# LST REVIEW

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## The Kamal Addararachchi Case

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# Editor's Note

In this month's issue of the LST Review we look at three recent cases decided by the appellate courts of Sri Lanka: two by the Supreme Court and one by the Court of Appeal.

## The Law on Rape

The trial of film actor Kamal Addararachchi aroused a large degree of public attention. In December 1997 the actor was found guilty of rape and apart from a prison sentence was asked to pay a fine of Rs one million. In December 2000 the Court of Appeal reversed this finding and acquitted the accused. The Court of Appeal upheld the argument of the accused that the girl had consented to sexual intercourse. The Court of Appeal also made several pronouncements on the law relating to rape, including the issue of corroboration and the lack of physical injuries.

In this issue we publish the Court of Appeal judgement in the Kamal Addararachchi Case. We also publish a comment on the case where the author argues that many of the legal concepts articulated by the Court of Appeal have 'rolled back' the law in this country. While the author does not comment on the adequacy of the evidence, he looks at the reasoning of the Court of Appeal and contends that the reasoning perpetuates myths and stereotypes about women.

Feminists have for long contended that the law on sexual violence is biased against women. By insisting on corroboration, physical injuries and not looking for genuine consent the court has perpetuated stereotypes about women and discriminated against them. It is in the context of this debate that we publish the judgement and the case comment. We hope it will stimulate debate about how the law should deal with sexual offences.

## Using international law in domestic courts

Judges and lawyers all over the world are now using international law in domestic litigation. International law is being used as an interpretive aid, to fill legislative gaps, to

interpret constitutional and statutory provisions and even to develop the common law. Sri Lankan courts have also used international standards on many occasions.

In this issue we publish the judgement of the Supreme Court in *Weerwansa v Attorney General* where the court uses the provisions of the International Covenant on Civil and Political Rights to interpret the provisions of the Constitution on arrest. According to the Supreme Court the Directive Principles of State Policy require the state to foster respect for international law and its treaty obligations. The Court reasoned that the state must as a result respect its treaty obligations in its dealings with its citizens. The case also deals with the procedures that should be observed when a person is detained.

**Arrest and Privacy**

The third case in this month's issue deals primarily with illegal arrest. A party of police officers swooped down on the petitioner and his female companion and arrested them while they were occupying a room in a guest house. The Court found that the initial arrest was invalid but the subsequent detention valid.

However, the facts of the case also raise some fundamental questions about privacy and the rights of consenting and unmarried adults. Sri Lanka's Bill of Rights does not contain a provision on the right to privacy. If it did then counsel's arguments before the Supreme Court may have been on a different point of law.

We also publish a comment on the case by Shantha Jayawardene who argues that if the initial arrest under the Brothels' Ordinance was invalid, then the subsequent detention could not be valid.

**We take this opportunity to wish our readers a peaceful 2001**

# The Law on Rape
# A Giant Step Back

**Mario Gomez** *

The recent Court of Appeal judgement in the *Kamal Addararatchchi Case* has regrettably rolled back the law on rape in this country.[1] The case raises a number of important legal issues in relation to sexual violence and has unfortunately reinforced many of the myths about women.

One of the issues was whether there was sufficient evidence to convict the accused of rape. This article does not deal with that issue. The High Court and the Court of Appeal took sharply contrasting views on the evidence and given this divergence of views, the quality of the evidence is a matter that should be considered by the Supreme Court in appeal. Instead we look at some of the legal concepts contained in the Court of Appeal judgement, which it is submitted with respect, is deeply flawed and reinforces notions of male supremacy in our society.

## Consent

One of the main issues in this case was consent. The defendant initially took up the position that there was no sexual intercourse. This was the position he took before the Police and at the non summary inquiry before the Magistrate. However, at the trial, and after the prosecution had closed its case the defendant took up the position that there had been intercourse and that it had taken place with the consent of the victim.

Consent lies at the borderline of a charge of rape. If there is genuine and real consent then a charge of rape cannot be sustained. The law recognizes that consent must be genuine and given freely. Thus consent obtained through threats or intimidation would not amount to real consent. Consent obtained while the woman is in a state of intoxication will also not amount to genuine consent.[2]

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[1] *Kamal Addararatchchi* v. *The State*, Court of Appeal judgement dated 15th December 2000. A shorter version of this article was published in the *Daily News* of 27th January 2001.

[2] See Section 363 of the Penal Code.

