
JOSEPH PERERA *ALIAS* BRUTEN PERERA
v.
THE ATTORNEY-GENERAL AND OTHERS

SUPREME COURT
SHARVANANDA, C.J.
WANASUNDERA, J.
ATUKORALE, J.
L. H. DE ALWIS, J. AND
SENEVIRATNE, J.
S.C. 107/86;
S.C. 108/86; AND
S.C. 109/86
16, 17, 18 AND 19 MARCH, 1987

Fundamental Rights – Regulation 28 of the Emergency (Miscellaneous) (Provisions & Powers) Regulation No. 6 of 1986 – Illegal arrest and detention – Freedom of speech and expression – Constitution, Articles 12(2), 13(1), 14(1) – Power of President to make Emergency Regulations – The vires of Regulation 28 of the Emergency Regulations – Regulations 18, 19, 26(a), 26(d) and 33 of the Emergency Regulations – Burden of proof – Constitution, Article 15(2) and (7) - Section 5 and 8 of the Public Security Ordinance and Articles 155(2) and 80(3) of the Constitution – Prior restraints – Pre-censorship.

Three petitions 107 – 109/86 were consolidated and heard together. The petitioner in application No. 107/86 Joseph Perera *alias* Bruten Perera was a member of the Revolutionary Communist League and organiser of the "Young Socialist" in Chilaw. The petitioner in application No. 108/86, Lorenz Perera *alias* Ruman Perera is a brother of Joseph Perera. The petitioner in application No. 109/86 Lionel Dias Wijegunasinghe was a one-time lecturer in History in the Colombo University. The Communist League organised a lecture to be delivered by the

petitioner in application No. 109/86 at the Luxmi Hall, Chilaw on 26 June 1986 at 3.30 p.m. on "Popular Frontism and Free Education". Two days prior to the meeting, a leaflet XI accusing the U.N.P. Government supported by the Roman Catholic Bishop of Chilaw of getting enmeshed in a capitalist racist war with the result that there were no funds to spend on free education and calling on the witch-hunted teachers, progressive students and parents to attend the meeting, to get together and establish their rights by imposing the fact that the accused parties are the enemies of the students and were trampling their rights, was distributed. The leaflet invoked the progressives to attend the meeting on 26 June and was issued in the name of "Young Socialist of the Revolutionary Communist League" "Kamkaru Mawatha". A poster "X" advertised the lecture.

Before the commencement of the meeting at Luxmi Hall on 26 June 1986, a Police party led by the 2nd respondent arrived at the place of the meeting and dispensed the crowd and took into custody the three petitioners. On the morning of the 26 June, 1992 the police had received two complaints from the Principal, St. Mary's College, Chilaw and the Vice Principal of Ananda College, Chilaw, to the effect that a meeting was organised and arranged to be held by some revolutionaries with a view to creating unrest among the students of the area. The Principal of St. Mary's College also informed that he had received a warning letter on 23 June, 1986 signed "Eelam Tigers" threatening to blow up the school. The Principal connected this threat with the proposed meeting. The threatening letter was not produced, but its contents were taken down into the Information Book by the Police who recorded the complaints of the school authorities.

A detention order was served on the three petitioners on 27 June 1986, and they were held at the Chilaw Police Station until 15 July 1986. On this day the Magistrate ordered them to be remanded until 29 July 1986. The remand order was extended until 25 August 1986 but they were released on bail on 07 August 1986. Sergeant Major Abeysinghe claimed that it was he and not the 2nd respondent who arrested the petitioner. The respondents sought to justify the arrest and detention on the basis of powers vested in the police by Regulations 18 and 19 of the Emergency Regulations. The petitioners were alleged to have been connected or been concerned in the commission of offences under Regulations 26(a), 26(d) and 33 of the Emergency Regulations. They were also said to have contravened Regulation 28 by distributing x and xi without the permission of the police.

Held:

(1) Article 14 of the Constitution deals with those great and basic rights which are recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country. Freedom of speech by Article 14(1)(a) goes to the heart of the natural rights of an organised freedom loving society to impart and acquire information. Of that freedom one may say that it is the matrix, the indispensable condition of nearly every other freedom. This freedom is not absolute. There is no

such thing as absolute and unrestricted freedom of speech and expression, wholly free from restraint; for, that would amount to uncontrolled licence which would lead to anarchy and disorder. Article 29(2) of the Universal Declaration of Human Rights sets forth the cases in which this freedom of expression may legitimately be restricted. On similar lines, there are provisions in our Constitution. Article 15(2) provides that the exercise and operation of the right of freedom of speech and expression shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence. Article 15(7) further provides that "the exercise and operation of all the fundamental rights declared and recognised by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality or for the purpose of the due recognition and respect of the rights and freedoms of others or of meeting the just requirements of the general welfare of a democratic society.

Section 5 of the Public Security Ordinance as amended by Law No. 6 of 1978, enables the President to make Emergency Regulations. Section 8 of the Public Security Ordinance is a preclusive section providing that no Emergency Regulation and Order, Rule, or Direction made or given thereunder shall be called in question in any court. Article 155(2) of the Constitution empowers the President to make regulations overriding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution.

Thus, the President's legislative power of making Emergency Regulations is not unlimited. It is not competent for the President to restrict via Emergency Regulations, the exercise and operation of the fundamental rights of the citizen beyond what is warranted by Articles 15(1) to (8) of the Constitution. The grounds of restriction specified in the limitation Article 15 are exhaustive and any other restriction is invalid.

The regulations which the President is empowered to make owes its validity to the subjective satisfaction of the President that it is necessary in the interest of public security and public order. He is the sole judge of the necessity of such regulation and it is not competent for this court to inquire into the necessity for the regulations *bona fide* made by him. The regulation to be valid must satisfy the objective test that it is in fact in the interest of national security, public, order, etc. It is competent to the court to question the necessity of the Emergency Regulation and whether there is a proximate or rational *nexus* between the restriction imposed on a citizen's fundamental rights by Emergency Regulation and the object sought to be achieved by the regulation. The integrity of the prohibition referable to section 8 of the Public Security Ordinance is to that extent detracted. Further, regulations made under section 5 of the Public Security Ordinance do not attract the immunity from challenge provided by Article 80(3) of the Constitution. In a contest regarding the validity of a regulation, the President's evaluation of the

situation that the regulation appeared to him to be necessary or expedient is not sufficient to lend validity to the regulation.

Freedom of speech and expression means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode. It includes the expression of one's ideas through banners, posters, signs etc. It includes the freedom of discussion and dissemination of knowledge. It includes freedom of the press and propagation of ideas, this freedom is ensured by the freedom of circulation. The right of the people to hear is within the concept of freedom of speech. There must be untramelled publication of news and views and of the opinions of political parties which are critical of the actions of the government and expose its weaknesses. Debate on public issues should be uninhibited, robust and widely open and that may well include vehement, caustic and sometimes sharp attacks on government.

Such debate is not calculated and does not bring the government into hatred and contempt.

It is only when the words written or spoken which have the tendency or objection of creating public disorder that the law steps in to prevent such activities in the interests of public security or public order.

Freedom of speech must yield to public order. In the interest of public order the State can prohibit and punish the causers of loud noises in the streets and public places by means of sound amplifying instruments, regulate the hours and places of public discussion, the use of public streets for the purpose of exercising freedom of speech, provide for the expulsion of hecklers from meetings and assemblies, punish utterances tending to incite an immediate breach of the peace or riot as distinguished from utterances causing mere public inconvenience, annoyance or unrest.

Regulation 28(1) applied to "any posters, handbills or leaflets" and required the permission of the police whatever its character for valid distribution.

The general rule is that any form of previous restraint is regarded on the face of it as an abridgment of the freedom of expression and offends Article 14(1)(a) of the Constitution. Any system of prior restraint of expression comes to court to bearing a heavy burden of showing justification for the enforcement of such a restraint.

Pre-censorship is under our law not necessarily unconstitutional and can be justified if brought within the ambit of Article 15. However, any system of pre-censorship which confers unguided and unfettered discretion upon an executive authority without narrow, objective and definite standards to guide the official is unconstitutional.

Regulation 28 violates Article 12 of the Constitution. It is violative of the equality provision because it would permit arbitrary and capricious exercise of power which is the antithesis of equality before the law.

The permission of the police mandated by regulation 28 is a form of prior restraint. It abridges the freedom of expression guaranteed by the Constitution. There is no rational or proximate *nexus* between the restriction imposed by regulation 28 and national security/public order. Hence the regulation is invalid and cannot form the basis of an offence in law.

The burden rests on the respondents to justify the arrest and detention of the petitioners.

Held further:

(Sharvananda, C.J., and Autkorale, J. dissenting).

1. (a) There was no illegal arrest and the detention was illegal only from 15.7.1986 (and not from 26.6.1986).

The powers of a police officer under the Emergency Regulations are in addition to and not in derogation of his powers under the ordinary law (regulation 54). In deciding on the validity of the arrest the sole issue for the court is the knowledge and state of mind of the officer concerned at the time of the making of the arrest.

A state of emergency was in existence and prevailed in the country and it was the duty of the Police and armed forces to be as alert and vigilant as possible to defend the State and the people from armed attack and subversion. It would not have been consistent with the vigilance expected of the police to ignore the complaint made by two responsible officers of two responsible institutions that persons were planning to take steps to blow up a school and also create unrest and disturbances among the students and have it directed against the government. The police team had promptly arrived at the scene of the offence and there saw a crowd of young persons and a meeting about to begin. Posters were affixed at the place. The petitioners were in possession of documents which on a cursory glance appeared to be subversive. Document 'XI' appeared to contain if not seditious statements, at least statements that can be regarded as tendentious. 'XI' was a ten paged tract that was in Sinhala. All this material required time to consider and legal opinion too could well have been considered necessary.

In deciding on the validity of the arrest, the sole issue for the court is the knowledge and state of mind of the officers concerned at the time of making the arrest.

Per Wanasundara, J., "the principles and provisions relating to arrest are materially different from those applying to the determination of the guilt or innocence of the arrested person. One is at or near the starting-point of a criminal proceeding while the other constitutes the termination of those proceedings and is made by the judge after hearing submissions of all parties. The power of arrest

does not depend on the requirement that there must be clear and sufficient proof of the commission of the offence alleged. On the other hand for an arrest, a mere reasonable suspicion or a reasonable complaint of the commission of an offence suffices. I should however add that the test is an objective one. I am of the view that the latter requirement was fulfilled in this case."

(b) Suspicion arises at or near the starting-point of an investigation of which the obtaining of *prima facie* proof is the end.

(c) This is not a case of the police riding roughshod over the rights of citizens. The police action was *bona fide* and within the scope of their functions and the outcome has depended on a legal issue.

