (1) (g) has not been established.

**Per Samarakoon, C. J.–**

“Communications between Counsel and client are privileged and no person has a right to pry into them.”

Per Wimalaratne, J. –

"In deciding whether any particular fundamental right has been infringed I would apply the test laid down in *Velmurugu* that the civil, and not the criminal standard of persuasion applies, with this observation, that the nature and gravity of an issue must necessarily determine the manner of attaining reasonable satisfaction of the truth of that issue."

Cases referred to :

(1) *A. K. Velmurugu v. The Attorney-General S.C. Application No. 74/81 Minutes of 9.11.81.*

APPLICATION under Article 126 of the Constitution for violation of fundamental rights.

*Dr. Colvin R. de Silva, with Mrs. M. Muththetuwegama, Ananda Malalgoda, Mahinda Ratnayake, Rohan Ratnapala, Daniel Philips and Miss Saumya de Silva for petitioner.*

*E. D. Wickremanayake with C. P. Jayaweera Bandara, for 1st and 2nd respondents.*

*Upawansa Yapa, D. S. G. with Asoka de Silva, S. S. C., and Mrs. Shirani Thilakawardene, S.C for A.G.*

*Cur. adv. vult.*

August 31, 1984.

### **SAMARAKOON, C. J.**

The Petitioner in this case complains of a violation of his fundamental rights by the 1st and 2nd Respondents (hereinafter referred to as Respondents). He is a suspect in a case of murder of one Shyama Dedigama of Kegalle. The Magistrate of Kegalle has assumed jurisdiction in the matter in case No. 49789. The Petitioner is presently on remand. The Petitioner states that on the 13th June 1984 at about 6.00 a.m. the Respondents entered his residence at Nagolle Road, Kegalle, searched his house and took into their custody documents and files belonging to the Petitioner. Thereafter they took the Petitioner into custody at about 9.00 a.m. and brought him to the 4th floor of the C.I.D. office at Colombo 1. They had neither a search warrant nor a warrant for arrest. He complains that he was held on the 4th floor of the C.I.D. office incommunicado until the 17th June and subjected to harassment, assault, torture, duress, humiliation and cruel, inhuman, degrading and barbaric treatment by the Respondents. He was not given a meal after his arrest until the afternoon of the 14th June. He states that it was only in the afternoon of the 17th that he was permitted to speak to his brother over the telephone in the presence of the C.I.D. officers. At about 2.00 p.m.

on the 17th June he was taken in a police vehicle to the residence of the Acting Magistrate. The Acting Magistrate remanded him and ordered him to be produced before the Joint Magistrate's Court on the 19th June. He was produced before the Joint Magistrate in case No. 1767 on the 19th June on a B Report filed by the 2nd Respondent (Copy marked P5). While in the dock the Petitioner handed to his Counsel a written note of instructions (P 6). The 1st Respondent thereupon demanded that he be shown the note but Counsel refused to show him the note. The Joint Magistrate ordered the Petitioner to be produced before him on the 22nd June. The Petitioner pleads that in contravention and violation of his fundamental rights guaranteed by Articles 11 and/or 13 (1) and/or 13 (2) and/or 13 (3) and/or 14 (1)(g) of the Constitution he was—

- (i) subjected to torture and/or to cruel and/or to inhuman and/or to degrading treatment ;
- (ii) arrested in contravention and violation of the procedure established by law and not informed of the reason for his arrest ;
- (iii) held in custody, detained or otherwise deprived of his personal liberty in contravention of the procedure established by Law and without being brought before the Judge of the nearest competent Court according to the procedure established by Law ;
- (iv) "subject to an attempt to deny the Petitioner the unfettered right to be freely defended by an Attorney-at-Law" ; (sic)
- (v) denied the freedom to engage in his lawful occupation, profession and business ;

He prays for an award of compensation and/or a direction that the Respondents furnish him with a list of documents taken from him and return to him his documents that are not necessary for the purpose of case No. 49787 of the Magistrate's Court of Kegalle.