At the level of international law the concept of rape has recently been re defined. The International Criminal Tribunal for Rwanda recently observed:

> *The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.*[3]

In the *Kamal Addararachchi Case* the High Court judge dealt at great length with the concept of consent since it was crucial to the defence of the accused.[4] One of the issues dealt with at the trial stage was whether the law recognized a concept of implied consent.

Defence counsel submitted that there had been tacit consent since the victim 'had not bitten, or scratched, or fought back against the accused' and there was no evidence of 'resistance or violence'.[5]

This submission was not accepted by the High Court judge. She observed that 'passivity does not amount to consent'. She noted further:

> *... to equate submission with consent is to overlook the essential character of consent as a social act whereby one person confers on another person the right to do something. Women may submit for many reasons inconsistent with consent .... Failure to recognize that passivity without more does not permit an inference of consent is reflected in certain common misconceptions and mistaken generalisations that bedeviled the law of rape.* [6]

According to the High Court judge the absence of violence is neutral and the person who infers consent from passivity makes an irresponsible inference. A person is not entitled to take ambiguity as consent but is obliged to obtain clarification on the issue of consent.

To the Trial Judge the mens rea of rape was satisfied when the accused knew that the victim was 'essentially saying no'.[7] The mens rea for rape was also satisfied when the

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[3] The *Jean Paul Akayesu Case*, Judgement of the International Criminal Tribunal for Rwanda, 2nd September 1998, <http://www.un.org/ictr/>.
[4] *Kamal Addararatchchi* v. *The Republic*, Case No 7710/96, Decision of the High Court of the Western Province, 22nd December 1997.
[5] Id. at pp. 14 and 16.
[6] Id p 14.
[7] Id. p 15.

accused knew that the victim was 'essentially not saying yes'.[8] The High Court judge went on to observe:

> *The mere absence of resistance of violence does not as I have clearly stated above mean that there was consent. Consent in this case legally means consent to the act of intercourse. The mere fact that a woman is willing to enter a room with a man does not itself mean that she was consenting to the act of intercourse. The fact that she entered the bedroom of a man may be an item of evidence to be considered in determining her consent but ultimately the specific issue that has to be decided was whether she gave her consent for the act of sexual intercourse.*[9]

It is submitted that it is this approach that should animate the law relating to consent. Consent in the case of sexual acts should never be presumed. The duty should be on the party that wishes to engage in sexual intercourse to be clear that the other party is a willing participant. This is more the case where the other party is relatively young as in this case. In the Court of Appeal however, the judges observed that the fact that the victim went into the room of an unknown house 'without making any fuss' was an indication that she was a consenting party to the sexual act.

Implied or tacit consent reflects certain stereotypical notions about women. It reflects a view that although women may say 'no' they really mean 'yes'. It reflects a view that women are ambiguous about sexual relations and are reluctant to indicate in definite terms their willingness to engage in sexual activity.

It is not only dangerous, but unfair and discriminatory for the law to draw such assumptions about women. As in all human relations a 'no' must be taken for what it means. Similarly a 'yes' must be taken for what it means. To equate a 'no' or silence with a 'yes' is a dangerous and discriminatory position for the law to take. That way the law would be assuming that all women mean 'yes' either when they say 'no' or when they are silent.

A similar position was taken in the English case of Stephen Olubumni Olugboja.[10] The Court of Appeal noted that as far as the actus reus of rape was concerned, the question

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[8] Ibid.
[9] Id. p 16.
[10] *Stephen Olubumni Olugboja* (1981) 73 Crim. App. R 344.

now was simply, 'at the time of sexual intercourse did the woman consent to it?'[11] The court observed that consent could cover wide range of states of mind in the context of intercourse between a man and a woman, ranging from actual desire on the one hand to reluctant acquiescence on the other.[12] The court noted that there was a difference between consent and submission. While every consent involves a submission, mere submission does not involve consent.[13] Apparent acquiescence after penetration does not necessarily involve consent, which must have occurred before the act took place, stated the court.

There is another issue that requires closer analysis. The power relationship that usually exists between a man and a woman was exacerbated in this case. Here was a young girl and a popular television star. Even if the girl was infatuated with the man, it does mean that she was willing to engage in sexual intercourse with him. Given the relative youth of the girl, the power relationship between him and her, it was obligatory on the man to make sure that she was freely consenting to the act of intercourse. Regrettably the Court of Appeal does not address these issues.