(d) No police officer can predict the trial outcome of a case or/how a legal provision would be interpreted by the court. If they are placed in peril and heavy damages awarded in respect of their acts where prosecution was to fail, no police officer would be inclined to perform his functions and may henceforth decide to leave well alone not only doubtful cases, but practically all cases, thereby bringing the administration of justice to a standstill.

(2) Though the initial arrest was legal, there is nothing in the documents which will justify the conclusion that they would have brought the President or the government into hatred or contempt or incite feelings of any disaffection.

They cannot be reasonably characterised as subversive literature. On completion of investigation into this complaint by 15.7.1985 no offence under the regulations could have been disclosed and detention after this date was illegal.

(3) Compensation in a sum of Rs. 10,000/- payable by the State would meet the ends of justice.

Cases referred to:

1. *Palks v. Connecticut* (1937) 302 us 319.
2. *Yasapala v. Wickremasinghe* FRD 143, 159, 160.
3. *Eshugbayi Eleko v. Govt. of Nigeria* (1931) AC 662, 670.
4. *Satchanandan v. Union of India* AIR 1982 SC 902.
5. *Griswald v. Connecticut* (1965) 28 US 479.
6. *Thornhill v. State of Alabama* 310 US 88.
7. *West Virginia State Board v. Barnette* (1942) 319 US 624, 641.
8. *Abrams v. US* (1919) 250 US 616.

9. *Austin v. Keele* (1971) 402 US 415, 419.
10. *Terminiells v. Chicago* (1949) 337, US 1.
11. *Superintendent Central Prisons v. Lohia* AIR 1960 SC 633.
12. *Francis v. Chief of Police* (1973) 2 ALL ER 251, 259.
13. *Shelton v. Tucker* (1960) 364 US 479, 488.
14. *Ex parte Jackson* (1877) 96 US 277.
15. *Lovell v. City of Griffin* (1938) 303 US 444.
16. *New York Times v. US* (1971) 403 US 713.
17. *Bantan Books v. Sullivan* 372 US 58 – 70.
18. *Organisation for a Better Austin v. Kiefe* (1971) 40 2 US 415.
19. *Stant v. Banter* (1958) 355 US 313.
20. *Shuttleworth v. City of Birmingham* (1919) 394 US 147.
21. *Yick Wo v. Hopkins* (1886) 118 US 356.
22. *Gunasekera v. de Fonseka* 75 NLR 246, 247, 250.
23. *Muttusamy v. Kannangara* 52 NLR 324, 327.
24. *Baba Appu v. Adan Hamy* 1900 1 34.
25. *Dumbell v. Roberts* (1944) 1 ALL ER 326.
26. *Hussien v. Chog Fook Kam* (1969) 3 ALL Er 1626.
27. *McArdle v. Egan* (1933) 150 LT 412.
28. *Nanayakkara v. Henry Perera and Others* (1985) 2 Sri LR 375, 385.

D. W. Abeykoon with *R. Balendra*, *C. V. Vivekanandan* and *N. M. Perera* for petitioners in SC 107/86 and 109/86.

C. V. Vivekanandan with *K. Packiyalingam*, *Miss Ranjanie Rayanathan* and *N. M. Perera* for petitioners in SC 108/86.

Upawansa Yapa, *D.S.G.* with *C. R. de Silva*, *S.S.C.* instructed by *Mrs. N. Nikapitiya*, *S.S.C.*, for Attorney-General.

Cur adv vult.

25th May, 1987.
SHARVANANDA, C.J.

These three petitions filed by the three petitioners under Article 126 of the Constitution were taken up together for hearing, as they covered the same questions of law and facts.

A Divisional Bench of five Judges of the Supreme Court was constituted in terms of Article 132(3) of the Constitution as the questions involved in these three applications are of constitutional importance.

Petitioner in application No. 107/86 says in his petition that he is a member of the Revolutionary Communist League, a Political Party and is the organiser of the "Young Socialist" in Chilaw. The Communist League organised a lecture to be held at Luxmi Hall, Chilaw on 26th June 1986. The said lecture related to the topic of "Popular frontism and free education" and was to be delivered at 3.30 that evening by L. D. Wijegunasinghe (a one-time Lecturer in History in the Colombo University) the petitioner in Application No. 109/86. Copies of printed poster 'X' were affixed and some copies of leaflet 'X1' were distributed to the public by the Petitioner two days prior to the date of the said meeting with a view to give publicity to the meeting. The poster marked 'X' ran as follows:

"PUBLIC LECTURE

POPULAR FRONT AND ATTACK ON FREE EDUCATION

LECTURER: WIJE DIAS

CENTRAL COMMITTEE MEMBER

R.C.L.

June 26 – 3 p.m.

CHILAW LUXMI HALL
YOUNG SOCIALISTS

Piyadasa Press
6/244, High Level Road, Maharagama."

The leaflet 'X1' is in Sinhala. The following is the English translation of it, filed by the State:

"Preserve the Fundamental Rights of Students and Teachers

1. Due to the ever intensifying capitalist economic crisis the U.N.P. Government has come forward with plans to completely deprive the oppressed young worker population of their right to education. Already the Government has deliberately, permitted the establishment of private Universities, the demolishing of existing Universities, the sacrifice of Maha Vidyalayas and Central Schools for Army camps and the ruination of other schools by handing over the administration of such schools to the stooges of the U.N.P.

2. The Government desperately endeavouring to perpetuate its existence having enmeshed itself in a *capitalist racist war* has no funds to spend on education and it has become necessary to do away with all these rights. These are pressures that the oppressed worker students cannot in any manner bear.

3. It is as a first step in the achieving of these wicked ends that over a 100 militant students have been banned from attending classes. It is under these circumstances that the University Teachers who receive a beggarly salary from the paltry amount set apart for education by the Government have stepped in to fight with the Government.

4. L.S.S.P. and the Stalinist leadership having not supported the students struggle branded them as strugglers of immature people and stated that nothing could be done owing to the crisis in the North. They opposed the formation of a Student Organisation. The Nava Samasamaja and the other capitalist (leadership) who said that solutions can be found by having discussions with the capitalist Government are fully responsible for the critical situation that has arisen today.

5. In these circumstances this crisis has come into the open in all areas of the Island in various forms. There are reports of

this crisis from two leading schools in Chilaw. The facts reported to us are briefly as follows:

6. Five popular and experienced teachers of Chilaw, St. Mary's Boys Maha Vidyalaya had been suddenly transferred to other schools. It is important to note that these five teachers have over a long period of time produced good results and performed their duties with dedication. Vile acts are done against these teachers by the Principal and some others who call themselves teachers. These people have a stinking history. These are people who in the previous student struggles and student issues resorted to have students physically assaulted and have them suspended from classes and thereby violating the fundamental rights of students. The parents of the area are well aware of this and they are held in contempt by the students and the parents. These people who had played about with the lives of the students in previous student struggles are today for their opportunist needs witch-hunting the best teachers left in the school and are destroying the education of the students with the idea of crowning themselves.

7. It is no secret that those people receive the complete co-operation of the political bosses and the head of the Catholic Church of Chilaw – namely the Bishop, in this venture.

8. In the meanwhile there are reports of teachers who threaten and harass students of Ananda College, Chilaw. It is reported that the Vice Principal of Ananda College, Chilaw who has assumed the leadership of this despicable service has been slinging mud, abusing students calling them terrorists. This person who has attracted displeasure in the schools he had served, does treacherous acts against the students in the company of some others who call themselves teachers.

9. We request the witch-hunted teachers, the progressive students and parents to get together and establish their rights by exposing the fact that these persons are enemies of the students and are trampling their rights.

10. We who are fighting for the workers to capture State power invite progressives to attend a lecture on the topic "Free Education and Popular Frontism" to be delivered at Luxmi Hall, Chilaw at 3.00 p.m. on the 26th of this month.

Young Socialist of the Revolutionary Communist League,
"Kamkaru Mawatha."

Before the commencement of the meeting at the said Luxmi Hall, a Police Party led by the 2nd Respondent arrived at the place of the meeting and dispersed the crowd who had come to hear the lecture and took into custody these three petitioners. According to the Petitioners they were not at any stage informed by the Police the reason for dispersing the crowd and the reason for their arrest. The three petitioners were detained at the Chilaw Police Station from 26.6.86 up to 15.7.86 by the 3rd Respondent without assigning any reason or cause for such detention. The Petitioner in application No. 108/86, who is a brother of the Petitioner in application No. 107/86 fell sick on 7.7.86 and was admitted to the General Hospital, Chilaw. The other Petitioners were produced before the Magistrate of Chilaw on 15.7.86 and were remanded by the Magistrate till 29.7.86. Though the Petitioner in S.C. Application No. 108/86 was not produced in court on 15.7.86, the Magistrate made order remanding him also and he was removed to the prison hospital, Negombo.

The Petitioners filed their applications to this court on 25th July 1986, while they were still under detention. Subsequently they were enlarged on bail by the Magistrate on 7.8.86.

The fact of the arrest and detention of the Petitioners are admitted by the Respondents. The 2nd Respondent however denied that he arrested the Petitioner and stated that he had nothing to do with their arrest and detention. One Dhanapala Abeysinghe, Sergeant Major attached to the Police Station, Chilaw, has filed an affidavit stating that it was he and not the 2nd Respondent who arrested the petitioners. He states that he informed them that he was taking them into custody on a charge of distributing newspapers and other documents, which brought the Government into hatred and contempt in the eyes of the students and other members of the public. He further deposed that upon complaints made on 26.6.86 by the

Principal, St. Mary's College, Chilaw and the Vice Principal, Ananda College, Chilaw, that a public meeting had been organised by certain revolutionaries with a view to create unrest among the students of the area, he along with a Police party proceeded at 2.30 p.m. on that day to Luxmi Hall, to investigate the said complaints. He questioned the petitioners and they informed him that they had organised a meeting among the school children, to educate them on "Free education and the unreasonable attitude of the Government towards free education." He found in the possession of the petitioners (a) 46 copies of the newspaper "Kamkaru Mawatha" (b) Pamphlet marked 'Y1' issued by the Revolutionary Communist Party on "Free Education" and (c) a document entitled "Kaleena Guru Handa Prakashana" marked Y2. According to him these documents contained material which would have brought the Government into hatred and contempt in the eyes of the people, including the persons who had gathered there for the meeting. "Having read the said documents, I suspected that the meeting had been organised with a view of causing hatred and to incite the feelings of disaffection against the Government, amongst the students of the area who had gathered there. Consequently I decided to arrest the petitioners." He further stated that the petitioners were detained at the Chilaw Police Station in terms of a written order 3R4 made by M. C. Mendis, the Senior Superintendent of Police, Chilaw, dated 27.6.86, by virtue of powers vested in him under Regulation 19(4) of the Emergency Regulations. The Superintendent of Police issued the detention order authorising the detention of the petitioners "as they had committed or were suspected to have committed an offence under Emergency Regulations 26(a) and 26(d) and 33 of the Emergency Regulations." Sergeant Major Abeysinghe further stated in his affidavit that he was aware that permission of the Inspector General of Police had not been obtained for the distribution of the aforesaid documents marked X and X1, and that their distribution by the petitioners without the permission of the Inspector General of Police was in violation of Regulation 28(1) of the Emergency Regulation.