The first Respondent has filed an affidavit denying these allegations. Briefly his position is that by the 15th June "it was publicly known by reason of newspaper items etc. that the murder of Miss Shyama Dedigama was suspected to be a 'contract' killing and that the police were looking for the person behind the said murder". He states that as a result of investigations and interrogations he was able to take into

custody on the 15th June 1984 a man named M. D. Jayasena alias 'Captain' who is now the second accused in M.C.Kegalle Case No. 49789. His interrogation revealed the complicity of the Petitioner in the murder. Captain who had been paid a sum of Rs. 15,000/- out of a sum of Rs. 20,000/- had offered to meet the Petitioner and ask for the balance money due to him. Para 13 of the affidavit then states thus-

"Accordingly, on the night of 15th June, 1984, Captain accompanied by a C.I.D. officer in disguise, met the petitioner in the garden of his residence on the night of 15th June, 1984, and engaged the petitioner in a conversation relating to the payment of the said money. This conversation was recorded on the mini tape recorder and I state that it unequivocally reveals the complicity of the petitioner in the commission of the said offences".

On the material available it was decided to take the Petitioner into custody. He states that he and his party of C.I.D. officers reached the house of the Petitioner at 6.00 a.m. on the 16th June and explained the nature of his visit to the Petitioner. He searched the office of the Petitioner (which was only one room) and took some documents into his charge. Thereafter the Petitioner was taken into custody. The Petitioner's wife was present throughout and was aware of what was being done. The Petitioner was brought to Colombo where the documents brought were inventorised. Interrogation of the Petitioner commenced at about 12 noon after the Petitioner had the lunch provided him and continued till about 2.30 p.m. when the tape recording of the meeting between him and Captain was played to him. The recording of his statement commenced at 3.00 p.m. and continued up to 6.30 p.m. The Respondent states that the statement was a voluntary one and the Petitioner himself made numerous corrections in the typescript in his own hand and initialled them. He further states that the Petitioner was remanded to Fiscal custody on the morning of the 17th. The 2nd Respondent has filed an affidavit. In para 3 he states - "I associate myself with and adopt in their entirety the contents" of the 1st Respondent's affidavit. The above is the broad picture. I will deal with the facts in detail later when I come to consider each of the fundamental rights alleged to have been violated.

This is a case in which a suspect in a murder case, who is on remand, is making a complaint of violation of his fundamental rights by the police officers who took him into custody. It is perhaps the first of

its kind in our Courts. Counsel for the Respondents submitted that if this Court holds that the arrest was on the 13th June (as stated by the Petitioner) and not on the 16th June (as stated by the Respondents) then the case against the Petitioner "cannot even be opened against the Petitioner at the criminal trial". He stated that this application was the result of a plan cleverly conceived to upset the criminal charge against the Petitioner. Such a possibility cannot be ruled out. It therefore behoves this Court to make a strict examination of the evidence while at the same time steering clear of facts and matters that do not concern this case and are only germane to the criminal charge. On the other hand Counsel for the Petitioner submitted that even a suspect on the blackest of criminal charges is entitled to his fundamental rights. This is no doubt true. In judging the facts of this case I will bear in mind both contentions of Counsel.

I will deal with the second and third allegations first. They state that the Petitioner without first being informed of the reason for his arrest was arrested, held in custody, detained or otherwise deprived of his personal liberty in contravention of the procedure established by law and without being brought before the Judge of the nearest competent Court according to the procedure established by law. This pleads a contravention and a violation of the fundamental rights guaranteed by Articles 13(1) and 13(2) of the Constitution. The dispute between the parties is as to the precise date of arrest and subsequent detention. Was the Petitioner arrested on the 13th June at about 9.00 a.m. and detained till the 17th June or was he arrested on the 16th and produced before the Magistrate on the 17th June? If the latter there has been no violation of a fundamental right (provided however that no procedural law has been violated). If the former then there has been an illegal detention of the Petitioner on the 4th floor of the C.I.D. office for a period of three days constituting a violation of the fundamental right conferred by Article 13 (2) of the Constitution.

