MAHANAMA TILAKARATNE
v.
BANDULA WICKRAMASINGHE, SENIOR SUPERINTENDENT OF POLICE AND OTHERS

SUPREME COURT
DHEERARATNE, J.,
WIJETUNGA, J. AND
BANDARANAYAKE, J.
S.C. APPLICATION NO. 595/98
MAY 25 AND 28, 1999.

Fundamental rights – Offences under sections 300, 141 and 316 of the Penal Code – Issue of warrant for arrest of suspect – Section 124 of the Code of Criminal Procedure Code Act – Arrest after the cancellation of warrant and release of suspect on bail – Validity of arrest and detention of suspect in police custody – Arrest under section 32 (1) (b) of the CCRP Act – Articles 13 (1) and 13 (2) of the Constitution.

On 11.06.1998 officer in charge (OIC) of the Kahatuduwa Police Station filed a report at the Kesbewa Magistrate's Court informing the Magistrate that he investigated into a complaint made on 01.06.1998 by one Somachandra that he had been assaulted on that day with clubs by three persons including the petitioner's son and that an offence under section 316 (grievous hurt) has been disclosed. The OIC obtained a date namely, 10.09.1998 to file a further report after completing investigations.

On 10.09.1998, Sub Inspector Rodrigo of the CID filed a further report in the same case at the Kesbewa Magistrate's Court. Relying on the statement of one Eugine Padmini, (which statement was not tendered to the Supreme Court) that report implicated the petitioner in the assault on Somachrandra and further

alleged that the petitioner had fired four shots in the direction of Somachandra who was lying fallen, offences punishable under sections 300, 141 and 316. In his report Rodrigo stated that on the advice of the Attorney-General he was moving for warrants to search the petitioner's house and to arrest the suspects.

The Magistrate expressed misgivings about the warrants sought when Rodrigo and the 2nd respondent (Superintendent of Police, CID) met the judge in chambers. Whereupon, a Senior State Counsel appeared assisted by the 1st respondent (Senior Superintendent of Police) and persuaded the Magistrate to issue the warrants asked for on the ground, which the Magistrate recorded namely, the warrants were asked for "because the suspect is a High Court Judge and the Magistrate must assist the Police". The warrants were apparently sought and issued under section 124 of the CCRP Act. The Magistrate also directed the police that he be kept informed of the arrest and the suspects be produced before him the following day itself. The same day, the petitioner surrendered to the Kesbewa Magistrate whereupon the Magistrate cancelled the warrant for his arrest and enlarged him on bail, and directed the Registrar to notify the CID the orders made. The Registrar addressed a letter to the Director, CID, in compliance with the Magistrate's direction. The same information was also conveyed to the CID by telephone which message was received by a woman sub Inspector named Fonseka. Before leaving the Court, the petitioner obtained certified copies of the Magistrate's order and the Registrar's letter addressed to the Director, CID.

That evening the petitioner was at his residence with his lawyers when several persons in civilian clothes who identified themselves as CID officers arrived and sought to arrest the petitioner on a warrant. The 2nd respondent who was among them was shown the copy of the Magistrate Court proceedings and the letter addressed to the CID. The 2nd respondent then contacted the 3rd respondent (DIG Police) over his cellular telephone and proceeded to search the petitioner's home on the search warrant. At about 7.30 pm the 1st respondent arrived. He refused to see the Court documents and arrested the petitioner saying that he had the order of the Attorney-General and the 3rd respondent to arrest the petitioner even without a warrant. No other reason for the arrest was given. The petitioner was taken to the CID headquarters and interrogated till 2.30 am. Lawyers were not allowed to make representations. They were told that petitioner will be produced that morning at the Magistrate's Court, Kesbewa.

On 11.09.1998 SI Rodrigo produced the petitioner before the Chief Magistrate, Colombo, in breach of the direction given by the Kesbewa Magistrate the previous day and on the false ground that due to unrest prevailing at Kesbewa there was a danger to the petitioner's life. The 1st respondent was also present in Court

and a State Counsel submitted to the Magistrate on instructions that the warrant of arrest of the petitioner was not recalled and the petitioner was not released on bail.

In proceedings before the Supreme Court, the 4th respondent (Attorney-General) denied that he gave instructions to any Police officer to arrest anyone and that when he learnt that the 1st respondent had made a note of alleged instructions, he brought it to the notice of the President.