According to the affidavit filed by Peter Fernando, I.P., Chilaw, on 26.6.86 the Principal, St. Mary's College, made a complaint at the Chilaw Police Station, that he had received a letter on 23.6.86 threatening to blow up the school; on examining the letter he found that the sender of the letter had been disclosed as 'Eelam Tigers.'

The Principal also informed him that the Revolutionary Communist League had organised a public meeting at 3.00 p.m. on the same date at Luxmi Hall, Chilaw, with a view to creating unrest amongst the students of the area. The Vice Principal of Ananda College, had also made a complaint that a public meeting had been organised by the Revolutionary Communist League with a view to create unrest among the students. On this complaint he suspected that the said meeting had been organised with a view to bring or attempt to bring the President and the Government into hatred and disrepute and to incite feelings of disaffection against the government amongst students and other members of the public, and that in consequence he sent a Police Party in charge of Sergeant Major Dhanapala Abeysinghe, to make inquiry and take action.

The Respondents have not filed the letter received by the Principal, St. Mary's College, which is alleged to have been sent to the Principal, St. Mary's College by 'Eelam Tigers,' threatening to blow up the school. This letter appears to be a red herring. It is to be noted that though the letter had been received by the Principal, on 23.6.86, he had not reported the matter to the Police until 26.6.86, until he became aware of the proposed meeting at Luxmi Hall on 26.6.86. This threatening letter does not appear to have influenced the Police or played any role in arresting the petitioners, as according to the Police, petitioners were arrested on the ground that they were organising a meeting to bring the President and the Government into hatred and contempt. It is not alleged that the petitioners had sent that letter nor were they even suspected of having sent it.

Mendis, the Superintendent of Police who issued the detention order 3R4 has filed affidavit stating that "having considered the material placed before me, by the Officer-in-Charge of the Chilaw Police Station, I was of the opinion that the petitioners had committed or had been concerned in commission of offences under Regs. 26(a), 26(d) and 33 of the Emergency Regulations. I was also of the opinion that the investigations were incomplete and it was necessary to detain the petitioners pending the completion of investigations."

In view of the conclusion that I have reached that the arrest and detention of the petitioners were illegal and unlawful and that there

was no legal justification for such arrest and detention, it is not necessary for me to go into the question whether the petitioners were, prior to their arrest and detention, informed of the reason for their arrest and detention.

The Petitioners in their applications to this court complained that their fundamental rights guaranteed to them by Articles 12(2), 13(1), 14(1) viz: freedom from arbitrary arrest and detention and freedom of speech and expression have been violated by administrative action.

The Respondents seek to justify the arrest and detention of the Petitioners on the basis of the powers vested in the Police by Regulations 18 and 19 of the Emergency Regulations. They state that the Petitioners had committed or had been concerned in commission of offences under Regulations 26(a), 26(d) and 33 of the Emergency Regulations. At the argument before us it was urged by Counsel for the Respondents that the petitioners had, by distributing leaflets X and X1, without the permission of the Police, in any event, violated Regulation 28 of the Emergency Regulations and that hence their arrest and detention were warranted in law.

Article 14 of the Constitution deals with those great and basic rights which are recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country. Freedom of speech guaranteed by Article 14(1)(a) goes to the heart of the natural right of an organised freedom-loving society to impart and acquire information. "Of that freedom one may say that it is the matrix, the indispensable condition of nearly every other freedom" *Palks v. Connecticut.*[1] This freedom is not absolute. There is no such thing as absolute or unrestricted freedom of speech and expression, wholly free from restraint; for, that would amount to uncontrolled licence which would tend to disorder and anarchy. Absolute and unrestricted individual rights do not and cannot exist in a modern State. The welfare of the individual, as a member of a collective society, lies in a happy compromise between his rights as an individual and the interests of the society to which he belongs. Article 29(2) of the Universal Declaration of Human Rights, sets forth the cases in which this freedom of expression may legitimately be restricted:- "In the exercise of his rights and freedoms everyone shall be subject only to

such limitations as are determined by law, solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." Our Constitution has rightly struck a proper balance between the varying competing social interests, and has in line with these principles, set forth the restrictions to which the fundamental right of speech and expression may be subject to. Though the rights of a citizen are neither absolute nor limitless, any limitation of the freedoms protected by Article 14 should however be closely scrutinised.

Article 14(1) of our Constitution provides that every citizen is entitled to freedom of speech and expression including publication.

Article 15(2) provides that the exercise and operation of this fundamental right shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence. Article 15(7) further provides that "the exercise and operation of all the fundamental rights declared and recognised by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law *in the interests of national security, public order* and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purpose of this paragraph "law" includes regulations made under the law for the time being relating to public security."

Section 5 of the Public Security Ordinance as amended by Law No. 6 of 1978 provides for the President to make Emergency Regulations. It enacted that (1) The President may make such regulations as appear to him to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot, or civil commotion, or for the maintenance of the supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by the preceding subsection, emergency regulations may, so far as

appear to the President to be necessary or expedient for any of the purposes mentioned in that subsection –

(a) authorize and provide for the detention of persons;

(b)

(c)

(d) provide for amending any law, for suspending the operation of any law and for applying any law with or without modification;

(e)

(f) and

(g)

The power of the President to make emergency regulations stems from the provisions of the aforesaid section 5 of the Public Security Ordinance as amended. It is the source of his legislative power to do so.

Section 8 of the Public Security Ordinance is a preclusive section providing that no emergency regulation and order, rule or direction made or given thereunder shall be called in question in any court.

Article 155(2) of the Constitution stipulates that the power of the President to make emergency regulations under the Public Security Ordinance ... shall include the power to make regulations, having the legal effect of overriding, amending or suspending the operation of the provisions of any law, *except the provisions of the Constitution.*

Thus the President's legislative power of making Emergency Regulations is not unlimited. It is not competent for the President to restrict via Emergency Regulations the exercise and operation of the fundamental rights of the citizen beyond that warranted by Article 15(1-8) of the Constitution. The width of the restriction envisaged by Article 15(7) cannot be added, varied or superseded by any emergency regulation in excess of that referred to in Article 15(7). For

a restriction, imposed by the Emergency Regulations which directly and substantially affects the freedom of speech, to be valid, it has to be based on one of the grounds of restriction specified in Article 15(2) and 15(7) and only to the extent referrable to it. Any further restriction will not have the support of law. The grounds of restriction specified in the limitation Article 15 are exhaustive and any other restriction is invalid.

Article 15(7) conditions the curtailment of the fundamental rights *in the interests of national security, public order etc.* In order that a law may be in the interest of national security, public order, there must be a proximate and reasonable nexus between say, (in the case of freedom of speech and expression) the nature of the speech prohibited and national security or public order – the phrase *"in the interests of public order"* is wider than the words "for the maintenance of national security or public order – the connection has to be intimate, real and rational. The phrase cannot be interpreted to mean that even if the connection between the restriction and the national security or public order is remote and indirect, the restriction can be said to be in the interests of national security or public order. A restriction can be said to be in the interests of security or public order only if the connection between the restriction and the security or public order is proximate and direct. Indirect or far-fetched or unreal connection between the restriction and security/public order would not fall within the purview of the expression in the interests of security/public order. "For the impugned restriction to be valid, the relationship between the impugned regulation and the purpose of the regulation must, of course be rational or proximate." *Yasapala v. Wickramasinghe.*[2] If the restrictions imposed are wide enough to cover permissible as well as impermissible restrictions, the regulation will be struck down as a whole, since the restriction put upon the freedom of speech will not be justified by Articles 15(2) or 15(7). Regulations attempting to restrict the freedom of speech must further be narrowly drawn. Precision of the regulation must be the touchstone in an area so closely touching a most precious freedom. Such a regulation must be strictly construed and greater the restriction, the greater the need for strict security by the court.

As stated earlier Article 155 of the Constitution has placed a limitation on the extensive power of the President to make emergency regulations under the Public Security Ordinance – not to enact law inconsistent with or in derogation of fundamental rights; if any regulation transgresses the limit, then to the extent of such contravention it is void. In the enforcing of a fundamental right the court is, by reason of the provisions of Article 155, necessarily charged with the duty of enforcing the fundamental right and of declaring void any regulation which is inconsistent with those rights to the extent of the inconsistency. When Article 15(7) provided that, for the purpose of that paragraph "law" included regulations made under the law for the time being relating to public security, it postulated *intra vires* regulations and not regulations prohibited by Article 155(2).

Section 5 of the Public Security Ordinance as amended by Law No. 6 of 1978, enables the President to make regulations "as appears to him to be necessary or expedient in the interests of public security and preservation of public order." The regulation owes its validity to the subjective satisfaction of the President that it is necessary in the interest of public security and public order. He is the sole judge of the necessity of such regulation, and it is not competent for this court to inquire into the necessity for the regulations *bona fide* made by him to meet the challenge of the situation. But under Article 15(7) of the Constitution it is not all regulations, which appear to the President to be necessary or expedient in the interests of public security and preservation of public order, made under section 5 of the Public Security Act which can impose restrictions on the exercise and operation of fundamental rights. It is only regulations which survive the test of being in the interests of national security, public order ..." in terms of Article 15(7). In a contest regarding the validity of a regulation the President's evaluation of the situation, that the Regulation appeared to him to be necessary or expedient is not sufficient, to lend validity to the regulation.

Under Article 15(7) the Regulation must in fact be in the interest of national security, public order ... The Regulation to be valid must satisfy the objective test. Though the court may give due weight to

the opinion of the President that the regulation is necessary or expedient in the interests of public security and order, it is competent to the court to question the necessity of the Emergency Regulation and whether there is a proximate or rational nexus between the restriction imposed on a citizen's fundamental right by emergency regulation and the object sought to be achieved by the regulation. If the court does not find any such nexus or finds that activities which are not pernicious have been included within the sweep of the restriction, the court is not barred from declaring such regulation void as infringing Article 155(2) of the Constitution. The integrity of the prohibition referrable to section 8 of the Public Security Ordinance is to that extent detracted. The Deputy Solicitor-General, very rightly conceded that this court can, today inquire into the validity of an Emergency Regulation. Section 8 of the Public Security Ordinance has to yield to Article 155(2) of the Constitution. Further Regulations made under said section 5 of the Public Security Act do not attract the immunity from challenge provided by Article 80(3) of the Constitution.