A convenient point to start a consideration of the facts would be the complaint made by the wife of the Petitioner to the Police at Kegalle on the 15th June at 15.15 hrs. A certified copy of it has been produced marked P4. Counsel for the Respondent characterised this as a "suspicious document". The English translation of it filed with P4 reads that the C.I.D. officers arrived at the residence of the Petitioner at 6.00 a.m. whereas the Petitioner in his affidavit states that they arrived at 6.00 p.m. The certified copy is not very clear. We therefore sent for the Information Book and the Criminal Investigation Book

Volume II of the Kegalle Police Station was produced for our inspection. The original clearly reads 6.00 a.m. (ස. ධ. 6.00 ට) Our examination further reveals that it is a contemporaneous record and there is no reason to doubt the fact that the statement P4 was recorded in the Information Book at 15.15 hrs. on the 15th June on page 13 of the Book and now appears as para 255. In paragraph 30 of his affidavit the 1st Respondent states that he is unaware of the truth of the contents of paragraph 10 of the Petitioner's affidavit which thereby includes the contents of P4. However in paragraph 36 he states that the contents of P4 are not true. In her complaint P4 the wife of the Petitioner states that her husband (the Petitioner) had been taken away to Colombo on the 13th June by the C.I.D. officers who came to the residence that day at 6.00 a.m., and that thereafter she had no information of him up to the time of making the complaint. The truth of her statement can be checked from other evidence both documentary and oral. The Member of Parliament for the electorate of Mawenella Chandra Ranatunga, who is also an Attorney-at-Law, has filed an affidavit in which he states that the wife of the Petitioner, who has been known to him for many years, came to his house on the 14th June and complained *inter alia* that her husband had been forcibly taken away at about 9.30 a.m. on the 13th June by persons claiming to be C.I.D. officers. Mr. Edward Vincent Lloyd Peiris an Attorney-at-Law who has been in practice in the Kegalle Courts for 29 years stated on oath in this Court that the wife of the Petitioner met him at his residence at about 8.00 a.m. on the 15th and told him that their house had been searched by the C.I.D. on the 13th morning and that her husband had been taken away by them when they left at about 9.30 a.m. She informed him that she had complained about this to the Member of Parliament. Mr. Peiris advised her to make a complaint to the Kegalle Police as 48 hours had passed and he had not been produced before the Magistrate. This evidence was not contradicted. He was not cross-examined by Counsel for the Respondents or by Counsel for the Attorney-General. Mr. Maliyawawadu Buddhadasa Ranatunga of Molagoda Estate, Kegalle, a retired Government Surveyor and Court Commissioner, now in private practice, has filed an affidavit stating that he went on the 13th to meet the Petitioner at his bungalow. There he was informed by the Petitioner's wife that the Petitioner had been taken into custody on the 15th by persons claiming to be C.I.D. officers and that she had not heard from him since. She also told him of the advice given her by

Mr. Winston Peiris and that she was reluctant to go alone to the Police Station. He informed her that she should follow legal advice and thereupon she went accompanied by him to the Police Station where she made a complaint. Kuruwita Arachchilage Peiris Appuhamy, Chief Survey Labourer under the Petitioner for 18 years, states in his affidavit that he went to the Petitioner's bungalow at 6.00 a.m. on 15th June as a survey had been fixed for that day in terms of a Commission issued in D.C., Kegalle, Case No. 22119<sup>o</sup> but the Petitioner was not in his house. He was informed by the Petitioner's wife that he had been taken into custody on the 13th by C.I.D. Officers. The Petitioner's diary was produced in court from the custody of the Respondents, at the request of Counsel for the Petitioner. In it was entered against date 15th June—

“P/Suvy D.C. 22119 Marapone Kegalle.”

Anandapala Cyril Jayaratne, Rest House Keeper of the Rest House, Kegalle states in his affidavit that on the 13th June at about 9.30 a.m. the 2nd respondent came into the Rest House and left after having tea. One Mervyn Dharmadasa Gammampila, a businessman of Kegalle, happened to be in the same Rest House that morning. He states that at about 9.00 a.m. or 9.30 a.m. a jeep came to the Rest House and was parked in the compound. Two passengers alighted and went into the Rest House. He looked through the perspex screen of the rear door and recognised the petitioner, whom he knew, seated inside. Later that day he came to know that the petitioner had been arrested by the C.I.D. The Respondents deny these statements and the 1st Respondent states that neither he nor the 2nd respondent nor any of his team of C.I.D. officers was in Kegalle on the 13th.