Held:

1. The purpose of issuing process of Court is to obtain the appearance of a person in Court and not to secure his presence in any police station or the CID headquarters. Thus, process may issue in terms of section 124 of the CCRP Act to compel a suspect to attend Court for an identification parade, and to assist investigators by requiring the suspect to provide handwriting, finger prints, samples of hair, fingernails or blood for investigating a crime.

Per Dheeraratne, J.

"Issuing a warrant is a judicial act involving the liberty of an individual and no warrant of arrest should be lightly issued by a Magistrate simply because a prosecutor or an investigator thinks it necessary."

2. Unless a warrant of arrest is issued for the failure to obey summons, recording of evidence is a *sine qua non* before issuing a warrant of arrest of a suspect whether investigations are completed and proceedings are instituted in the Magistrate's Court under S. 136 (1) (*b*) of the CCRP Act or the investigations are incomplete and no proceedings are instituted in Court. The Magistrate must before issuing a warrant against the offender, record evidence on oath substantiating the allegation.

3. On the basis of the 1st respondent's representations to the Chief Magistrate, the petitioner was arrested on the authority of the warrant and no other. If that warrant was otherwise legally valid, the 1st respondent could not have arrested the petitioner as the warrant was directed to SI Rodrigo, and SI Rodrigo had not endorsed the warrant to another peace officer as required by section 52 (3) of the CCRP Act; nor was there any justification for the 1st respondent to have arrested the petitioner in terms of section 32 (1) (*b*) of the Act, as he was not involved with the investigations of the alleged offences.

4. The defence that the 1st respondent was acting purely on the orders of his superior the 3rd respondent and that as a police officer he was bound to do so is untenable. The arrest under those circumstances was illegal.

5. The arrest and the detention of the petitioner in police custody were not in accordance with the law and the 1st and 3rd respondents violated the petitioner's fundamental rights guaranteed by Articles 13 (1) and 13 (2) of the Constitution.

Cases referred to:

1. *Faiz v. Attorney-General and others* – (1995) 1 Sri LR 372.
2. *Attorney-General v. Jayasinghe* – (1949) 50 NLR 203.
3. *Wills v. Sholay Kangany* – (1915) 18 NLR 443.
4. *Gunasekera v. De Fonseka* – (1972) 75 NLR 246.
5. *Muthusamy v. Kannangara* – (1951) 52 NLR 324.
6. *Christy v. Leachinsky* – (1947) AC 583.
7. *Corea v. The Queen* – (1954) 55 NLR 457.
8. *Senaratna v. Punya de Silva and Others* – (1995) 1 Sri LR 272.

APPLICATION for relief for infringement of fundamental rights.

Ranjith Abeysuriya, PC with *Geethaka Gunewardena* and *Ms. Priyadarshinie Dias* for petitioner.

Denzil Gunaratne with *Buddhika Jayasinghe* and *Udayanthi Seneviratne* for 1st, 2nd, and 3rd respondents.

K. C. Kamalasabayson, PC, SG with *Jayantha Jayasuriya,* SSC *Uditha Egalahewa,* SC for 4th and 6th respondents.

Cur. adv. vult.

July 21, 1999.

DHEERARATNE, J.

Introduction

This is a case teeming with several unusual and strange features, perhaps unheard of in the annals of our judicial history. The petitioner was admitted and enrolled as an Advocate in May, 1968. In September, 1978, he joined the Sri Lanka Judicial Service and served at several places in the Island as a Magistrate and a District Judge. In January, 1994, he was appointed a High Court Judge. At the time material to this application, he was officiating as the High Court Judge, Colombo, sitting in High Court No. 7 and was residing with his family at Thalagala, Kiriwaththuduwa, a place falling within the Kahathuduwa Police Station area. The petitioner complains to this Court that his arrest by the 1st respondent on 10th September, 1998 and his detention thereafter were violative of his fundamental rights guaranteed under the Constitution. At the time material to this action, the 1st respondent was a Senior Superintendent of Police, the 2nd, a Superintendent of Police attached to the Criminal Investigations Department (CID), the 3rd, a Deputy Inspector-General of Police (CID), the 5th, the Inspector-General of Police. Besides, making the Chief Law Officer of the State the Attorney-General, *nomine officii* a party to this case (6th respondent) as required statutorily, the petitioner has also made him a party (4th respondent) personally and by name. The basis of the alleged complicity of the 2nd and 3rd respondents with the alleged violations, was that they acted together in concert and collusion with the 1st respondent in taking the petitioner into custody unlawfully; while that of the 4th respondent was that, by his inaction he facilitated the unlawful arrest. For the concept of facilitating a violation by inaction, learned counsel for the petitioner placed much reliance, among other cases, on the case of *Faiz v. Attorney-General and others*[1].