The basis of the three petitioners' applications is that they were unlawfully arrested and kept in unlawful detention. The respondents admit the arrest and detention. The question then arises as to on whom the burden of proof lies to establish the legality of the arrest and detention. One of the essential attributes of the Rule of Law is that executive action to the prejudice of or detrimental to the right of an individual must have the sanction of law. The State has got no power to deprive a person of his life or liberty without the authority of law. This is the essential postulate and basic assumption of the Rule of Law. Lord Atkin said "In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice." *Eshugbayi Eleko v. Govt. of Nigeria.*[3] Thus the burden rests on the respondents to justify the arrest and detention of the petitioners. The respondents must show that the regulation which gives them the power to arrest/ detain is covered by one of the permissible grounds of restriction e.g. interest of national security or public order stipulated by Article 15(7). If the impugned regulation imposes a restriction upon the

fundamental right, by interfering with its exercise by the petitoner, the burden of proving that the restriction is in the public interest lies upon the Respondents *(Satchanandan v. Union of India).*[4]

Dhanapala Abeysinghe who arrested the petitioners states in his affidavit, that he found documents in the possession which contained material "which would have brought the Government into hatred and contempt in the eyes of the people including the persons who had gathered there at the meeting." The documents referred to, are copies of the newspaper "Kamkaru Mawatha" and pamphlets Y1 and Y2. He arrested the petitioners on a charge of "distributing newspapers and other documents which brought the Government into hatred and contempt. The documents in question are X and X1 (*supra*).

M. C. Mendis, Senior Superintendent of Police, states in his affidavit that "having considered the material placed before me by the Officer-in-Charge of the Chilaw Police Station, I was of the opinion that the petitioners had committed or had been concerned in commission of offences under Regulations 26(a), 26(d) and 33 of the Emergency Regulations." The material that appears to have been placed before him consisted of the complaints of the Principal and Vice Principal, referred to above, documents X, X1, Y1 and Y2 and the newspaper "Kamkaru Mawatha". He adds because of that opinion, he issued the detention order 3R4, on 27.6.86 to detain the petitioners at the Chilaw Police Station.

Regulation 18 of the Emergency Regulation authorises the arrest without warrant and detention for purpose of search any person who is committing or has committed or whom he has reasonable ground for suspecting to be concerned in committing an offence under the Emergency Regulations.

Regulation 19(2) authorises the detention of the person detained under Regulation 18 for a period not exceeding ninety days.

The respondents allege that the petitioners have committed offences under Regulation 26(a), 26(d) and 33 and hence they were justified in arresting and detaining them.

The relevant regulations provide as follows:

"26. Any person who by words, whether spoken or written or by sign or visible representations or by conduct or by any other act –

(a) brings or attempts to bring the President or the Government into hatred or contempt, or excites, or incites or attempts to excite or incite feelings of disaffection to, or hatred or contempt of the President or the Government; or

(b)

(c)

(d) raises or creates or attempts to raise or create discontent or disaffection among the inhabitants or Sri Lanka or any section, class or group of them, shall be guilty of an offence ..."

"33. Whoever without lawful authority or reasonable excuse, the proof whereof shall lie on such person, has in his possession, custody or control, any book, document or paper containing any writing or representation which is likely to be prejudicial to the interests of national security or to the preservation of public order or which is likely to arouse, encourage or promote feelings of hatred or contempt to the Government or which is likely to incite any person directly or indirectly to take any step towards the overthrowing of the Government shall be guilty of an offence."

Sergeant Abeysinghe who testifies to having arrested the petitioners states that, having read the documents X, X1, Y1 and Y2 and the newspaper 'Kamkaru Mawatha' he suspected that the meeting was organised with a view of causing hatred and to incite feelings of disaffection against the Government among the students in the areas who had gathered there and that was why he arrested

the petitioners. M. C. Mendis, Senior Superintendent of Police also states that these documents contained material which would have brought the Government into hatred and contempt in the eyes of the people and that was why he issued the detention order 3R4 on these petitioners. These documents have been placed before this court. I regret to state that a scrutiny of these documents does not show that they contain any objectionable matter from which it would be possible for any reasonable man to draw the conclusion that the petitioners had committed or attempted to commit offences under Regulations 26(a) and/or (d) and Regulation 33 and that it was necessary to arrest or keep them in detention. In my view it is not sufficient for these Police Officers to say that they had material and that they felt satisfied on the basis of that material that it was necessary to take preventive action against the petitioners. Their word cannot be treated as an *ipse dixit*, when the material viz: the impugned documents are before us and we are in a position to see whether it was possible for a reasonable man to reach the conclusion or the satisfaction deposed to by the Police Officers. Satisfaction of the mind presupposes application of the mind and forming a conclusion after an assessment of the entire matter. It is not a mechanical act. Satisfaction must be such as can be reached by a rational mind. The satisfaction must be of a reasonable man. The Police Officer must apply his mind to see whether the consequences which he apprehends have a reasonable nexus to the nature and contents of the documents. If the apprehended consequences are far-fetched or unwarranted, then the satisfaction would not be real. Having perused the documents in question, I cannot persuade myself to think that a rational and reasonable person could have been satisfied that the writings would bring the President or the Government into hatred or contempt or incite feelings of any disaffection or that they could reasonably be characterised as subversive literature. The impugned writings do not contain anything objectionable.

The pamphlet Y1 is a printed article in Sinhala, titled "Defend the Right of Free Education – Build the Mass Movement to Defend the White Paper on Education." It purports to be a statement of the political committee of the Revolutionary Communist League. It is

dated 5.2.1982 and priced at Rs. 1/- runs into several pages criticising the Government's White Paper on Education as conducing to the erosion of free education.

The pamphlet Y2 dated 8.1.1986 is a Guru Handa Publication – Voice of the Teachers, titled 'Education is not a privilege but a right' and was issued by the Lanka Teachers Association. It purports to set out the hardships and handicaps suffered by the poor parents' children as against the privileges and advantages enjoyed by rich men's children. It sets out facts and figures substantiating the allegation that the poor man's child is disadvantaged.

The petitioners admit that the documents Y1 and Y2 contain criticism of the Government but state that it is a legitimate criticism of its stepmotherly attitude towards free education and village schools, but refute the allegation that they bring the President or the Government into hatred or contempt or ill-affection. I have scrutinised these pamphlets carefully to see whether the allegation of the respondent that the petitioners had by having in their possession Y1 and Y2 committed any offence under the Emergency Regulations 26(a) and (d). In my opinion these documents do not bear out the allegations that the Petitioners had committed the alleged offences. The Deputy Solicitor-General did not waste his time in trying to support the respondent's fanciful allegation based on Y1 and Y2.

The respondents did not file as an exhibit any copy of the newspaper 'Kamkaru Mawatha' which they seized from the petitioners. They did not rely on that newspaper to substantiate their allegation against the petitioners.

Finally the respondents were reduced to relying on the poster 'X' (*supra*) and the pamphlet 'X1' (*supra*) to justify their contention, that the petitioners had committed the said offences. The poster X can, by no stretch of imagination, be said to come within the category of documents referred to in the said Regulations. It is preposterous to state that the poster X, announcing the holding of a meeting to expatiate on "Popular Front Politics and Attack on Free Education" was calculated to bring the Government into hatred and contempt. The Deputy Solicitor-General did not base any arguments adverse to

the petitioners on the poster X and rightly did not seek to rationalise the view of the Police Officers.

The Deputy Solicitor-General had finally to rest the case of the Police Officers on the pamphlet X1. He did not accept the correctness of the translation of X1 (original is in Sinhala) filed by the petitioners and has chosen to file a separate translation which is reproduced above. It is not necessary to determine whose translation represents the correct version. Even on the above translation which is most favourable to the respondents, one cannot reasonably find anything incriminating in X1 or any foundation for the opinion that X1 was calculated to bring the Government into hatred and contempt. *Ex facie* X1 does not contain anything derogatory of the President or of the Government. The Deputy Solicitor-General was hard put to detect anything in X1, which would lend support to the allegation of the respondents that the document could justifiably be the basis of a charge under the aforesaid regulations. He has drawn our attention to some stray sentences in X1 (those sentences are sidelined in X1 above) which, according to him, may conduce to bring the President and Government into ridicule and contempt and have the tendency to incite feelings of disaffection. While appreciating his valiant effort to salvage the opinion of the Police Officers, I cannot identify in those sentences or in the tenor of the whole document X1, anything which can reasonably substantiate the accusation of the Police against the petitioners. He pointed to the passages in X1 where it is stated that "the Government is desperately endeavouring to perpetuate its existence having enmeshed itself in a *capitalist racist war*" and that "it is no secret that these people receive the complete co-operation of the political bosses and the head of the Catholic church of Chilaw – namely the Bishop, in this venture" and submitted that these passages go beyond criticism of the Government and are calculated to create discontent or disaffection among the inhabitants of Sri Lanka or any section of them. I cannot agree with this far-fetched construction. The comment may be strongly worded. But it does not have the pernicious tendency or intention of creating public disorder or disturbance. The pamphlet is not couched in any language calculated to incite persons to action. There is no advocacy of action. It certainly contains expressions of dissent and criticism against Government. But freedom of speech and expression would be

illusory if the Police can with impunity arrest and detain a person if he does not obsequiously sing the praises of the Government. The danger to a party in power is not the same as rocking the security or sovereignty of the State. The Police should not be timorous to scent in every utterance criticising the Government, an attempt to incite disaffection against or to overthrow the Government. It is to be noted that what is prohibited is advocacy of action and not advocacy of ideas. Only when the speech is an integral part of action does it become penalised.

Freedom of speech and expression means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode. It includes the expression of one's ideas through banners, posters, signs etc. It includes the freedom of discussion and dissemination of knowledge. It includes freedom of the Press and propagation of ideas; this freedom is ensured by the freedom of circulation. "The right of freedom of speech and press includes not only the right to distribute, the right to receive, the right to read and freedom of inquiry and the right to teach ... These are proper peripheral rights" per Douglas, J., in *Griswald v. Connecticut.*[5]

The freedom of speech and expression is not only a valuable freedom in itself but is basic to a democratic form of Government which proceeds on the theory that problems of government can be solved by the free exchange of ideas and by public discussion – Servai, Indian Constitution, 3rd Ed. Vol. I at 491. Free discussion of governmental affairs is basic to our constitutional system. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association, the People are the sovereign, not those who sit in the seats of power. It is the voice of the People which ultimately prevails. Free political discussion is thus necessary to the end that government may be responsive to the will of the people and changes may be obtained by peaceful means. The Constitutional protection for speech and expression was fashioned to bring about political and social changes desired by the people.

Freedom of speech and expression consists primarily not only in the liberty of the citizen to speak and write what he chooses, but in

the liberty of the public to hear and read, what it needs. No one can doubt if a democracy is to work satisfactorily that the ordinary man and woman should feel that they have some share in Government. The basic assumption in a democratic polity is that Government shall be based on the consent of the governed. The consent of the governed implies not only that consent shall be free but also that it shall be grounded on adequate information and discussion aided by the widest possible dissemination of information from diverse and antagonistic sources. The crucial point to note is that freedom of expression is not only politically useful but that it is indispensable to the operations of a democratic system.