Moreover this was an act between two strangers. They had met only a few hours previously and there had been no previous sexual relations between them. In this context it is even more dangerous for the man to make any assumptions about her state of mind. In the context of two strangers there was even a greater burden on the man to make sure that the girl was willing to engage in an act of intercourse.[14]

**Corroboration**

According to the Court of Appeal one of the reasons for acquitting the accused was the lack of corroboration. There was no other evidence such as physical injuries on the accused to support the victim's testimony. The Court of Appeal refers to the old Sri Lankan case of *King* v. *Attukorale* to support its view that corroboration was required in cases of sexual violence.[15]

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[11] Id. p 350.
[12] Ibid.
[13] Ibid.
[14] On the issue of consent see also Shyamala Gomez & Mario Gomez, 'Gender Violence in Sri Lanka: From Rights and Shame to Remedies and Change', (Shakti: 1999) p 65 – 75.
[15] *King v Attukorale* 50 NLR 256.

The judicial practice with regard to corroboration has confused the Sri Lankan law in relation to sexual offences. To many this practice is a good example of the gender biases in the law. The 'judicial practice' that corroboration is required in cases of sexual offences evolved as a result of the influence of English law. However, this 'rule of prudence' stands in direct conflict with an express provision of the Evidence Ordinance which states that:

> *No particular number of witnesses shall in any case be required for the proof of any act.*[16]

Chief Justice Basnayake interpreting this section has argued that except where corroboration is expressly required by statute 'our rule of evidence' is that 'no particular number of witnesses shall in any case be required for the proof of any fact.'[17]

In *Rajaratne* v. *The Attorney General* defence argued that the failure of the trial judge to indicate to the jury that the identity of the accused was not corroborated, was fatal to the conviction.[18] In this case the identity of the alleged rapist was in issue. The victim in this case was a four year old child when the offence was committed and the rapist was identified solely by her evidence.

The trial judge had instructed the jury in this case that it was unsafe to convict on the uncorroborated evidence of the victim and that one should look for some independent evidence. There was independent medical evidence of the act of intercourse having taken place and consent was not an issue since the victim was so young. However, there was no independent evidence regarding the identity of the accused.

The Court of Appeal, after examining English authorities, concluded that 'the quality of the identification evidence' in this case was good.[19] The offence took place in the afternoon, the child had known the accused previously and this provided sufficient opportunity for identification. The Court of Appeal noted that this was a case in which 'the jury could have been left to assess the value of the identifying evidence even though there was no other evidence to support it'.[20] The conviction was affirmed.

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[16] Section 134 of the Evidence Ordinance of 1896, Cap 21.
[17] *R v Dharmasena* 58 NLR 15 at 17.
[18] Court of Appeal Minutes of 23rd January 1996.
[19] Id. p 13.
[20] Ibid.

In the Indian case of *State of Maharashtra* v. *Chandraprakash Kewalchand Jain* the Indian Supreme Court rejected the idea that a rape victim's testimony be corroborated by other evidence.[21] The Court observed:

> *The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under S. 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act ... which requires it to look for corroboration.*[22]

The irrationality of the corroboration rule was noted in an English case.[23] As the court observed in this case, if one applies the corroboration rule strictly, the woman's evidence about the identity of an intruder requires no corroboration if he confines himself to robbing or stealing, but must be the subject of the usual warning if, having stolen or robbed, he then goes on to rape the woman. This is despite the fact that the rape would almost certainly give her more opportunity to observe his appearance than a robbery or theft.[24]

Many Sri Lankan High Court judges have indicated in out of court conversations that they no longer insist on corroboration. If the quality of the victim's testimony is good, that alone would be sufficient to sustain a conviction.

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[21] *State of Maharashtra* v. *Chandraprakash Kewalchand Jain* AIR 1990 SC 658.
[22] Id. P 664.
[23] *R* v. *Chance* (1988) Cr. App. R 398 cited in *Rajaratne* v. *The Attorney General*, Court of Appeal Minutes of 23rd January 1996.
[24] Id. p 11-12.

**Evaluation of the evidence**

One of the main issues in the case related to the evidence given by the prosecutrix. Was her evidence reliable? Much of the defence case was devoted to attacking the credibility of the victim's evidence.

The Trial Judge believed the victim and found her evidence reliable. The judge opted for the testimony of the victim for many reasons, one of which was that her evidence was corroborated in material sections by the evidence of other witnesses. The Trial Judge divided the sequence of events into three stages: events that occurred before the victim met the accused, events that occurred after the accused dropped off the victim, and events surrounding the alleged rape. The judge found that the victim's evidence about the events that occurred before she met the accused, and the events that occurred after she was dropped off by the accused, 'was corroborated in all material particulars' by the testimony given by five other witnesses.