The 1st report filed in the Kesbewa Magistrate's Court Case No. BR 653/98

On 11th June, 1998, the officer-in-charge (OIC) of the Kahathuduwa police station filed a report at the Kesbewa Magistrate's Court, informing the Magistrate that he investigated into a complaint made on 1st June by one Uyana Hewage Niroshini Somachandra of Thalagala. The report stated that according to the complaint, Uyana Hewa Somachandra was assaulted about 5.40 am with clubs, at the byroad situated near the house of the petitioner, by petitioner's son Padmika, a servant of his household named Sena, and a boy working at a smithy close by called Upul; the incident was said to have occurred when Somachandra was attempting to put his son Piyum Kalyana into a school van. The report further said that Piyum Kalyana too made a statement to the effect that the three persons named earlier assaulted his father with clubs and that he ran away from that place; when he was running he heard some shots being fired. The report further said that the injured Somachandra has made a statement while being warded in the General Hospital Colombo; that an offence punishable under section 316 (grievous hurt) has been disclosed; that while the statements of Padmika, Sena and Upul were recorded; the petitioner had volunteered to make a statement. A summary of the petitioner's statement was given in the report. The OIC moved the Court by his report, to grant him a date to file a medical report from the General Hospital, Colombo, and to file a further report having investigated the matter further. The Court fixed 10th September as the date for further report. No summons or warrant was requested to be issued by Court.

On 9th September on a motion filed by an AAL on behalf of suspect Padmika, the case was called and he was bailed out on a personal surety bond of Rs. 1,000.

The 2nd report filed in the Kesbewa Magistrate's Court case No. BR 653/98 and issuance of the warrant to arrest the petitioner

On 10th September, 1998, Sub Inspector Rodrigo of the CID, filed a further report in the same case at the Kesbewa Magistrate's Court, making the petitioner the first suspect. Rodrigo, for some reason, wanted to shroud his report in a veil of secrecy; for, his report was prefaced by a somewhat startling statement of law, that, in accordance with the case of *Attorney-General v. Jayasinghe*[2], the Magistrate should treat his report as a confidential document; that it should not only be kept in the personal custody of the Magistrate, but also that no other party should be permitted to inspect or read the same. I may mention here that Jayasinghe's case, decided nearly fifty years ago, does not reflect the law as it stands today and was determined at a time when subsection 122 (3) of the repealed Criminal Procedure Code was in force, which absolutely prohibited any statement recorded in the course of a chapter XII enquiry from being seen by or disclosed to an accused person or his agents. It is a matter of surprise to us that this unwarranted and obsolete preface either escaped the attention of learned Senior State Counsel who appeared in support of the relief claimed for in Rodrigo's report; or, if he did observe it, he took no steps to get it promptly expunged. Rodrigo stated in this report that he investigated into a complaint made by K. V. I. Padmini on 11.8.1998 regarding causing grievous hurt by beating with clubs and shooting; that after the injured person Somachandra's wife K. V. I. Padmini sent a petition to Her Excellency the President, the CID was now in the process of making investigations. I may pause here to mention that in the petition sent by Padmini to Her Excellency, a copy of which was produced by the 3rd respondent, there is absolutely no reference to an incident which had occurred on 1st June, 1998; but among some other allegations made against the petitioner, she has stated that she had come to know that the petitioner has "ordered" several police stations not to entertain any statement from her about throwing stones and firing at

her house. Rodrigo reported that according to the statement made by K. V. Eugine Padmini, a sister of K. V. I. Padmini, who now lives at Hingurakgoda, she had stated that when she was residing with her sister K. V. I. Padmini at Thalagala, on the night of 25th March, 1998, some stones were thrown and some shots fired from the direction of the petitioner's house; that she came to know that on 30th March 1998 the petitioner had fired some shots in the air and threatened her brother-in-law Somachandra; that in addition she saw on the morning of the 1st June, 1998, with the aid of a torch light, the petitioner's son Padmika, his servant Sena and several others assaulting Somachandra with clubs; that she saw the petitioner giving a club which was in his hands to his son Padmika saying "kill him, finish him off"; that she saw the petitioner firing three or four shots in the direction of Somachandra who was lying fallen. Although various other statements and notes were quite readily submitted to us by 1st to 3rd respondents, Eugine Padmini's statement was not tendered to us for our perusal. The report did not say that the allegation of any shots having being fired was found to be true on an examination made at the spot.