As against this mass of evidence the Respondents produced for our inspection in Court a document which was referred to by the Deputy Solicitor General as the “Information Book” of the C.I.D. It was not a book. It turned out to be a collection of loose leaves punched and filed between two hard covers. It had originally been serially numbered but those serial numbers had been altered. Counsel read out a series of such alterations and submitted that this clearly proved fabrication and interpolation of papers. Such a comment is not unjustified in the circumstances. No reliance can be placed on it to justify a finding that the arrest took place on the 16th June and not on the 13th June. There is another suspicious circumstance which militates against the respondents. The respondents state that Captain was taken into

custody on the morning of the 15th and produced before the Magistrate on the 16th. The original of the B Report has the date "84-06-16" under the signature of the 2nd respondent. The figure "16" is an alteration in ink of the figure in typescript. The figure "2" in type is clearly visible, over which the figure "1" has been written. The date placed under the Magistrate's order has the figure "16" written in heavy hand over another figure (which is not visible) indicating an alteration. The carbon copy of this same B Report which is also filed of record has the following date in type :

"84 - 06 - 14"

Before "1" in "14" appears "2" which has been struck off by a verticle stroke. If as the respondents state "Captain" was arrested on the 15th morning how came it that a B Report was prepared in respect of him with the date 14th June stating *inter alia* in terms of section 124 that Captain had indicated his willingness to make a confession to the Magistrate? I find myself unable to place any reliance on these documents. The totality of evidence adduced on behalf of the petitioner is consistent with the allegation that he was arrested on the morning of the 13th June and not on the 16th June. I reject the statements of the respondents on this point.

I will now consider the first of the allegations. The petitioner complains that he was subjected to torture and/or to cruel and/or to inhuman and/or to degrading treatment. This allegation has been described in detail in paragraph 10 of his affidavit (marked P1) as follows :

"10. On the said 4th floor after a few preliminary questions the ordeal of torture which I underwent at the hands of the C.I.D. commenced. A.S.P. Hettiarachchi ordered that no food or water was to be given to me. I.P. Amunugama hit my knuckles until they bled. Thereafter he hit my skull and forehead methodically, after which he made me stretch my hands out and placed two heavy ledgers in my hands and made me to carry them in that position until I could not hold them no longer. While this was going on he kept describing the various methods of torture that the C.I.D. are capable of and reminded me of the case of Dodampe Mudalali. Thereafter I was handed over to a lower ranking officer who placed three large ledgers weighing over 100 pounds on my head and made me walk on my knees. I was thereafter taken into another room and made to do the same until I collapsed of exhaustion. Well after midnight I

was handcuffed to a chair and made to lie down on a table. In the morning the torturing commenced and I was made to walk on bended legs with heavy ledgers on my head. Inspector Amunugama started questioning me and when I denied any knowledge of the crime, I was assaulted, hit on the jaws, given karate shots on the chest and ten paper pins were driven under the nails of both hands. Thereafter A.S.P. Hettiarachchi arrived and I was taken before him for questioning. I denied any knowledge of the crime. At the end of the interrogation the A.S.P. left with the remark to his subordinates "do not kill him". I.P. Amunugama thereafter started his torturing session again and this time an additional ten pins were driven under the nails of both my feet. I was given a packet of food on the afternoon of the 14th. I was confronted with a person called Captain whom I had never seen before who said that I am the person who engaged him to commit the crime. Thereafter, tiny tape recorders were produced and played where my voice had been recorded. Thereafter I was taken to another room, manacled to a cupboard and made to sit on the ground. Captain who was in the room begged of me to agree to say what the Police wanted otherwise they would torture me as they had tortured him and the others, and said, that I would never be able to withstand the other tortures. At about 4.30 p.m. I.P. Amunugama came and assaulted me again and trampled my ankles and stood on my thighs and kicked me on the jaws with the heel of his shoes and drove a few more pins under my nails and left threatening to continue the torture in the evening. In the evening he brought a spike and showed a handkerchief which would be used to hold a lighted cigarette to the nose."