"Public opinion plays a crucial role in modern democracy. Freedom to form public opinion is of great importance. Public opinion, in order to meet such responsibilities, demands the condition of virtually unobstructed access to and diffusion of ideas. The fundamental principle involved here is the people's right to know. The freedom of speech guaranteed by the Constitution embraces at the least the liberty to discuss publicly all matters of public concern without previous restraint or fear of subsequent punishments." *Thornhill v. State of Alabama,*[6] – Without free political discussion, no public education, so essential for the proper functioning of the process of popular government, is possible. The welfare of the community requires that those who decide shall understand them. The right of the people to hear is within the concept of freedom of speech.

Freedom of discussion must embrace all issues about which information is needed to enable the members of a society to cope with the exigencies of their period. It is essential to enlighten public opinion in a democratic state; it cannot be curtailed without affecting the right of the people to be informed through sources, independent of the government, concerning matters of public interest. There must be untrammelled publication of news and views and of the opinions of political parties which are critical of the actions of government and expose its weakness. Government must be prevented from assuming the guardianship of the public mind. Truth can be sifted out from falsehood only if the Government is vigorously and constantly cross-examined.

"Authority ... is to be controlled by public opinion, not public opinion by authority" *West Virginia State Board v. Barnette.*[7] "The ultimate good desired is better reached by free trade in ideas – the best test of truth is the power of thought to get itself accepted in the competition of the market." Per Justice Holmes in *Abrams v. U.S.*[8]

One of the basic values of a free society to which we are pledged under our Constitution is founded on the conviction that there must be freedom not only for the thought that we cherish, but also for the thought that we hate. All ideas having even the slightest social importance, unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion have the protection of the constitutional guarantee of free speech and expression. Hence criticism of government, however unpalatable it be, cannot be restricted or penalised unless it is intended or has a tendency to undermine the security of the State or public order or to incite the commission of an offence. Debate on public issues should be uninhibited, robust and wide open and that may well include vehement, caustic and sometimes unpleasantly sharp attacks on Government. Such debate is not calculated and does not bring the Government into hatred and contempt.

"Criticism of public measures or comment on Government action however strongly worded is within reasonable limits and is consistent with the fundamental right of freedom of speech and expression. This right is not confined to informed and responsible criticism but includes the freedom to speak foolishly and without moderation. So long as the means are peaceful, the communication need not meet "standards of common acceptability." *Austin v. Keele.*[9]

The perspective of free criticism with its limits for free people everywhere was eloquently brought out by Sir Winston Churchill on the historic censure motion in the Commons, as Britain was reeling under defeat at the hands of Hitler –

> "This long debate has now reached its final stage. What a remarkable example it has been of the unbridled freedom of our Parliamentary institutions in time of war. Everything that could be thought of or raked up has been used to weaken confidence

in the Government, has been used to prove that Ministers are incompetent and to weaken their confidence in themselves, to make the army distrust the backing it is getting from the civil power, to make workmen lose confidence in the weapons they are striving so hard to make, to present the Government as a set of non-entities over whom the Prime Minister towers, and then to undermine him in his own heart, and, if possible, before the eyes of the nation. All this poured out by cable and radio to all parts of the world, to the distress of all our friends and to the delight of all our foes. I am in favour of this freedom, which no other country would use, or dare to use, in times of mortal peril such as those through which we are passing."

It is only when the words, written or spoken, which have the pernicious tendency or object of creating public disorder that law steps in to prevent such activities in the interests of public security or public order. However precious the freedom of speech may be in a democratic society, the means can never override the end itself. The object of freedom of speech is to "maintain the opportunity of free political discussion to the end that government may be responsive to the will of the people and that changes, if desired may be obtained by peaceful means." *Terminiells v. Chicago.*[10] This opportunity can hardly be maintained without the existence of an organised government. No State can, therefore, tolerate utterances which threaten the overthrow of organised government by unlawful or unconstitutional means. The reason is that the security of the State or organised government is the very foundation of the freedom of speech. None of the freedoms guaranteed by our Constitution can flourish in a state of disorder. Order is an elemental need in any organised society. The law restricting freedom of speech is not solely directed against undermining the security of the State or its overthrow, but is made generally in the interest of public order. Freedom of speech must yield to public order. In the interests of public order the State can prohibit and punish the causing of loud noises in the streets and public places by means of sound amplifying instruments, regulate the hours and places of public discussion, the use of public streets for the purpose of exercising freedom of speech; provide for the expulsion of hecklers from meetings and assemblies, punish utterances tending to incite an immediate breach

of the peace or riot as distinguished from utterances causing mere "public inconvenience, annoyance or unrest" *Superintendent Central Prison v. Lohia.*[11] The phrase *in the interests of public order* "covers action taken for the avoidance of excessive noise seriously interfering with the comfort or convenience of a substantial number of persons. The phrase would of course cover action for the avoidance of any behaviour likely to lead to breach of the peace and perhaps excessive noise can be brought under that heading." Per Lord Pearson, delivering the judgment of the Privy Council in *Francis v. Chief of Police.*[12]

As stated earlier the view of the Police is untenable and hence the arrest and detention of the petitioners are not authorised in law. Since the culpable action of the Police Officers constituted executive or administrative action, within the meaning of Article 126 of the Constitution, the State is liable for their infringement of petitioners' fundamental rights.

Counsel for the State finally sought to justify the conduct of the Respondents by submitting that the petitioners had, on the admitted facts, violated Regulation 28(1) of the Emergency Regulations. For committing that offence they could lawfully be arrested and detained. Regulation 28(1) reads as follows:-

> "The person shall without the permission of the Inspector General of Police or any Police Officer authorised in that behalf by the Inspector General of Police, affix in any place visible to the public or distribute among the public any posters, handbills or leaflets."

It is not denied that the Petitioners had not obtained any such permission as required by Regulation 28(1) for distributing the poster X and leaflet X1. The Petitioners contend that they are not bound in law to apply for and obtain any such permission to distribute such innocuous documents. They submitted that Regulation 28(1) was *ultra vires* the regulation-making power of the President under section 5 of the amended Public Security Ordinance read with Article 155(2) of the Constitution and is void. They pointed to the fact that Regulation 28(1) applied to *"any posters, handbills or leaflets"* and

that it required the permission of the Police whatever its character for its valid distribution. They argued that this requirement of permission from the Police *ex facie* restricts the exercise and operation of their fundamental right of freedom of speech and expression and that this restriction is not referrable to the provisions of Article 15(2) and 15(7) of the Constitution. It is not disputed that Article 15(2) does not apply to the facts of the case. But the Deputy Solicitor-General urged that emergency regulations are 'law' in terms of Article 15(7) and that the sweep of the fundamental right declared by Article 14(1)(a) can lawfully be restricted by Emergency Regulations such as Regulation 28. Counsel for the petitioners countered that a regulation such as Regulation 28 which provides for obtaining of prior Police permission for distribution of posters and leaflets, of all categories, be they be innocuous or harmful, be they be political pamphlets, seditious literature or party manifestos cannot be justified as having been passed in the interests of "national security, public order etc., in terms of Article 15(7) – where is absent any proximate and reasonable nexus between the nature of the poster/leaflet and national security or public order etc. Counsel further pointed out that the permission, required by Regulation 28 to render legal the distribution of a poster/handbill could be granted or refused at the uncontrolled will or opinion of the Police Official. He submitted that freedom of expression, one of whose facets is the distribution of posters, handbills and leaflets, would not truly exist if that right could be exercised only with the grace or goodwill of the police. It is the basic right of a citizen to publish what he chooses without obtaining the prior permission from any authority, subject only to the responsibility before the law.

Laws that trench on the area of speech and expression must be narrowly and precisely drawn to deal with precise ends. Over-breadth in the area has a peculiar evil, the evil of creating chilling effects which deter the exercise of that freedom. The threat of sanctions may deter its exercise almost as patently as the application of sanctions. The State may regulate in that area only with narrow specificity. There can be no doubt of the legitimacy of the Government's interest in protecting the State from subversion. But "even though the Government's purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal

liberties when the end can be more narrowly achieved." *Shelton v. Tucker.*[13]

Liberty of circulating is as essential to the freedom of speech as liberty of publishing; indeed without the circulation the publication would be of little value. *Ex parte Jackson.*[14] This freedom is not to be confined to newspapers but embraces pamphlets and leaflets. "These indeed have been historic weapons in the defence of liberty, as the pamphlets of Thomas Paine and others abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion – Per Chief Justice Hughes in *Lovell v. City of Griffin.*[15]

The general rule is that any form of previous restraint is regarded on the face of it as an abridgment of the freedom of expression and offends Article 14(1)(a) of the Constitution.

It was said in *New York Times v. U.S.*[16] that "any system of prior restraints of expression comes to this court, bearing a heavy presumption against its constitutional validity." *Bantan Books v. Sullivan.*[17] The Government thus carries a heavy burden of showing justification for the enforcement of such a restraint *"Organisation for a Better Austin v. Kiefe."* [18]

Pre-censorship is under our law not necessarily unconstitutional and can be justified if brought within the ambit of Article 15. However any system of pre-censorship which confers unguided and unfettered discretion upon an executive authority without narrow objective and definite standards to guide the official is unconstitutional. "It is settled that an ordinance which makes the peaceful enjoyment of freedoms which the constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or licence which may be granted or withheld in the discretion of such an official is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms – *Stant v. Banter.*[19] A person faced with such an unconstitutional licencing may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a licence" *Shuttleworth v. City of Birmingham.*[20]

Regulation 28 violates Article 12 of the Constitution. The Article ensures equality before the law and strikes at discriminatory State action. Where the State exercises any power, statutory or otherwise it must not discriminate unfairly between one person and another. If the power conferred by any regulation on any authority of the State is vague and unconfined and no standard or principles are laid down by the regulations to guide and control the exercise of such power, the regulation would be violative of the equality provision because it would permit arbitrary and capricious exercise of power which is the antithesis of equality before law. No regulation should clothe an official with unguided and arbitrary powers enabling him to discriminate – *Yick Wo v. Hopkins.*[21] Regulation 28 confers a naked and arbitrary power on the Police to grant or refuse permission to distribute pamphlets or posters as it pleases, in exercise of its absolute and uncontrolled discretion, without any guiding principle or policy to control and regulate the exercise of such discretion. There is no mention in the regulation of the reasons for which an application for permission may be refused. The conferment of this arbitrary power is in violation of the constitutional mandate of equality before the law and is void. The exercise of the basic freedom of expression cannot be made dependent upon the subjective whim of the Police, without offering any standard of guidance. Where power is entrusted to a State official to grant or withhold permit or licence in his uncontrolled discretion, the law *ex facie* impinges the fundamental rights under Article 12. The permission of the Police mandated by Regulation 28 is a form of prior restraint. It abridges the freedom of expression guaranteed by the Constitution. It gives the Police absolute discretionary power to control the right of citizens to exercise their right of expression. There is no rational or proximate nexus between the restriction imposed by Regulation 28 and national security/public order. It is unconstitutionally overbroad. It strikes at the foundation of the fundamental right of speech and expression by subjecting it to prior permission. Hence that Regulation is invalid and cannot form the basis of an offence in law.