Rodrigo's report further stated that according to the medical report filed therewith, the injuries on Somachandra were grievous (the medical report revealed no injury caused by a firearm); and that offences punishable under sections 300, 141 and 316 were disclosed against the suspects. Rodrigo stated in the report that on the advice obtained from the Attorney-General, he was moving Court to issue a search warrrant to search the petitioner's residence and to issue a warrant to arrest the suspects, to be in force between 10.9.98 and 17.9.98.

Before Rodrigo filed the report, the 2nd respondent along with Rodrigo, met the learned Magistrate in his Chambers and discussed about the report they were intending to file that day and the learned Magistrate expressed certain misgivings about issuing the warrants of arrest asked for. Thereafter, according to the 2nd respondent he went to the Piliyandala Police Station and informed the 3rd respondent

over the telephone about the "developments". The 3rd respondent asked him to prepare a motion and further informed him that he was sending the 1st respondent and a named Senior State Counsel to the Piliyandala Police Station. On the same day, that is the 10th of September, about 1 pm Rodrigo's report was filed. Learned Senior State Counsel assisted by the 1st respondent appeared in open Court, moved that the matter be taken up, and succeeded in persuading the Court to issue the warrants asked for. It is recorded with laconic brevity that the warrants were asked for and were issued "because the suspect is a High Court Judge and that the Magistrate must assist the police". This is a non sequitur. It was not submitted to the Magistrate that the petitioner was either avoiding to make a statement or was avoiding arrest by the investigators. It was not stated why the Magistrate's assistance was required for the investigation by the arrest of the petitioner and others. However, the learned Magistrate whose conscience was apparently troubled, took the precaution to order that he be promptly informed of taking the suspects into custody and that they be produced before him without delay. The learned Magistrate recorded the fact that the 1st respondent gave an undertaking to produce the suspects the following day itself. The Sinhala word *"hetama"* seems to suggest that what the Magistrate was made to believe was that the arrest will be made on the following day and the suspects will be produced the same day. The Sinhala letter *"ma"* conveys no other meaning.

Although no arguments were addressed to us on the manner in which the warrants were issued for the arrest of the petitioner and others, yet I think it is my bounden duty to express my view on that all important matter, which involves the liberty of the subject, so as to prevent any abuse of process even in the future. As at date on which the warrants of arrest were asked for, proceedings had not been instituted against the suspects in terms of section 136 of the Code of Criminal Procedure (CCRP) Act. Had proceedings been instituted against them in terms of section 136 (1) (*b*), and if the Magistrate were to issue warrants of arrest because the report disclosed an offence in respect of which a warrant

shall be ordinarily issued in the first instance according to the first schedule of the CCRP Act, it would have been obligatory on the Magistrate (he shall), before issuing the warrants, to "examine on oath the complainant or some material witness or witnesses" (section 139 (1)). In the instant case the investigations were said to be proceeding and warrants of arrest were apparently asked for and issued in terms of section 124 of the CCRP Act to assist the investigations. Section 124 reads :

> "Every Magistrate to whom application is made on that behalf shall assist the conduct of an investigation by making and issuing appropriate orders and processes of Court and may, in particular hold, or authorize the holding of, an identification parade for the purpose of ascertaining the identity of the offender, and may for such purpose require a suspect or other person to participate in such parade, allow a witness to make his identification from a concealed position and make or cause to be made a record of such parade."

It must be primarily borne in mind that the purpose of issuing process of Court is to obtain the appearance of a person in Court and not to secure his presence in any police station or the CID headquarters. In addition to a suspect being compelled to attend Court for the purpose of an identification parade, as section 124 itself indicates, there may be several other reasons why a suspect's presence will be required in Court to assist the conduct of the investigations; for example, the investigators may require the suspect's handwriting, fingerprints or samples of hair, fingernails, and blood for investigation of a crime.

If for the assistance of the conduct of an investigation, process of Court by way of issuing a warrant of arrest is required, the Magistrate must proceed to issue such warrant in terms of chapter V of the CCRP Act titled "of process to compel appearance". Section 50 under that chapter provides that "every warrant of arrest issued under this Code . . . shall be in the prescribed form". The prescribed

form is form No. 4 of the second schedule to the Code. The form provides the following words in addition to specifying the offence "and oath being now made before me substantiating the matter of such complaint. "(cf Form No. 3 – Warrant of Arrest in default of appearance to summons; Form No. 6 – search – Warrant).