These are third degree methods and if true they constitute a violation of Article 11 of the Constitution. However we have only the statement of the petitioner on this point. He appears to have complained of torture to his Counsel in Court on the 19th June (*Vide* Note P 6). Counsel in his affidavit states that he brought this to the notice of the Magistrate on the 22nd June and asked for an order that the petitioner be examined by the Judicial Medical Officer. There is nothing on record to this effect and no such order has been made. On the 19th, consequent to an application made by Counsel, the Magistrate has made order that the petitioner be examined by the prison doctor for his diabetic condition. But this order has not been communicated to the prison authorities and therefore the examination has not been

done. Perhaps if this order was carried out a complaint might have been made to the prison doctor of torture too. In the result corroborative evidence that might have been available is lacking. The 1st respondent states that the 4th floor comprises a set of offices used by several high ranking officers for their official duties. There is no evidence that such a place has living facilities for ordinary human existence but this fact alone cannot establish torture, cruel or inhuman or degrading treatment. In the circumstances I hold that a violation of the fundamental right set out in Article 11 has not been established.

The fourth allegation is that the first respondent attempted to deny the petitioner the unfettered right to be freely defended by an Attorney-at-law. This concerns an incident that occurred in the well of the Magistrate's Court on the 19th June. While in the dock the petitioner handed to his counsel a note of instructions (P 6). The first Respondent then demanded that he be shown this note which Counsel refused to do. The first respondent states that he was unaware of such a note and therefore denies the allegation. The Petitioner is corroborated on this point by his Counsel Mr. D. M. S. Gunasekera who states that such an incident did occur which led to cross-talk between himself and the first Respondent in Court. He describes the incident thus in paragraph 6 of his affidavit (P 14) :

"6. Whilst submissions were being made by other Counsel a note was handed to me by my client from the dock. Thereafter A.S.P. Hettiarachchi the C.I.D. officer in the case demanded of me to show the note to him. I indignantly refused to show it to him and said that it was a communication from my client to me. Thereafter there was an exchange of words during the course of which the said A.S.P. Hettiarachchi threatened to have me questioned on the 4th floor of the C.I.D. I countered that I would report him for contempt of Court."

The first Respondent states in his counter affidavit that these averments of Counsel are false. He adds :

"I further state that the Court Room in the Colombo Fort Magistrate's Court is quite small and was packed to capacity on the 19th June 1984."

What impact this fact had on the falsity or otherwise of the allegation made by Counsel is difficult to comprehend. In view of the fact that this affidavit and others had been filed on the 31st July and the inquiry commenced on the 3rd August and also in view of the

importance of the matters in issue I informed Counsel for the first Respondent and the Deputy Solicitor General that they could cross-examine any of the deponents if they chose to, but they declined to do so. Nothing has been established to indicate that this statement of Counsel for the petitioner is untrue and I see no reason to reject his testimony on this issue. The conduct of the first Respondent in this instance in Court is reprehensible and I have no doubt the Magistrate would have taken serious note of it had it been brought to his notice. Communications between Counsel and client are privileged and no person has a right to pry into them. However this attempt on the part of the first Respondent to see these instructions has not succeeded and has therefore not impeded a fair trial.

The last complaint is that the Petitioner has been denied the freedom to engage in his lawful occupation, profession and business by reason of his arrest on the 13th June and the failure or neglect to furnish him with a list of, and/or signed receipt for, the documents taken from his residence. This is a reference to the right conferred by Article 14 (1) (g) of the Constitution. There is no doubt that his professional work could not have been done during the three days that he was illegally detained. His diary shows that such work had been fixed for the 15th June. Failure to provide a list or receipt for the documents taken is of little consequence as the Petitioner does not complain of the taking of the documents itself.

Since writing this judgment I have had the benefit of reading the order of Justice Wimalaratne. I find that I have not dealt with the allegation that there has been a violation of the provisions of Article 13 (1) of the Constitution. I have perused the reasons given by Justice Wimalaratne and I agree with his finding that there has not been a violation of the right granted by Article 13 (1) of the Constitution.

