

**NALLANAYAGAM**  
**v.**  
**DELGODA AND OTHERS**

SUPREME COURT.

WANASUNDERA, J. COLIN-THOMÉ, J. AND ATUKORALE, J.

S.C. APPLICATION No. 95/85.

OCTOBER 18, 1985.

*Fundamental Rights—Articles 12(1), 13(1), 13(2), 13(4) of the Constitution—Jurisdiction—Emergency Regulations 19, 20, 59, 64.*

Jurisdiction based on the geographical location of the place where the offence was committed has given way under the Emergency Regulations to the place where the suspect is being kept for the time being.

Article 13(4) clearly implies that detention does not constitute a punishment provided the detention is for further investigation or a trial of the person detained is pending. At the end of the investigations if no trial of the person detained is contemplated then that person should be released from detention without waiting for the duration of the limit of 90 days to be over.

When a trial of the detenu is contemplated at the end of the investigation his detention in police custody must be converted to Fiscal custody in terms of Regulation 19(3) read with Regulations 20 and 64 and Article 13(4) of the Constitution. Under Regulation 20 any person produced before a Magistrate under the provisions of Regulation 19(3) shall remain in Fiscal custody for a continuous period of three months and shall not be released at any time prior to the expiry of such period, except in accordance with the provisions of Regulation 64.

Once the indictment is filed the detenu will be remanded by the High Court until the conclusion of the trial under the provisions of Regulation 59(1) and 59(2).

Remand for an offence under the Emergency Regulations is made compulsory and bail can only be granted with the prior consent of the Attorney-General. It is as if the law itself made such an offence non-bailable, thereby preventing a Magistrate from considering the question of bail.

On the lapse of the period of three months, the Magistrate is empowered, except in the case of violation of Regulation 24(1)(b), to release such a person on bail, unless the Attorney-General directs otherwise. Further, after the period of 3 months' detention, the ultimate power of release on bail is reposed in a judicial tribunal, the Court of Appeal which could do so in exceptional circumstances.

**Case referred to:**

*Yasapalitha Nanayakkara v. Henry Perera—S.C Appeal No. 19/85—S.C minutes of 9.8.1985.*

APPLICATION for infringement of Fundamental Rights

*Nimal Senanayake, P.C. with K. P. Gunaratne, S. Jayatillake, Mrs. A. B. Dissanayake and Miss A. P. Thelespha for petitioner.*

*Sunil de Silva, Addl.S.G. with Rohan Jayatilleke, S.S.C. and Nihara E. Rodrigo, S.C. for respondents.*

*Cur. adv. vult.*

November 22, 1985.

**COLIN-THOMÉ, J.**

This application filed on 2.9.85 by the petitioner is a sequel to Supreme Court Application No. 59/85 filed on 11.6.85 by the petitioner.

The petitioner states that on 26.7.85 he was taken from the Slave Island Police Station before the Magistrate, Colombo Fort, and thereafter to the Magazine Gaol, where the petitioner has been in custody since 26.7.85. He has not been produced before any Judicial Officer after 26.7.85.

The petitioner states that his fundamental rights under Articles 12(1), 13(1), 13(2) and 13(4) have been infringed by his continued detention on or after 1.8.85.

The petitioner avers that his continuing detention is under the authority of Emergency Regulations which are ultra vires and illegal and in any event the application of Emergency Regulations 18, 19 and 20 are inapplicable in the circumstances of his case.

The petitioner states further that the petitioner's continued detention and production on or about 26.7.85 before the Magistrate, Colombo Fort, by the 5th respondent is illegal and makes and renders the provisions of Regulations 19 and 20 inapplicable to the petitioner. The detention of the petitioner is consequently illegal and the petitioner's fundamental rights aforesaid are being violated on each and every day of the continuing detention by the 1st and 5th respondents.

The petitioner prays—

- (a) for an order on the 1st respondent and any other officer of State to whom the 1st respondent may deliver custody of the petitioner to release the petitioner forthwith from custody;
- (b) for a declaration that the petitioner's fundamental rights have been violated;
- (c) for compensation in a sum of Rs. 250,000;
- (d) for costs and other further relief as seem meet to this court.

It has been brought to our notice that on 30.7.85 an indictment charging the petitioner with committing offences under the Emergency Regulations was filed in the High Court of Batticaloa. Thereafter, the Attorney-General has designated the High Court of Colombo as the court where the trial of the petitioner will take place and accordingly the indictment was filed in the High Court of Colombo on 24.9.85. On the same day the Judge of the High Court, Colombo, enlarged the petitioner on bail with the consent of the Attorney-General. The trial is to take place on 8.1.86.

The Inspector-General of Police, the 4th respondent, has stated in his affidavit that on or about the 25th July 1985 he was advised that the investigations had been concluded and that the Attorney-General has decided that there was sufficient material to indict the petitioner on charges of contravening provisions of the Emergency Regulations.