Issuing a warrant is a judicial act involving the liberty of an individual and no warrant of arrest should be lightly issued by a Magistrate simply because a prosecutor or an investigator thinks it is necessary. It must be issued as the law requires, when a Magistrate is satisfied that he should do so, on the evidence taken before him on oath. It must not be issued by a Magistrate to satisfy the sardonic pleasure of an opinionated investigator or a prosecutor.

Recording of evidence is a *sine qua non,* before issuing a warrant of arrest of a suspect, unless that warrant is issued for the failure to obey summons. To hold otherwise would mean that, in connection with an allegation of a commission of an offence in respect of which a warrant of arrest could be issued in the first instance, if investigations are completed and proceedings are instituted in the Magistrate's Court, the Magistrate is obliged, before issuing a warrant against the offender, to record evidence on oath substantiating the allegation; but in connection with an allegation of similar nature, were investigations are incomplete and no proceedings are instituted in Court, the Magistrate can issue a warrant for the arrest of the offender without recording evidence on oath substantiating the allegation. There can be no justification for making such a distinction.

I think I cannot do better than to echo the words of Sampayo, J. where in a similar situation he observed : "The issue of a warrant is a serious matter, and the Magistrate should exercise his own independent judgment on the facts before he does this judicial act. In every case it is the duty of the Magistrate to see that the complainant or other person, when giving what purports to be oral evidence, gives it consciously and with due sense of his own

responsibility, and that he not merely adopts general statements already printed and furnished to him by the proctor. The Magistrate should himself record that evidence from the witness's own mouth, and should in no case recognize printed matter contained in forms which the proctor may keep in stock. I think the practice followed in this case is reprehensible, and I hope not to see another instance of it". See *Wills v. Sholay Kangany*[3].

The petitioner's surrender and recall of the warrant of arrest

On the 10th of September, 1998, the petitioner went on the Bench in the performance of his judicial functions and he adjourned the Court about 12.45 pm. Soon thereafter, some lawyers brought to the notice of the petitioner, that at the instance of the CID and on an application made by Senior State Counsel, the Magistrate, Kesbewa, has issued a warrant for his arrest and a search warrant in relation to his house. In view of this information, the petitioner proceeded to the Magistrate's Court, Kesbewa, accompanied by a few lawyers and surrendered himself. The Magistrate thereupon cancelled the warrant of arrest and released the petitioner on bail on a personal bond for Rs. 1,000. The Magistrate directed the Registrar of his Court to take steps to inform the CID over the telephone that, on the petitioner surrendering to Court, the warrant issued for his arrest was cancelled. Before leaving the Kesbewa Magistrate's Court, through an abundance of caution, the petitioner obtained a certified copy of the order made by the Magistrate enlarging him on bail and a letter by the Registrar addressed to the Director, CID, informing him, that as the petitioner appeared before Court on 10th September, 1998, the warrant issued for his arrest should not be executed and returned to Court. The petitioner was informed, before he left the Magistrate's Court, Kesbewa, by the Registrar of that Court, that the telephone message was conveyed to the CID and was received by a woman Sub Inspector named Fonseka.

Arrest of the petitioner

Having left the Kesbewa Magistrate's Court, the petitioner proceeded to his residence with his lawyers. At the gate of his residence, about 5 pm he was confronted by several persons in civilian clothes who identified themselves as police officers attached to the CID, who had come to take him into custody on a warrant issued for his arrest. One of that group who identified himself as the 2nd respondent Premaratne, was then shown the certified copy of the proceedings of the Magistrate's Court, Kesbewa, enlarging the petitioner on bail and the letter addressed to the Director, CID, obtained from the Registrar of the Magistrate's Court certifying to that effect. Although the 2nd respondent denies having been shown the certified copy of the Magistrate's Court proceedings, I hold that it is more probable that the petitioner's lawyers had that certified copy with them and both documents were shown to the 2nd respondent at that stage.

The petitioner states that the 2nd respondent refused to accept the letter as it was addressed to the Director, CID. On the 2nd respondent's own admission, having read the letter addressed to the Director, CID, he stated that he would not take the petitioner into custody. The petitioner and his lawyers were thereafter permitted to enter the petitioner's residence. The 2nd respondent then contacted the 3rd over his cellular telephone and informed him that the warrant of arrest has been recalled. The 3rd respondent had informed the 2nd that he was sending the 1st respondent to the residence of the petitioner. The 2nd respondent thereafter informed the petitioner and his lawyers to await the arrival of the 1st respondent.