In view of my finding that the Petitioner has been illegally detained for three days and the finding that he has been unlawfully prevented from practising his profession on those days he is entitled to relief and I order the first and second Respondents to pay the Petitioner a sum of Rs. 10,000 as compensation. His prayer for an order to furnish a list of documents taken and that his documents be returned to him is a matter for the Magistrate of Kegalle and application should properly be made to him. The petitioner will be entitled to costs.

**WIMALARATNE, J.**

I have had the benefit of reading the Judgment prepared by the Chief Justice where the relevant facts are set out. I am in entire agreement with him that we should steer clear of facts and matters that do not concern this case, but are only germane to the proceedings pending in the Magistrate's Court of Kegalle.

The question of the degree of proof required of a Petitioner seeking to establish his case of infringement of fundamental rights has assumed great importance because of the sharp conflict in the material placed before us by the parties. The nature of that degree of proof has been considered by this Court on earlier occasions, of which I may refer to the decision in *A. K. Velmurugu v. The Attorney General* (1) which is a decision of a Bench of five Judges. Wanasundera, J. expressed the view that "the petitioner must prove his allegations to the satisfaction of the Court", and observed that the Court had tried to steer clear of using a formula or language that may lead to any misunderstanding. But he also made it clear that the test they had applied was "the degree of proof used in civil cases, which is not so high as is required in criminal cases". In reaching this conclusion the Court appears to have balanced the consideration of laying an undue burden on a petitioner complaining of an infringement of his fundamental rights, which it is the duty of the Court to safeguard, as against the contrary consideration that as the liability that has been imposed is one against the State, a high degree of probability, which is proportionate to the subject matter is necessary.

In deciding whether any particular fundamental right has been infringed I would apply the test laid down in *Velmurugu* (above) that the civil, and not the criminal standard of persuasion applies, with this observation, that the nature and gravity of an issue must necessarily determine the manner of attaining reasonable satisfaction of the truth of that issue.

**Alleged infringement of Articles 13 (1) and 13 (2) of the Constitution.**

These Articles read as follows :-

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

- (2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law".

In the context of the present case "procedure established by law" in the above Article cannot mean any other than the procedure established by the Code of Criminal Procedure Act, No. 15 of 1979. The two sections of that Code relevant for present purposes are sections 36 & 37.

- "36. A peace officer making an arrest without warrant shall without unnecessary delay and subject to the provisions herein contained as to bail take or send the person arrested before a Magistrate having jurisdiction in the case.
37. Any peace officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate".

These valuable statutory rights enjoyed by suspects have now been made constitutional rights, and unless there are compelling reasons, they ought not to be cut down by judicial construction. The importance of this requirement that no suspect shall be kept in police custody in any event for more than 24 hours is underlined in section 115(4) of the Code which provides for the procedure that police officers are required to adopt when investigations are long drawn out and cannot be completed within the 24 hour period. In such an event the officer in charge of a police station has first to obtain the authorisation of the Magistrate to have access to the remand prisoner for the purpose of further investigation ; and such Court may authorise the police officer to take the suspect from place to place *only* if the court is of opinion that the suspect is required to be so taken and *only* in the company of a prison officer. This new procedure was not contained in the earlier Criminal Procedure Code (Cap. 16) even after it received extensive amendments in 1938.

In his judgment the Chief Justice has outlined the mass of evidence adduced by the petitioner in support of his allegation that he was arrested on the 13th of June. In their second affidavits filed on 3.8.84, the 1st and 2nd respondents stated that they were trying to obtain the entries relating to the movements of police jeep bearing No. 31 Sri 5019 which was the vehicle assigned to them for the purpose of this investigation and which was the vehicle used by them on the 16th of June when they took the petitioner into custody. The running chart of that vehicle was not made available to us for scrutiny even though arguments in this case went on till the 8th of August.

Applying the test relating to the degree of proof referred to above to the evidence before us, I am satisfied that the petitioner was arrested at his house in Kegalle at about 9.30 a.m. on the 13th of June, 1984, and not on the 16th of June as averred by the 1st and 2nd respondents. The Petitioner was produced before the acting Joint Magistrate of Colombo only on the 17th of June long after the period of time specified in section 37 of the Code. I am in agreement with the Chief Justice that there has thus been an infringement by the 1st and 2nd respondents of the petitioner's fundamental right guaranteed by Article 13 (2). In view of this finding it is unnecessary to decide the question as to whether in the light of the facts of this case "the nearest competent court" was the Magistrate's Court of Kegalle.