For the foregoing reasons, I hold that the petitioners' fundamental rights of freedom from arbitrary arrest and detention and freedom of speech and expression secured to them by Articles 13 and 14 have been violated by executive/administrative action.

The petitioners have been held in unlawful detention from 26.6.86 till 7.8.86. The detention resulted from the unlawful detention order 3R4.

The petitioners are entitled to relief in terms of Article 126(4) of the Constitution.

Since the infringements complained of by the petitioners were caused by executive/administrative action the State is liable to render the petitioners relief that is just and equitable in the circumstances. The infringements in question constitute serious violations of a citizen's fundamental rights. They call for substantial relief being granted to the aggrieved parties. However, in the special circumstances of this case, I direct the State to pay each of the petitioners in Application Nos. 107, 108 and 109 a sum of Rs. 25,000/- as damages, on account of the violations complained of.

I allow the applications of the petitioners and order the 1st respondent to pay each of the petitioners a sum of Rs. 3,000/- as costs of his application to this court.

ATUKORALE, J. – *I agree.*

WANASUNDERA, J.

I am in agreement with the lucid and learned exposition of the provisions of Article 14(1)(a) of the Constitution relating to the fundamental right of freedom of speech and expression contained in the judgment of the Chief Justice. I myself subscribe strongly to the view that the constitutional provisions of Article 15(2) and (7) cannot be availed of to prohibit legitimate political expression of opinion and discussion except probably at a time of gravest emergency and danger to the survival of the State. So important is this fundamental right, the Chief Justice has rightly cited the statement that this right is "the matrix, the indispensable condition of nearly every other freedom". While there can be no disagreement about the importance and range of this provision of the Constitution, difficulties do arise in

the application of the abstract principle embodying this right to concrete situations. Since my own evaluation of the facts has led me to a slightly different conclusion, it is necessary that I set down my reasons in a separate judgment.

It is unnecessary to traverse the ground covered by his judgment except to underscore the factual matters which I think lend themselves to a different interpretation. The arrest of the petitioners took place on the 26th of June 1986. On the morning of that day, the Police had received two complaints from two responsible persons, namely, the Principal of St. Mary's College, Chilaw, and the Vice Principal of Ananda College, Chilaw, to the effect that a meeting had been organised and was shortly to be held by some revolutionaries with a view to creating unrest among the students in the area. The Principal of St. Mary's College also informed the Police that he had received a warning letter on 23rd June 1986 signed "Eelam Tigers" threatening to blow up the school. Rightly or wrongly, the Principal coupled this threat with the proposed meeting and thought that the Police should be apprised of this situation.

In this connection it may be noted that under the Emergency Regulations there is a duty on every person who becomes aware of an intention or an attempt or a preparation to commit an offence under any emergency regulation to give information to the authorities (regulation 49). And regulation 45 makes every attempt and even the preparation to commit any such offence, an offence by itself.

The meeting was due to commence at about 3.00 p.m. on that day. Before the meeting commenced the Police had rushed to the scene, dispersed the students who had come to the meeting, and arrested the three petitioners. If the meeting had been held and speeches made, we do not know whether the Police would have been placed in a better position to defend this petition. What we now have are the acts and events leading up to the start of the meeting and we have to decide whether they were sufficient to permit the arrest and whether they can constitute an offence. The Police took into custody certain documents belonging to and in the possession of the petitioners. Copies of the printed poster "X" had been affixed on the walls. The leaflets "X1" had been distributed prior to the

meeting. The petitioners also had in their possession (1) "Y1" – a pamphlet on "Free Education", (2) "Y2" – a document entitled "Guru Handa Prakashana", and (3) 46 copies of a newspaper called "Kamkaru Mawatha".

The Chief Justice has set out the translation of the contents of leaflet "X1" *in extenso* in his judgment. Since the State has submitted that some of the statements therein are tendentious or seditious, I shall highlight those passages:

> 2. "The Government desperately endeavouring to perpetuate its existence having enmeshed itself in a *capitalist racist war* has no funds to spend on education and it has become necessary to do away with all these rights. These are pressures that the oppressed worker students cannot in any manner bear."
>
> 3. "It is as a first step in the achieving of these wicked ends that over a 100 militant students have been banned from attending classes. It is under these circumstances that the University Teachers who receive a beggarly salary from the paltry amount set apart for education by the Government have stepped in to fight with the Government."
>
> 4. "L.S.S.P. and the Stalinist leadership having not supported the students' struggle branded them as strugglers of immature people and stated that nothing could be done owing to the crisis in the North. They opposed the formation of a Student Organisation. The Nava Samasamaja and the other capitalist (leadership) who said that solutions can be found by having discussions with the capitalist Government are fully responsible for the critical situation that has arisen today."
>
> 10. "We who are fighting for the workers to capture State power invite progressives to attend a lecture on the topic "Free Education and Popular Frontism" to be delivered at Luxmi Hall, Chilaw, at 3.00 p.m. on the 26th of this month."
>
> "Young Socialist of the Revolutionary Communist League,
> 'Kamkaru Mawatha'."

Document "Y1" is a tract in Sinhala running into 10 pages. A detailed consideration of this would require considerable time. It has been issued by the Political Committee of the Revolutionary Communist League. One of the petitioners is the organiser of the "Young Socialists" in Chilaw and is a member of the Revolutionary Communist League. Another petitioner is the brother of the above petitoner. The organisation is not a proscribed organisation and the State has also not stated that it has any links or affiliations with any proscribed organisation.

The legal provisions permitting arrest and detention can be found both in the emergency regulations and in the Criminal Procedure Code. Regulation 18(1) is worded as follows:-

> "Any police officer, any member of the Sri Lanka Army, the Sri Lanka Navy or the Sri Lanka Air Force, or any other person authorised by the President to act under this regulation may search, detain for purposes of such search, or arrest without warrant, any person who is committing or has committed or whom he has reasonable ground for suspecting to be concerned in or to be committing or to have committed, an offence under any emergency regulation, and may search, seize, remove and detain any vehicle, vessel, article, substance or thing whatsoever used in or in connection with the commission of the offence."

The material words for the purpose of this case are "whom he has reasonable ground for suspecting to be concerned in or to be committing or to have committed an offence under any emergency regulation."

The powers of a police officer under the emergency regulations are in addition to and not in derogation of his powers under the ordinary law (regulation 54). The relevant provisions of the Criminal Procedure Code relating to this arrest is found in section 32(1)(b) and is worded as follows:-

> "any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been

made or credible information has been received or a reasonable suspicion exists of his having been so concerned."

To judge whether or not the complaint was reasonable or that a reasonable suspicion or a reasonable ground for suspecting existed for making the arrest, the state of mind of the person making the arrest at the time of making the arrest has to be ascertained. In this connection the court has to take cognizance of the fact that a state of terrorism amounting to almost civil war is raging in the northern and eastern provinces of the country and that incidents like bomb explosions of a terrorist nature occur sporadically in other parts of the country where subversion cannot be ruled out. The safety of the State and the protection of the general public have now become more than ever the paramount duty of the State and of the armed forces and the Police. A state of emergency is in existence and prevails in the country and it is the duty of the Police and armed forces to be as alert and vigilant as possible to defend the State and the People from armed attack and subversion. In that context, would it have been consistent with the vigilance expected of the Police to ignore the complaint made by two responsible officers of two responsible institutions that some persons were planning to take steps to blow up a school and also create unrest and disturbances among the students and have it directed against the government? Was that not a matter eminently calling for action?

The Police team had promptly arrived at the scene of the offence. They have to take an instantaneous decision while in the field and while the action was proceeding. They had received two complaints of an attempt or preparation to create unrest among students from responsible persons. At the scene there was a crowd of young persons and a meeting was about to begin. Posters (which cannot be regarded in isolation, but constituting part and parcel of the transaction) were affixed at that place. Regulation 28(1) to which I will refer later bans the affixing of posters without the permission of the authorities. The petitioners were in possession of literature, which on a cursory glance could have appeared to be subversive. Document "X1" appeared to contain if not seditious statements at least statements that can be regarded as tendentious. "Y" was a ten-paged tract in Sinhala. All this material required examination which

may have taken at least a few hours, if not days, and a matter in which legal opinion could well have been considered necessary. But Sergeant-Major Dhanapala Abeysinghe who actually made the arrest says that on a cursory reading he found that this material transgressed the law and he took the petitioners into custody after informing them that they had violated the law in distributing material that brought the Government into hatred and ridicule.

In deciding on the validity of the arrest, the sole issue for the court is the knowledge and state of mind of the officer concerned at the time of the making of the arrest – *Gunasekera v. de Fonseka*,[22] and *Muttusamy v. Kannangara* [23]. Our courts had held that –

> "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 statements by other persons in a way which justify him in giving them credit." *(Baba Appu v. Adan Hamy)* [24]

The principles and provisions relating to arrest are materially different from those applying to the determination of the guilt or innocence of the arrested person. One is at or near the starting-point of criminal proceedings while the other constitutes the termination of those proceedings and is made by the judge after hearing submissions from all parties. The power of arrest does not depend on the requirement that there must be clear and sufficient proof of the commission of the offence alleged. On the other hand, for an arrest a mere reasonable suspicion or a reasonable complaint of the commission of an offence suffices. I should however add that the test is an objective one. I am of the view that the latter requirement was fulfilled in this case.

I find that the corresponding provisions of the U.K. law have been interpreted by the courts on similar lines. In *Dumbell v. Roberts*,[25] Scott, L.J. said:

> "127 the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called upon

before acting to have anything like a *prima facie* case for convicting ... The duty of the police ... is, no doubt, to be quick to see the possibility of crime, but equally they ought to be anxious to avoid mistaking the innocent for the guilty ... The police are required to be observant, receptive and open-minded and to notice any relevant circumstance which points either way, either to innocence or guilt. They may have to act on the spur of the moment and have no time to reflect and be bound, therefore, to arrest to prevent escape; but where there is no danger of the person who has *ex hypothesi* aroused their suspicion ... (escaping) ... they should make all presently practicable enquiries from persons present or immediately accessible who are likely to be able to answer their enquiries. I am not suggesting a duty on the police to try to prove innocence; that is not their function; but they should act on the assumption that their *prima facie* suspicion may be ill-founded."

In *Hussien v. Chog Fook Kam*,[26] Lord Devlin said:

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.' Suspicion arises at or near the starting-point of an investigation of which the obtaining of *prima facie* proof is the end. When such proof has been obtained, the police case is complete, it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police inquiries are examples of those factors ...