Meanwhile, the 2nd respondent executed the search warrant with the consent of the petitioner. According to the 2nd respondent "when the house of Mahanama Tllakaratne was being searched by me, he informed me that his pistol is in the almirah and he gave me the same with two magazines and nine live ammunitions and a valid permit to possess same". About 7.30 pm the 1st respondent arrived at the petitioner's premises with a large posse of Police

officers, some in civilian clothes and some in uniform. According to the petitioner, when his lawyers attempted to show the 1st respondent the certified copy of the Magistrate's Court proceedings and the letter addressed to the Director, CID, the 1st respondent shouted,: "damned with the orders; I do not want to see that. Ignore that. I can arrest him whatever the Magistrate has ordered. I have got a cut and dry order from the Attorney-General and the DIG. Even without a warrant I can arrest him. We obtained the warrant because he is a Judge".

I accept the version of the petitioner that this was the manner in which he was arrested. The 1st respondent was presenting a false front that he got orders from the Attorney-General, as according to the 4th respondent he was informed of the arrest about 8.00 pm by the 3rd respondent. The 1st respondent admits having arrested the petitioner by placing his hand of the petitioner. Although the 1st respondent states that he gave reasons for his arrest, on the totality of the evidence before us, I hold that he gave no reasons; he came storming into the residence of the petitioner on the order given by the 3rd respondent and arrested the petitioner. The petitioner was, thereafter, taken to the CID headquarters in a police vehicle about 9.30 pm. Petitioner's lawyers were not permitted to meet the 3rd respondent so that they could show the documents in their possession to prove that the warrant was recalled and petitioner was bailed out. The petitioner's statement was recorded till 2.30 am of 11th September, 1998. In the morning of the 11th the petitioner's lawyers were refused permission to have access to the petitioner and they were informed by the officers of the CID that he will be produced that morning at the Magistrate's Court, Kesbewa.

Production of the petitioner before the Chief Magistrate, Colombo

In the morning of the 11th September petitioner's lawyers were anxiously waiting at the Kesbewa Magistrate's Court anticipating the production of the petitioner from the custody of the CID.

About 12.45 pm, in desperation, petitioner's lawyers brought to the notice of the Magistrate, Kesbewa, that the petitioner was still being kept in the custody of the CID, in spite of the order made enlarging him on bail. The Magistrate, Kesbewa, recorded the submissions of the lawyers and made a further order to release the petitioner.

Meanwhile, SI Rodrigo of the CID, filed a motion before the Chief Magistrate, Colombo and produced the petitioner before him about 1.00 pm. The motion stated that the petitioner was arrested the previous night about 7.30 pm in accordance with a warrant issued by the Magistrate, Kesbewa. This warrant was produced along with the motion. The motion further stated that according to a reliable confidential information, there was grave unrest in the area around Kesbewa Magistrate's Court in connection with the offence committed by the petitioner and the production of the petitioner before the Magistrate's Court, Kesbewa, would be imminently dangerous to the life of the petitioner.

I am of the view that the story of unrest at Kesbewa and the imminent threat to the petitioner's life was dishonestly concocted by Rodrigo and the 1st respondent to hide, from the Magistrate, Kesbewa, their actions taken in defiance of the order made by him recalling the warrant of arrest. It is passing strange that the 1st respondent and Rodrigo obtained confidential reliable information about the restive crowd at Kesbewa but got no information of the receipt of the telephone message conveyed to their office informing of the withdrawal of the warrant of arrest. Moreover, despite the undertaking given by the 1st respondent to the Magistrate, Kesbewa, he failed to inform him promptly about the arrest of the petitioner; and for that reason as well, he preferred not to face the Magistrate, Kesbewa. A State Counsel, different from the one who appeared to obtain the warrant of arrest, appeared before the Chief Magistrate when the petitioner was produced before him. It appears that this unsuspecting State Counsel was led by his nose by the 1st respondent who transfigured him to a mere mouthpiece. The learned State Counsel vehemently

submitted that his instructions were that the warrant of arrest of the petitioner was not recalled and the petitioner was not released on bail, when the Magistrate was told otherwise. The Chief Magistrate pointedly put this position to the 1st respondent who was present in Court and recorded – "Director, CID, states that he does not know and further he had not been informed". This conduct of the 1st respondent is most reprehensible. The Chief Magistrate did what the learned State Counsel should have done in the interest of justice. Having adjourned the Court, he telephoned the Kesbewa Magistrate who confirmed that the warrant was recalled and the petitioner was released on bail.