The Petitioner complains also of infringement of his rights guaranteed by Article 13 (1). Police powers of arrest without a warrant are laid down in section 32 (1) (b) of the Code. It would appear that the C.I.D. had certain information against the petitioner which empowered them to arrest the petitioner. Thus no complaint about an illegal arrest can be entertained. The question is whether the further requirement that he should have been informed of the reason for his arrest had been complied with by the officers arresting the petitioner. On this question too there is a sharp conflict of testimony. As against the affidavits of the petitioner and of his wife there are the affidavits of the 1st and 2nd respondents. In regard to the date of arrest the material placed before us by the petitioner was conclusive. But in regard to this question as to whether the petitioner was informed of the reason for his arrest, there is no such independent evidence. In that situation I would hold that the petitioner has not established an infringement of Article 13 (1) by the respondents.

**Alleged infringement of the fundamental right guaranteed by Article 13 (3) of the Constitution.**

Article 13 (3) reads thus :

Any person charged with an offence shall be entitled to be heard. in person or by an attorney-at-law, at a fair trial by a competent court".

The corresponding provision of the Indian Constitution (Article 22 (1) ) is much wider in that "no person arrested can be denied the right to consult, and to be defended by a legal practitioner of his choice". It is unnecessary to examine the ambit of Article 13 (3) because the petitioner had in fact been represented by his lawyer on 19.6.84 and there has thus been no infringement of this Article. If any incident as related by Mr. Goonasekera did occur in the Magistrate's Court on that date it is a matter to be dealt with by the Magistrate.

**Alleged infringement of the fundamental right guaranteed by Article 14 (1) (g) of the Constitution.**

This paragraph of Article 14 reads as follows :

"Every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise".

In paragraph 20 (e) of his petition the petitioner complains that he has been denied the freedom to engage in his lawful occupation, profession and business by reason of the acts referred to in paragraphs 3 and 4. Now, in paragraphs 3 and 4 he complains mainly about the illegal search and removal of several documents including files relating to Court cases and surveys conducted by him. The contention of learned Counsel for the petitioner was that as a result of the removal of these documents, he was unable to entrust his professional work to another surveyor. The 1st respondent's answer is that the only documents removed were those that he believed would help in the further investigation of the offences.

Article 14 (1) postulates a legal capacity to exercise the right guaranteed by it and if a citizen loses the freedom of his person as a result of either a lawful arrest, remand or detention on conviction for an offence or otherwise, he cannot in my view claim any of the freedoms guaranteed by Article 14 (1). In this case the petitioner

should have been produced before the Magistrate on the 14th of June. Had he been so produced the Magistrate had no option but to remand him. As regards his complaint that he had been denied his right to carry on his business by entrusting it to others, there necessarily has to be curtailment of such right if the documents seized are necessary for the investigations. There has thus been, in my view, no infringement of the right guaranteed by Article 14 (1) (g).

**Alleged infringement of the fundamental right guaranteed by Article 11.**

I am in agreement with the reasons and finding of the Chief Justice that the petitioner has not established infringement of the fundamental right guaranteed by Article 11.

**Relief.**

In view of my finding that the Petitioner, a professional man, has been illegally held in the custody of the 1st and 2nd respondents at the fourth floor of the C.I.D. for a period of three days, I order the 1st and 2nd respondents to pay the petitioner a sum of Rs. 10,000 as compensation.

The Petitioner will also be entitled to the costs of this application.