The Court of Appeal on the other hand did not believe the victim and thought that her evidence was unreliable. There is no indication from the Court of Appeal as to why the victim would fabricate a charge of rape. Given the trauma of a rape trial it would require a high degree of motivation for a woman to fabricate and then pursue a charge of rape.

The Court of Appeal and the Trial Judge also disagreed on the interpretation placed certain parts of the evidence. For example the Trial Judge believed that the evidence of the two defence witnesses Mulin Senewiratne and Miriyan de Silva corroborated the evidence of the victim. The Court of Appeal thought otherwise.

All these raise substantial questions of law which require consideration by superior court.

**The Right to a Fair Trial**

Much of the Court of Appeal judgement was aimed at showing that the accused did not have a fair trial. According to the Court of Appeal, the High Court judge had 'mollycoddled' and shown a partiality to the victim, granted an adjournment when one was not required, changed prosecuting counsel and held an 'camera trial' when the circumstances did not warrant this.

The procedures followed by the Trial Judge raise substantial questions of law which cry out for review by a superior court. What are the appropriate procedures to be followed in cases of sexual violence? Does the exclusion of the public affect the rights of an accused to a fair trial? Given that few prosecuting counsel are trained to lead evidence in cases of this nature, is it reasonable for the trial judge to seek the assistance of a mature prosecuting attorney in leading evidence? Can a trial be paused where a victim of sexual violence breaks down?

In cases of rape a victim has to 'go public' with her story on at least four occasions. She has to make a statement to the police, she has to tell the medical doctor who examines her what happened, she has to come out with her story before the Magistrate at the non summary inquiry and she has to give evidence at the trial and face cross examination by opposing counsel. Given these procedures, many of which can be extremely humiliating, it is surprising that rape victims resort to the criminal law at all. Clearly then, a trial judge acts legitimately in trying to mitigate some of these procedures and adopting procedures that are less harsh on the victim.

**The Need For Review**

The are at least five substantial questions of law which arise from the Court of Appeal's judgement and which require consideration by the Supreme Court:

**Consent and Implied Consent**

What is consent in cases of rape? Does the Sri Lankan law recognize the concept of implied consent: that is, can consent be inferred from silence, or ambiguous conduct? Alternatively, does the law require the man to be convinced that the woman is a willing participant to the act of intercourse?

**Corroboration**

Does the Sri Lankan law require corroboration of the victim's testimony in a case of rape and other sexual offences?

**Physical Injuries**

Is a rape victim required to show bruises and scratches and produce evidence that she fought back to establish non consensual intercourse?

**Evaluation of Evidence.**

The Trial Judge and the Court of Appeal differed significantly on the weight that was to be attached to the victim's evidence.

One of the reasons for disbelieving the victim according to the Court of Appeal, was that 'having regard to the normal conduct and behaviour patterns of women and girls in Sri Lankan society' and 'the yardstick of accepted and **expected** behavior of women in society' (emphasis added) it was clear that the act of intercourse was consensual. Is this the standard to be applied in evaluating the victim's testimony? Who defines the normal behaviour patterns of girls and women in Sri Lankan society?

**In camera trials.**

Do 'in camera trials' jeopardize the right of an accused to a fair trial? How does the exclusion of the public from court proceedings affect the rights of an accused in a charge of rape? In what circumstances can a trial judge order an 'in camera' trial?

**Conclusion**

There are other problems in the Court of Appeal judgement including its unwillingness to consider the credibility of the defence evidence. One of the reasons why the High Court judge disbelieved the accused was because he first denied that there was sexual intercourse at all. He raised the question of consent only after the victim at given evidence and towards the end of the High Court trial.

Perhaps the accused was not guilty of rape and should be acquitted. Maybe the evidence on close scrutiny will not support a conviction of rape. These are matters for an appellate court to decide. Yet even if the accused is acquitted, it should not be for the reasons set

out in the judgement of the Court of Appeal. The High Court took the law on rape forward, especially in the way it conceptualized consent. The Court of Appeal unfortunately has taken the law on rape a giant step back. The case raises some fundamental issues on the question of sexual violence that require consideration by a superior court.