... There is another distinction between reasonable suspicion and *prima facie* proof. *Prima facie* proof consists of admissible evidence. Suspicion can take into account matters that could

not be put in evidence at all. There is a discussion about the relevance of previous convictions in the judgment of Lord Wright in *McArdle v. Egan*..[27] Suspicion can take into account also matters which, though admissible, could not form part of a *prima facie* case. Thus the fact that the accused has given a false alibi does not obviate the need of *prima facie* proof of his presence at the scene of the crime; it will become of considerable importance in the trial when such proof as there is being weighed perhaps against a second alibi; it would undoubtedly be a very suspicious circumstance ..."

This wider discretion vested in the Police is logical and is also necessary for the proper performance of the functions of the Police and for the maintenance of the law and order in the country.

Just as the Chief Justice has stated that over-breadth in the restriction of the freedom of speech and expression has a peculiar evil, the evil of creating chilling effects which deter the exercise of that freedom, any restriction on the powers of the Police in this area of action will also have a peculiar evil, the evil of creating a chilling effect which will inhibit law-enforcement officers from the due performance of their duties which ensure the protection and safety of the citizens and their property. No police officer can predict the final outcome of a case or how a legal provision would be interpreted by the court. If they are placed in peril and heavy damages awarded in respect of their acts where prosecution were to fail, no police officer would be inclined to perform his functions and may henceforth decide to leave well alone not only doubtful cases but practically all cases, thereby bringing the administration of justice to a standstill. In my view such a construction of the powers of arrest was furthest from the minds of the legislators.

For these reasons I would hold that the arrest was legal and does not constitute a violation of the petitioners' fundamental right. But this does not mean that the subsequent detention (except for reasonable period to scrutinise the material) can be excused. Any detention beyond what can be justified transgresses the law.

Looking at it objectively, I agree with the Chief Justice that the material before us falls short of establishing the commission of an offence by the petitioner, although in my view it was adequate to justify the arrest. In this connection I should also like to add that we are here not dealing with a matter relating to judicial proceedings, but in regard to a detention by the executive authorities. The provision for the production of the detainee before a judge at one stage of the proceedings is in fact more of a formal nature.

The Deputy Solicitor-General ultimately fell back on regulation 28(1) of the Emergency Regulations to defend the conduct and actions of the respondents. Regulation 28(1) is worded as follows:-

> "No person shall, without the permission of the Inspector General of Police or any police officer authorized in that behalf by the Inspector General of Police, affix in any place visible to the public or distribute among the public any posters, handbills or leaflets."

The distribution of the pamphlets was admitted by the petitioners and Dhanapala Abeysinghe had come to the conclusion that the material was seditious or tendentious.

While the arrest can be justified, different considerations as I have stated earlier apply when we have to determine whether or not an offence under this provision can ultimately be made out.

It may have been possible to advance an argument to preserve the application of this regulation to the grounds referred to in Article 15(7). But counsel for the State, in his desire to make it applicable to the present case, took a mere ambitious course and sought to defend the regulation in the context of a wider application. The Chief Justice has dealt with the validity of the regulation on the level of his submission and has come to the conclusion that the entire regulation has to be declared invalid. I am in agreement with his conclusion. I may add that counsel's submission that the regulation is incomplete and has to be supplemented on the most vital and essential component of classification by the exercise of discretion by a police officer (who may even be an Inspector or Sub-Inspector and who is

not even indicated in the regulation) is a further ground for holding it invalid. Where a fundamental right has to be restricted or limited, it can only be done by a law (including an Emergency Regulation), but such law must express and contain within itself all the vital and necessary components relating to the restriction. An incomplete regulation omitting the most essential component and requiring that it be supplemented by the discretion of an administrative officer cannot be regarded as a "law" restricting the fundamental right within the meaning of Article 15. This is an additional ground for nullifying regulation 28(1).

Since I hold that the arrest can be justified, there remains for consideration only the matter of the detention (beyond a reasonable period necessary for processing the matter) and the transgression of the right of freedom of speech and expression. I yield to none in the protection of those fundamental freedoms and in the appreciation of their importance and relevance to a democratic system of government. The fact that there was a reasonable basis for the initial action of the arrest and that the Police have acted *bona fide* seems to throw a somewhat different complexion on the matter and makes me view it from a standpoint different from that of the judgment of the Chief Justice. This is not a case of the Police riding roughshod over the rights of citizens. The Police action was *bona fide* and within the scope of their functions, and the outcome of the case has depended on a legal issue. While the detention after the period that would be reasonably required for processing the file and inquiry notes would be unjustified, it appears that this delay is due to the authorities not taking prompt steps in the matter. Making every allowance for delays that may be occasioned by reason of the present situation, yet I think these petitioners have been deprived of their liberty for a considerable period of time. What is involved is a very important right and they are entitled to relief.

In my opinion the transgression of the petitioners' rights would be sufficiently compensated and the ends of justice met if all the petitioners are awarded a sum of Rs. 10,000/- each. The petitioner in S.C. Application 109 had been a University lecturer at one time, but this, I think, is no reason to draw a distinction between him and the others as regards compensation. Each petitioner would also be

entitled to costs in a sum of Rs. 3,000/-. This is a liability incurred by the State and payable by the State.

L. H. DE ALWIS, J.

I have had the benefit of perusing the judgments prepared by My Lord the Chief Justice and Wanasundera, J., and agree with the conclusion reached by Wanasundera, J. I set out my reasons in a separate judgment.

I shall first deal with the question of the arrest and detention of the three Petitioners.

Sergeant Major Abeysinghe, of the Chilaw Police Station who made the arrest stated in his affidavit that upon a complaint made on 26.6.86 by George Bertram Remius Silva, the Principal of St. Mary's College, Chilaw, and by Singapulige Vincent, the Vice Principal of Ananda College, Chilaw, that a public meeting had been organized by certain revolutionary groups with a view to creating unrest among the students in the area, he set out with a police party in uniform at about 2.30 p.m. and proceeded to Luxmi Hall, Chilaw, which was the venue of the meeting, to investigate the complaint.

The complaint had been made at 10.30 a.m. that day at the Chilaw Police Station by the Principal and Vice Principal of the two respective schools. They produced a letter, the envelope and a leaflet printed in red ink and handed them over to the Police for investigation. The letter was not produced in Court but its contents were taken down in the Information Book by the Police Officer who recorded their complaints marked 3R1 and 3R2. The letter had been received by the Principal on the 23rd of June and ran as follows :—

> "Comrade Brother George,
>
> Are you not 'holding pot' to Jayawardena of Sri Lanka very much ? Your school will be blown up between the months of June and July. Comrade take care. We also live in Chilaw. This is Eelam Tigers."

The Principal of St. Mary's College in his statement said that on receipt of the letter he stayed in the school in great fear for the safety of his students and himself. He did not rush with the letter to the Police but made secret inquiries into it himself. But when one of the members of his staff produced before him a leaflet printed in red (x1) handed to him by one of the students, entitled "Defend the rights of students and teachers", published by members of a Revolutionary Group, stating in the last paragraph that the working class who are fighting to take over the government request the students to attend a lecture on 26 June at 3 p.m. at Luxmi Hall, Chilaw on the subject "Right to Free Education and Popular Frontism" his fears of the threat conveyed in the earlier letter were apparently confirmed as day of the lecture fell between the months of June and July. He also felt that the students were being invited to the lecture "with some intention of *inciting* and inducing them" (to action). It was then that he went the next morning to the Chilaw Police Station along with Vice Principal of the other school with whom he had discussed the matter and made the complaint.

Sgt. Major Abeysinghe says in his affidavit that he proceeded to investigate the complaint made at 2.30 p.m. on 26.6.86. On his arrival at Luxmi Hall with a Police Party, a group of persons who had gathered there for the lecture took to their heels. He questioned the petitioners who were present and found with them 46 copies of a newspaper entitled "Kamkaru Mawatha", a pamphlet issued by the Revolutionary Communist Party on Free Education (Y1) and a document entitled "Kaleena Guru Handa Prakashana" (Y2). Y1 runs into 10 pages, each containing 3 columns of reading matter in Sinhala. He read the documents Y1 and Y2 and suspected that the meeting was organised with a view to causing hatred and to incite feelings of disaffection against the Government. He therefore decided to arrest the petitioners. Before doing so he informed them that he was taking them into custody for distributing newspapers and other documents which brought the Government into hatred and contempt, [which are offences under Emergency Regulations 26(a) and (d)]. Having arrested them he produced them at the Chilaw Police Station at 3.35 p.m. where he recorded their statements. The petitioner (in application No. 107/86) admitted in his statement that he had distributed leaflets among the school children. Sgt. Major

Abeysinghe was aware that permission of the Inspector General of Police had not been obtained for the distribution, (which is an offence under Regulation 28).

The petitioner in Application No. 107/86 is a member of the Revolutionary Communist League and had organized the lecture that day. The petitioner in 108/86 is his brother, and the petitioner in Application No. 109/86, had come there to deliver the lecture and is a Central Committee Member of the Revolutionary Communist League.

These are the circumstances which led to the arrest of the petitioners. The arrest was made in pursuance of the powers vested in a Police Officer in terms of Emergency Regulation 18(1). As pointed out by Wanasundera, J., the material words for the purpose of this case are, "whom he has reasonable ground for suspecting to be concerned in or to be committing or to have committed an offence under any Emergency Regulation." I agree with all that Wanasundera, J., has said in regard to the state of terrorism prevailing in the country at the time and the quick decision Sgt. Major Abeysinghe had to make that afternoon in arresting the petitioners. He had no time to make a close scrutiny of the documents taken into custody by him. The Sgt. Major says in his affidavit that the complaint was that a public meeting had been organized by a certain revolutionary group with a view to creating *'unrest'* among the students in the area. But the word used in the complaint by Principal of St. Mary's College is "inciting" (උපිගැන්වීමක් කිරීමේ චේතනාවෙන්). The complaints 3R1 and 3R2 are produced in the proceedings and it is on these complaints that the Sgt. Major set out for inquiry. They form part and parcel of his affidavit. The Sgt. Major's affidavit is not a reflection of his own state of mind on the complaint but simply a record of the contents of the complaint. When he therefore erroneously used the word "unrest" he must be taken to have meant "incitement" since that was the word that appeared in the complaint. The students were young and immature and could easily have been roused to action. Thus, taking into consideration the contents of the complaints of the Principal and Vice Principal of the two schools, of which Sgt. Major Abeysinghe himself would have been aware on reading the Police information Book before setting out for inquiry, and also taking judicial notice of the state of civil unrest prevailing in the country caused by acts of

terrorism committed by certain groups of persons, I agree with Wanasundera, J., that applying the objective test a rational man would have had reasonable grounds for entertaining the suspicion that led Sgt. Major Abeysinghe to make the arrest under regulation 18(1).