**COLIN-THOMÉ. J.**

The Petitioner who is a suspect in a case of murder of Shyama Dedigama has complained of a violation of his fundamental rights by the 1st and 2nd respondents. The petitioner pleads that in contravention and violation of his fundamental rights guaranteed by Articles 11 and/or 13 (1) and/or 13 (2) and/or 13 (3) and/or 14 (1) (g) of the Constitution he was –

- (a) subjected to torture and/or to cruel and/or to inhuman and/or to degrading treatment ;
- (b) arrested in contravention and violation of the procedure established by law and was not informed of the reason for his arrest ;

- (c) held in custody, detained or otherwise deprived of his personal liberty in contravention of the procedure established by law and without being brought before the judge of the nearest competent court according to the procedure established by law ;
- (d) subject to an attempt to deny the petitioner the unfettered right to be freely defended by an Attorney-at-Law ;
- (e) denied the freedom to engage in his lawful occupation, profession and business.

He prays for an award of compensation for the torture, cruelty and/or inhuman, and/or degrading treatment and/or suffering and/or humiliation and/or harassment caused to him, for costs, and a direction that the respondents furnish him with a list of documents taken from him and to return to him forthwith any documents that are not necessary for the purpose of M.C. Kegalle case No. 49789.

The learned Chief Justice has summarised the facts in this case in his judgment. The material placed before Court has been by way of affidavit, counter affidavit and the sworn testimony of Mr. E. V. L. Peiris, Attorney-at-Law, residing at Nagolle Road, Kegalle. As there are certain inherent difficulties in the proof of allegations averred in petitions and affidavits, this Court out of an abundance of caution examines carefully the evidence available from an independent source.

In this case there is no medical evidence to support the allegation of torture. I agree therefore with the learned Chief Justice and Wimalaratne, J. that it follows that there is insufficient material before this Court that Article 11 was violated. For similar reasons, the material before this Court to establish that Article 13 (1) which required that the person arrested shall be informed of the reason of his arrest is insufficient. I agree with the learned Chief Justice and Wimalaratne, J. that Article 13 (1) has not been violated.

I agree with the learned Chief Justice and Wimalaratne, J. that there is reliable independent evidence which establishes that the petitioner was arrested on the 13th of June 1984 by the 1st and 2nd respondents and was illegally detained by them on the 4th floor of the C.I.D. office for three days violating the mandatory provisions of Article 13 (2) of the Constitution read with Sections 36 and 37 of the

Code of Criminal Procedure Act No. 15 of 1979. The evidence of Mr. E. L. V. Peiris, Attorney-at-Law, that the petitioner's wife informed him on the morning of the 15th of June 1984 that her husband had been taken away on the 13th morning by the C.I.D. and that he advised her to make a complaint to the Kegalle Police was not challenged either by learned Counsel for the 1st and 2nd respondents or the learned Deputy Solicitor-General. Mr. Chandra Ranatunga, M.P. for Mawanella, stated in his affidavit that the petitioner's wife informed him on the morning of the 14th of June that the petitioner was taken away by the C.I.D officers on the morning of the 13th of June. The veracity of this affidavit was not challenged by learned Counsel for the 1st and 2nd respondents and the learned Deputy Solicitor General. Learned Counsel for the 1st and 2nd respondents suggested that Mr. Ranatunga may have made a mistake about the date the petitioner was taken into custody. On the totality of the evidence in this case this suggestion is untenable. The learned Chief Justice has referred to the other evidence which establishes that the petitioner was taken into custody on the 13th.

In my view Article 13 (3) of the Constitution has not been violated because at the time the petitioner passed the note P6 to his Counsel the stage of a trial by a competent court had not been reached. However, it appears that an attempt was made to interfere with the petitioner's right of representation contravening section 41 (1) of the Judicature Act No. 2 of 1978. This was a matter which could have been dealt by the Magistrate if brought to his notice.

As we have held that the arrest of the petitioner under Article 13 (1) has not been violated it follows that the seizure of the documents may have been necessary for the investigation of the crime. I hold that Article 14 (1) (g) has not been violated. The petitioner may make an application to the Magistrate of Kegalle for the return of his documents that have no relevance in M.C. Kegalle No. 49789.

As the learned Chief Justice, Wimalaratne, J. and I are agreed that the petitioner has been illegally detained for three days and that his fundamental rights under Article 13 (2) have been violated. I order the 1st and 2nd respondents to pay the petitioner a sum of Rs. 10,000 as compensation. The petitioner will also be entitled to the costs of this application.

*Compensation ordered for illegal detention.*