Accordingly the petitioner was produced on 26.7.85 in the Magistrate's Court, Colombo Fort, in terms of Regulation 19(2) of the Emergency Regulations. The Magistrate made order under Regulation 19(3) remanding the petitioner till 20th September, 1985. A copy of the warrant of detention was produced marked 1 R 1. According to the Commissioner of Prisons, the 1st respondent, since 26.7.85 on the order of the Magistrate's Court, the petitioner has been detained in the custody of the Fiscal in a prison established under the Prisons Ordinance.

Learned President's Counsel for the petitioner submitted that the warrant of detention marked 1R1 was not issued by a Court of "competent jurisdiction" under Regulation 19(3). He stated that the court of competent jurisdiction was the High Court or Magistrate's Court having jurisdiction in Kalmunai where the alleged offences are said to have been committed. He further submitted that under Regulation 19(2) and 19(3) a competent court cannot be the court contemplated in Regulation 57(1).

It is now necessary to examine the relevant regulations:—

- 19(2) Any person detained in pursuance of the provisions of regulation 18 in a place authorized by the Inspector-General of Police may be so detained for a period not exceeding ninety days reckoned from the date of his arrest under that regulation, and shall at the end of that period be released by the officer in charge of that place unless such person has been produced by such officer before the expiry of that period before a court of competent jurisdiction.
- (3) Where a person who has been arrested and detained in pursuance of the provisions of regulation 18 is produced by the officer referred to in paragraph (2) before a court of competent jurisdiction, such court shall order that such person be detained in the custody of the Fiscal in a prison established under the Prisons Ordinance.
20. The provisions of section 115 of the Code of Criminal Procedure Act, No. 15 of 1979, shall not apply in relation to any person who is produced before a Magistrate under the provisions of regulation 19(3) or appears before a Magistrate in any other manner and is detained or remanded in the custody of the Fiscal in any prison in respect of being suspected or accused of any offence under any emergency regulation. Such person shall remain in such custody for a continuous period of three months and shall not be released at any time prior to the expiry of such period, except in accordance with the provisions of regulation 64.

Regulation 57(1) reads as follows:—

57(1) Save as otherwise herein provided and notwithstanding any other written law the proceedings in respect of an offence alleged to have been committed by a person under any emergency regulation may be taken before the appropriate court in Sri Lanka having jurisdiction over *the place* where that person is for the time being.

Under section 9 of the Code of Criminal Procedure Act, No. 15 of 1979, the criminal summary jurisdiction of Magistrates' Courts extends to offences committed wholly or in part within its local jurisdiction. However, under Regulation 57(1) of the Emergency Regulations the appropriate court is the court having jurisdiction over *the place* where the suspect is for the time being.

The geographical location of the place where the offence has been committed under the ordinary law has given way under the Emergency Regulations to the place where the suspect is being kept for the time being. The reason for this change of venue is in the interests of national security.

Under section 30 of the Judicature Act, No. 1 of 1978, a Magistrate's Court could be vested with the power and jurisdiction to remand a suspect. A reading of Regulations 19(2), 19(3), 20, 57(1) and 64 of the Emergency Regulations makes it clear that the court contemplated is the Magistrate's Court.

The phrase "a court of competent jurisdiction" has to be read with Article 13(2) of the Constitution which reads:

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

As the petitioner was being kept at all times relevant to the Magistrate's order at the Slave Island Police Station the nearest court having jurisdiction over such place was the Magistrate's Court, Colombo Fort. We hold therefore, that the order of the Magistrate, Colombo Fort, marked 1 R 1, has been lawfully made by a Magistrate having jurisdiction and that the petitioner was in lawful custody at the time of filing of this application on 02.09.85.

Learned President's Counsel also submitted that there is no clear evidence when the investigations were completed. He conceded that detention pending trial is not punishment under Article 13(4) of the Constitution and hence a law or regulation authorising detention pending trial is permissible. He submitted, that there was no regulation authorising detention pending trial. Learned counsel also submitted that there was no material before the Magistrate that there was a trial pending when he made his order of detention on the 26th July, 1985. He added that the authority for detaining a person pending trial contemplated in Article 13(4) cannot be any other than the tribunal before which inquiry or trial is pending. All these submissions were collectively made in order to urge that the warrant of detention issued on the 26th July 1985 was illegal and that the continuing detention of the petitioner was violative of his fundamental rights.

The Inspector-General of Police has stated in his affidavit that on or about the 25th July 1985 he was advised that the investigations had been concluded and that the Attorney-General had decided that there was sufficient material to indict the petitioner on charges of contravening provisions of the Emergency Regulations. Though there is prima facie material indicating when the investigations were concluded, investigations are however in law not concluded the moment the police are of the view that no further statements need to be recorded. Investigations will continue until the Attorney-General is satisfied that no further investigations are necessary. This is so even under the ordinary law. Under section 397 of the Code of Criminal Procedure Act, No. 15 of 1979, the Attorney-General may give instructions to a Magistrate with regard to further investigations.

The relevant portion of Article 13(4) of the Constitution states :

“The arrest, holding in custody, detention or other deprivation of personal liberty of a person, *pending investigation or trial* shall not constitute punishment.”