It was submitted by Counsel for the petitioners that that the arrest and detention were unlawful because the petitioners were not informed of the reason for their arrest and detention. Sgt. Major Abeysinghe in his affidavit has stated that he informed the petitioners that he was taking them into custody for distributing documents which brought the government into hatred and contempt. Sgt. Major Abeysinghe on a reading of the documents Y1 and Y2 coupled with the background information that he had, entertained a reasonable suspicion rightly or wrongly in good faith, that offences under Emergency Regulation 26(a), (d), 28 and 33 were being committed. The petitioners were therefore caught by him "*in flagrante delicto*" so to say, and there was no need for him to have informed them of the reason for their arrest as they would have known why. Nevertheless the Sgt. Major, out of an abundance of caution, did inform them of the reason for their arrest.

In *Mrs. Sita Gunasekara v. A. T. de Fonseka & 2 others*,[22] H. N. G. Fernando, C.J., while agreeing with the decisions in the cases cited by him, to the effect that when a Police Officer arrests a person without a warrant, he should, save in exceptional cases, inform the suspect of the true ground of arrest said at page 250 as follows :-

> "According to the decisions which I have cited there are exceptional cases in which the requirement will not apply, particularly cases in which it is obvious in the circumstances that a person must necessarily know why he is being arrested . . . So also if a person is arrested under Regulation 19 of the Emergency Regulations (No. 6 of 1971, which is similar to Emergency Regulation 18 in the present case) **when he is committing an offence,** then the requirement that he be informed of the ground for his arrest may not apply." In that case the arrest did not fall within these exceptions. But in the present case it does. In any event the petitioners have been informed of the reason for their arrest. The Sgt. Major has made

a prompt entry in his notes (3R3) that day itself, that he explained the charge against the petitioners before taking them into custody and I accept it.

I am therefore of the view that the arrest of the petitioners was lawful and did not constitute a violation of the petitioners' fundamental rights.

Senior Superintendent of Police, M. C. Mendis, states in his affidavit that on 27.6.86, Sarath Perera, the Officer-in-Charge of the Chilaw Police Station informed him of the complaint made and produced before him the documents taken charge of by the Police at the time of the arrest of the petitioners on 26th along with Sgt. Major Abeysinghe's notes (3R3) and the statements of the Petitioners recorded by the Police in connection with the incident. After consideration of this material he was of the opinion that offences, under Emergency Regulations 26(a),(d) and 33 had been committed by the Petitioners and that the detention of the petitioners was necessary to complete the investigations. He accordingly acted *bona fide* and issued the order 3R4 for the detention of the petitioners at the Chilaw Police Station for a period of one month from that day by virtue of the powers vested in him under the Emergency Regulation 19(2). He was informed by Inspector Sarath Perera that the detention order was handed over to the Petitioners as instructed by him.

The detention of a person arrested without a warrant under Regulation 18 can be justified if the detention is for search. The expression search is synonymous with investigation. Hence detention for further investigation is lawful, *Nanayakkara v. Henry Perera & 3 others.*[28]

The investigation, according to the affidavit of Inspector Sarath Perera was however completed by 15.7.86. During that period the police had sufficient time to scrutinize very carefully the documents that they had taken into their custody. I agree with the Chief Justice, that there is nothing in the documents X, X1, Y1, Y2 "to think that a rational and reasonable person could have been satisfied that the writings would bring the President or Government into hatred or contempt or incite feelings of any disaffection or that they could

reasonably be characterised as subversive literature." It would not have taken the Police investigators much time to arrive at that conclusion themselves after due consideration of the documents. Even the Deputy Solicitor-General who appeared for the Attorney-General was hard put to it to support the view that the documents were subversive or objectionable. He therefore fell back upon Regulation 28 in an effort to justify the detention.

I also agree with the Chief Justice and Wanasundera J., that Regulation 28 is invalid so that the detention of the petitioners on the basis of an offence committed under this regulation is unjustified.

In *Nanayakkara v. Henry Perera & 3 others* (*supra*) Colin-Thome, J., said at page 385 :-

> "It is manifest, therefore, that the detention of a person arrested without a warrant under Regulation 18 can be justified in law only if the detention is for further investigation. It would be unlawful to detain such a person for an unspecified and unknown purpose as this would be an infringement of Article 13(4). It necessarily follows from this that no sooner the further investigation is concluded the suspect is entitled to his release from detention without waiting for the duration of ninety days to be over."

In my view therefore, on the completion of the investigation into this complaint by 15.7.86, no offence under the Emergency Regulations could have been disclosed and the petitioners were entitled to be released from detention.

The Headquarters Inspector of the Chilaw Police Station, Sarath Perera however produced the Petitioners in Applications Nos. 107/86 and 109/86 before the Magistrate on a report and moved that they be remanded or released on bail. He also moved that an order be made in respect of the other petitioner in Application No. 108/86 who was sick in hospital. The Magistrate had no power under the Emergency Regulations to grant bail during the period of the authorised detention of the petitioners under the Regulations, except with the prior written consent of the Attorney-General. (Regulation 64(1)). The

Magistrate therefore made order remanding all three petitioners till 15.8.86. They were however released on bail on 7.8.86.

The Inspector further stated in the report that he was taking steps to get instructions from the Attorney-General. But he had ample time to do so from the date of the detention order on 27.6.87 (3R4). A careful scrutiny of the documents especially Y1, and Y2 would not have taken a couple of days. Indeed there appears to have been no necessity to consult the Attorney-General on the matter because, the Inspector had already formed the opinion that the petitioners had committed offences under Emergency Regulations 26(a), (d), 27, 28 & 33 when he made his report to the Magistrate and stated so. But as was pointed out earlier, none of these offences could have been made out so that it was incumbent on the Inspector to have released the petitioners when investigations were completed by 15.7.86 without producing them before the Magistrate. Their detention from 15.7.86 until they were released on bail on 7.8.86 is therefore unjustified and unlawful.

It must be noted that the unlawful detention of the petitioners has been made by executive or administrative action and not in judicial proceedings. Even though the last order of remand was made by a Magistrate it was not in the exercise of his judicial discretion, since he had none under the Emergency Regulations.

In the result I allow the application in part. I award the petitioners compensation in a sum of Rs. 10,000/- each on account of the violation of their fundamental rights during the period of their unlawful detention. They are also entitled to costs in a sum of Rs. 3,000/- each. Since these infringements have been caused by executive or administrative action the State is liable to make these payments.

SENEVIRATNE, J.

As these three applications dealt with the same matter, the arrest and detention of the petitioners in each of these applications, who described themselves as members of the Revolutionary Communist

League, a political party in Sri Lanka, a section of the International Committee of the Fourth International, the three applications were consolidated and heard. Initially these applications were heard by a Bench of three Judges. In the course of the argument an issue arose as regards the scope and validity of Regulation 28 of the Emergency (Miscellaneous Provisions & Powers) Regulations No. 6 of 1986 made under Section 5 of the Public Security Ordinance. Due to this legal issue My Lord the Chief Justice constituted a Bench of 5 Judges to hear these applications.

His Lordship the Chief Justice has adequately considered this regulation in relation to Chapter 3 of the Constitution and held that it was invalid. This Bench has unanimously agreed with that finding.

I have had the advantage of reading the judgment of My Lord the Chief Justice regarding the other important matters that arose in these applications to wit :–

(a) the validity of the arrest of the petitioners made on 26.6.86,

(b) the detention of these petitioners from 26.6.86 to 15.7.86 at the police station on a detention order made by the Senior Superintendent of Police Mr. Mendis,

(c) the detention of the petitioners from 15.7.86 to 7.8.86 on court orders made in terms of the Emergency Regulations 19 & 20, read with Regulation 64, which sets out –

> "No Magistrate shall, except with prior consent of the Attorney-General release on bail any person suspected or accused of any offence under any emergency regulation".

Under the said Regulation 19 a person arrested and detained in a police station under Regulation 18 –

> "shall be produced before any Magistrate within a reasonable time, having regard to the circumstances of

each case, and in any event, not later than 30 days after such arrest".

I must state that O.I.C. Police Station Chilaw and the Senior Superintendent of Police Chilaw have scrupulously observed the relevant regulations. The said Regulation 20 permits the detention of a person in prison by a Magistrate "for a continuous period of 3 months and shall not be released at any time prior to the expiry of such period except in accordance with the provision of Regulation 64". Regulation 64 has been observed and the petitioners who were remanded by court have been released on bail on 7.8.86, presumably with the consent of the Attorney-General. Thus, these three petitioners have been detained from 26.6.86 to 7.8.86, a period of 42 days on a police detention order and remand orders made by the Magistrate.

His Lordship the Chief Justice had held that –

(a) the original arrest of the three petitioners by Police Sgt. Dhanapala Abeysinghe, and the later detention up to 7.8.86 was illegal and unwarranted.

I respectfully disagree with His Lordship the Chief Justice as regards the finding (a) above. I agree with Wanasundera, J. and L. H. de Alwis, J. that for the reasons set out by these two brother Judges, the original arrest on 26.6.86 and detention was perfectly legal and warranted and is covered by Regulation 18(1), which sets out that –

> "Any police officer ..... arrest without a warrant, any person who is committing or has committed or whom he has reasonable ground for suspecting to be concerned in or to be committing or to have committed an offence under any Emergency Regulation".

I emphasise the words "has reasonable ground for suspecting", and agree that the circumstances which led to the arrest of the petitioners gave Police Sgt. Dhanapala Abeysinghe "reasonable ground for suspecting". My brother Judges Wanasundera, J. and De Alwis, J. have held that though initially the arrest was warranted the

detention became illegal later due to the unduly long delay of detention particularly after 15.7.86 which made the detention illegal unwarranted as there was sufficient time for the authorities to consider whether the petitioners had committed any offence under the Emergency Regulations. This Bench has unanimously agreed that the documents relied on by the respondents to justify the arrest and detention to wit – Y1 & Y2 recovered from the petitioners are not writings coming within the Regulations 26(a), 26(d) and 33, in that those writings do not contain any subversive literature which is likely to "arouse, encourage or promote feelings of hatred or contempt to the government ..... likely to incite any person ..... to take any steps towards the overthrowing of the government". I agree with my brother Judges Wanasundera, J. and De Alwis, J. that the prolonged detention of these petitioners, that is for a greater length of time than necessary in the circumstances, to consider the nature and effect of documents Y1 and Y2 made the detention of the petitioners illegal and unwarranted. I agree with Wanasundera, J. "that this is not a case of the police riding roughshed over the rights of citizens. The police was *bona fide* and within the scope of their functions and the outcome of the case has depended on a legal issue". I agree that the transgression of the petitioners' right would be sufficiently compensated and ends of justice met by the award to each petitioner a sum of Rs. 10,000/- and award as costs a sum of Rs. 3,000/-. The Applications are accordingly allowed.

Arrest legal.
Detention after 15.7.1986 illegal.
Compensation Rs. 10.000/-.
Regulation 28 ultra vires.