The conduct of the 1st respondent in the Chief Magistrate's Court unequivocally suggests the he represented to the Chief Magistrate – (1) that the petitioner was arrested on the warrant issued by the Magistrate, Kesbewa, which warrant was returned to the Chief Magistrate; (2) that he was unaware that the warrant was recalled at that stage and that no one has so informed him and (3) that the petitioner was arrested on the authority of the warrant and of no other.

The first opportunity the 1st respondent got to inform a Court of justice regarding the circumstances under which the petitioner was arrested, was when the petitioner was produced before the Chief Magistrate, Colombo. The 1st respondent had this to state in his affidavit submitted to the Supreme Court relating to the circumstances under which the petitioner was arrested : "on the same day (ie 10th) at 17.30 hrs at Deputy Inspector-General/CID office the 2nd respondent telephoned the DIG and informed him that the aforesaid warrant had been recalled by the Magistrate, Kesbewa. At that stage the DIG/CID (3rd respondent) contacted the Hon. Attorney-General and informed me that Hon. Attorney-General had granted approval for the arrest of the petitioner under normal law in terms of the Code of Criminal Procedure, and directed me to appraise the lawyers present at the High Court Judge's house the approval of the Hon. Attorney-General. He further directed me

to proceed to Thalagala, Kiriwaththuduwa, in the Kahathuduwa police area and to arrest the petitioner and the other suspects". (para 8).

If the above statement is correct, why did the 1st respondent refrain from saying so to the Chief Magistrate, Colombo? It would appear also that the 1st respondent gave the plaint State Counsel instructions which he knew to be false that he did not know of the withdrawal of the warrant arrest. This false position of the 1st respondent is also supported by the 3rd respondent in his affidavit. The 4th respondent denies that he ever gave instructions to any Police Officer to arrest anyone. At para 22C of his affidavit, the 4th respondent states : "when I learnt of the note alleged to have been made by the 1st respondent and reproduced in the subparagraph "O" of paragraph 91 of the petitioner's affidavit, I immediately brought to the notice of the additional Solicitor-General in charge of the subject and suggested him to summon the 3rd respondent to ascertain the basis on which such an incorrect note has been made. After the discussion with the 3rd respondent, I brought to the notice of Her Excellency the President being the Minister of Defence, that an incorrect note has been made by the 1st respondent which had led to protest by certain members of the Bar against Attorney-General's Department. Her Excellency assured me that she would call for a report from the IGP and take action in this matter. . .".

I accept the version given by the 4th respondent and observe that his reaction to the note made by the 1st respondent, which he calls incorrect, is the natural reaction of anyone in his position. The mastery of the 1st respondent in the art of prevarication is amply demonstrated by the following averments he has made in his affidavit. ". . .I admit that I informed the learned State Counsel that I was unaware that the petitioner has already being granted bail by the Magistrate's Court, Kesbewa, on 10.9.98 and wished to add that the petitioner nor his counsel produced any document to substantiate this fact and that the learned Chief Magistrate, Colombo, was constrained to adjourn Court in order to telephone the Magistrate of Kesbewa to ascertain as to

whether in fact the petitioner had been granted bail. And wished to add that if the petitioner did in fact show me, as stated in his affidavit, a certified copy of the said order granting bail, I cannot imagine as to why it was not produced in Court on this occasion" (para 34). This statement is made by a man who knew very well that producing the petitioner before the Chief Magistrate, Colombo, was something he craftily manoeuvred, knowing well that the petitioner's lawyers were awaiting his production at the Kesbewa Magistrate's Court.

Is the arrest of the petitioner according to procedure established by law?

As stated earlier it is admitted that the arrest of the petitioner was made by the 1st respondent. To the learned Chief Magistrate, Colombo, he represented that the petitioner was arrested on a valid warrant issued by the Kesbewa Magistrate. Even if this warrant was otherwise legally valid, the 1st respondent could not have arrested the petitioner on that warrant in view of subsection 52 (3) of the CCRP Act which states :

> "when a warrant is directed to a peace officer by name it shall not be executed by any other peace officer unless endorsed by him by name."