Article 13(4) clearly implies that detention does not constitute a punishment provided the detention is for further investigation or a trial of the person detained is pending. At the end of investigations if no trial of a person is contemplated then that person should be released from detention without waiting for the duration of ninety days to be over. In *Yasapalitha Nanayakkara v. Henry Perera et al* a trial of the suspect was never contemplated. That is why the judgment stated at page 11 :

“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 flows 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.”

When a trial of the detenu is contemplated at the end of the investigation his detention in police custody must be converted to fiscal custody in terms of Regulation 19(3) read with Regulations 20 and 64. These regulations have also to be read with Article 13(4) of the Constitution. Under Regulation 20 any person produced before a Magistrate under the provisions of Regulation 19(3) shall remain in Fiscal custody for a continuous period of three months and shall not be released at any time prior to the expiry of such period, except in accordance with the provisions of Regulation 64.

Once the indictment is filed the detenu will be remanded by the High Court until the conclusion of the trial under the provisions of Regulation 59(1) and 59(2).

Regulation 64 deals with the question of bail. The relevant parts of Regulation 64 states as follows:

64 (1) Notwithstanding anything in any other law, no Magistrate shall, except with the prior written consent of the Attorney-General, release on bail any person suspected or accused of any offence under any emergency regulation.

(2) In every case where a person is remanded by reason of the provisions of paragraph (1) of this regulation, the Magistrate shall forthwith, inform the Attorney-General of such remand and the circumstances relating to such case.

(3) Where any person by reason of the provisions of paragraph (1) of this regulation, has been on remand for a continuous period of three months, the Magistrate shall release such person on bail, unless the Attorney-General directs otherwise:

Provided that where any person is suspected or accused of having under the provisions of sub-paragraph (b) of paragraph (1) of regulation 24 of these regulations, committed the offence of causing or attempting to cause death, such person shall not, be released on bail until the conclusion of the trial except with the prior written consent of the Attorney-General.

(3A) The Court of Appeal may, in exceptional circumstances release on bail, any person who has been on remand for a period exceeding three months notwithstanding the provisions of paragraph (3) of this regulation.

(4) Where a Magistrate has released any person on bail and the Attorney-General intimates to the Magistrate that such person should not have been so released, the Magistrate shall, forthwith, take such steps as may be necessary to take such person into custody and to remand him.

We note that the above regulations provide that remand for an offence under the Emergency Regulations is made compulsory and bail can only be granted with the prior consent of the Attorney-General. This is undoubtedly due to the emergency situation that would be prevailing. Such a provision in that context would be as if the law itself made such an offence non-bailable, thereby preventing a Magistrate from considering the question of bail. In an emergency situation which could endanger the security of the State, the courts must concede some latitude to the executive for a proper handling of the situation. The above provisions are however limited for a period of three months, and we do not consider this unreasonable.

On the lapse of a period of three months, it would appear that different considerations apply. Except in the case of violation of Regulation 24(1) (b), a Magistrate is now empowered to release such a person on bail, unless the Attorney-General directs otherwise. Further, after the period of 3 months' detention the ultimate power of release on bail is found reposed in a judicial tribunal, namely the Court of Appeal which could do so in exceptional circumstances.

On 30.09.85 the indictment was filed in the High Court of Colombo designated by the Attorney-General to be the trial court. On the same day the petitioner was released on bail with the consent of the Attorney-General.

We have examined photocopies of the record in M.C. Colombo Fort Case No. B.R. 3053. We find from the entries in the record on the 26th July 1985 that the Magistrate has examined the merits of the application for bail by counsel for the petitioner. He has made a full note of the submissions of counsel for the petitioner as well as the submission made by Mr. Seneviratne, A.S.P. who appeared for the prosecution. Mr. Seneviratne informed court that he had instructions from the Attorney-General to move court to remand the suspect in Fiscal's custody under regulation 19(5). He had also been instructed by the Attorney-General to file indictment against the suspect in the High Court. There was, therefore, material before the Magistrate of a pending trial.

Learned President's Counsel submitted that Regulations 19 and 20 are in conflict with Articles 3 and 4(d) of the Constitution. Articles 3 and 4(d) state:

3. In the Republic of Sri Lanka Sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.
4. The Sovereignty of the People shall be exercised and enjoyed in the following manner:
  - (d) the fundamental rights which are by the Constitution declared and recognised shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided

These articles have to be read with Article 15(7) of the Constitution.

15(7) 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, etc..... For the purposes of this paragraph 'law' includes regulations made under the law for the time being relating to public security.

In other words the laws relating to arrest and detention may be modified under the Emergency Regulations in force at the time in the interests of national security.

For the reasons stated in this judgment we hold that the petitioner has failed to establish a contravention of any fundamental right guaranteed under Chapter III of the Constitution. The application is dismissed but without costs.

**WANASUNDERA, J.**—I agree.

**ATUKORALE, J.**—I agree.

*Application dismissed.*