The warrant was directed to U. E. C. Rodrigo, Sub Inspector of Police, and only he could have arrested the petitioner on that warrant. Rodrigo has not endorsed the warrant to enable another peace officer to execute it. This was probably why the 1st respondent abstained from signing the warrant as the one who executed it, when he produced that to the Chief Magistrate, Colombo. It is surprising that learned State Counsel who appeared when the petitioner was produced before the Chief Magistrate, Colombo, overlooked these important matters of law and was content to swallow the instructions given to him by the 1st respondent hook, line and sinker.

If the petitioner was not arrested on the warrant of arrest issued by the Magistrate, a peace officer could only have arrested him in terms of subsection 32 (1)(*b*) of the CCRP Act, on the allegation of his having committed offences punishable under section 300 and 141 of the Penal Code which are cognizable offences, in the circumstances mentioned in that subsection. That subsection reads :

> "Any peace officer may without an order from the Magistrate and without a warrant arrest 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."

Learned Solicitor-General who appeared for the 4th respondent, with his customary fairness, submitted that it is settled law that the arresting officer should be able to justify an arrest on one or more of the grounds set out in subsection 32 (1) (*b*) and that in the instant case there did not appear to be any justification for the 1st respondent to arrest the petitioner. Admittedly, the 1st respondent was not involved with the investigations of the alleged offences said to have been committed by the petitioner and the 1st respondent does not claim to have acted under subsection 32 (1) (*b*).

It appears to me that both the 1st and 3rd respondents cooked their notes after the petitioner was produced before the Chief Magistrate, Colombo. It is stated in the written submissions filed on behalf of the 1st to 3rd respondents that "the position taken up by the 1st respondent was that at all times he was acting purely on the orders of his superior the 3rd respondent and that as a police officer he was bound to do so".

The 1st respondent states in his affidavit : "on the same day at 19.30 hrs. I arrived at the house of the petitioner where I found the 2nd respondent present along with the petitioner and four Attorneys-at-law. Mr. Premaratne informed me that the warrant of arrest of the

petitioner had been recalled and he had also recovered a weapon suspected to have been used by the petitioner to commit an offence. The 2nd respondent further informed me that the petitioner had obtained ammunition from various police officers in order to test his revolver. I am aware that ammunition is an inventorized item, the obtaining of such ammunition was illegal and required further investigations under the Public Property Act" (para 9). "I then explained the charges of attempted murder and unlawful assembly committed by the petitioner and further informed the DIG/CID (3rd respondent) about the discovery of the weapon and received orders to arrest the petitioner" (para 10).

There is nothing to indicate that the 1st respondent gave his independent mind to bear on the arrest of the petitioner : he executed the orders given by his superior the 3rd respondent. The arrest under those circumstances is illegal. See *Gunasekera v. De Fonseka*[4]; *Muthusamy v. Kannangara*[5]; *Christy v. Leachinsky*[6] and *Corea v. The Queen*[7]; I am of the view that the 1st and 3rd respondents have falsely stated that they got the approval of the 4th respondent to arrest the petitioner and further that he was informed of the arrest after the event. The British Statesman, Herbert Henry Asquith, once observed, that the War office kept three sets of figures ; one to mislead the public, another to mislead the Cabinet and the third to mislead itself. Similarly, I would say it is quite probable that the CID kept three sets of facts on the issue of the arrest of the petitioner; one to mislead the Chief Magistrate, another to mislead the Supreme Court and the third to mislead itself.

Conclusion

I hold that the arrest of the petitioner is not in accordance with the law. Further, the petitioner was unnecessarily and unreasonably detained at the CID office at least from 2.30 am to 12.45 pm on 11th. Vide – *Senaratne v. Punya de Silva and others*[8]. There is

no complicity of the 4th/6th respondent and the 2nd respondent in the illegal arrest. I hold that the 1st and 3rd respondents have violated the fundamental rights of the petitioner guaranteed under Articles 13 (1) and 13 (2) of the Constitution by the unlawful arrest and detention of the petitioner. I order the 1st and 3rd respondents to pay the petitioner personally a sum of Rs. 50,000 each as compensation; in addition, I direct the State to pay the petitioner a sum of Rs. 200,000 as compensation and a sum of Rs. 50,000 as costs. The petitioner will thus be entitled to in total, a sum of Rs. 350,000.

WIJETUNGA, J. – I agree.

BANDARANAYAKE, J. – I agree.

Relief granted.