The case also illustrates the attitudes of lawyers to questions of gender equality. Many lawyers welcomed the Court of Appeal judgement and thought that it was the 'right' verdict. Opinions were formed although many of them had not read either the High Court judgement or the Court of Appeal judgement. The inference is irresistible: here was a female judge in the High Court dealing with a woman victim, she must have 'gone overboard' in a bid to convict the accused.

The case presented a good opportunity for the Court of Appeal to have invited an amicus curiae to assist the court. Unfortunately this was not done. If the case does go up on appeal then hopefully the Supreme Court will consider inviting an amicus to assist the court as it did in the *Abeysundera* case.

# Maximus Danny v. IP Sirinimal Silva and six others

## A Comment on the Case

Shantha Jayawardena*

### 1. Introduction

The recent Court decision in *Hewagama Koralalage Maximus Danny* v. *IP Sirinimal Silva and six others* gathered popularity for the unique nature of its facts.[1]

The case was an application by one Maximus Danny to the Supreme Court under Article 126 of the Constitution alleging that he was arrested and detained by the Police and this arrest and detention violated his fundamental rights guaranteed by Articles 12(1), 13(1) and 13(2) of the Constitution.

### 2. Principal Facts

On 22nd July the petitioner met one Leela Perera with whom he had a relationship of sexual intimacy and they decided to spend that night at the Sirisevana Guest House, Dankotuwa. Around 10.30 in the night the first to fifth respondents, who were Police officers entered the bedroom in which the petitioner was with his companion. Asserting that they were from the Chilaw Police Station they arrested both the petitioner and his companion. From 2.30 a.m. on the following day (23rd) they were kept in custody. They were produced before the Marawila Magistrate around 12 noon of the same day. The Magistrate refused bail and the petitioner was remanded for six days until he was discharged on 29th July 1998.

### 3. Contentions of the parties and the relevant Statutory and Constitutional Provisions

The contention put forward on behalf of the petitioner was that his arrest and detention was not in accordance with the procedure established by law and therefore it was

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[1] SC (Application) No. 488/98, S.C. Minutes 12th December 2000.

violative of his fundamental rights guaranteed by Articles 13(1) and 13(2) of the Constitution.

Articles 13(1) and 13(2) of the Constitution read as follows:

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

Section 32(1)(b) of the Code of Criminal Procedure Act of 1979 lays down the procedure of arrest, without a warrant of a person who has been concerned in any cognizable offence. It reads as follows

> *"Any peace officer may without an order from a Magistrate and without a warrant arrest any person....*
> *(b) 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."*

According to section 37 of the same Act,

> *"Any peace officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate."*

It was contended for the respondents that the Police Officers raided the Guest House in order to investigate information that several LTTE suspects were residing in the Guest House. It was further averred that as the petitioner was unable to furnish facts to establish his identity, the Police had to arrest the petitioner so as to verify his identity.

The respondents had charged the petitioner who was arrested on suspicion of being a LTTE terrorist under the Brothels' Ordinance of 1889.

According to Section 2 of the Brothels' Ordinance,

> *"Any person who-*
> *(a) Keeps or manages or acts or assists in the management of a brothel; or*
> *(b) Being the tenant, lesee, occupier or owner of any premises, knowingly permits such premises to be used as a brothel, or for the purpose of habitual prostitution; or*
> *(c) Being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof, with the knowledge that such premises or some part thereof or is to be as a brothel, or is willfully a party to the continued use thereof as a brothel;*
> *Shall be guilty of an offence...."*

**4. The Issues in Question**

The court had to decide two issues. Firstly, whether or not the arrest of the petitioner without a warrant by the respondent Police Officers fell within ground (b) stipulated in section 32(1) of the Code of Criminal Procedure Act. Secondly, whether or not the detention of the petitioner was in accordance with section 37 of Criminal Procedure Act.

**5. Decision of the Court**

The court considered whether the arrest of the petitioner fell within the subsection (b) of the section 31(1). An arrest may fall within this subsection in any of the following situations:

a) Where the person has been concerned in the offence;
b) Where there is a reasonable complaint against the person;
c) Where credible information has been received;
d) Where a reasonable suspicion exists that the person was so concerned.

Justice Bandaranayake referring to the previous cases of *Coore* v. *James Appu*[2] and *Abeykoon* v. *Kulathunga*[3] stated, that:

> *... for the petitioner to be charged under the Brothels' Ordinance there should have been evidence that he had either managed or assisted in the management of the brothel.*[4]

The court found that there was no evidence to suggest that the petitioner was engaged in the management of a brothel. Therefore, the arrest did not fall within subsection (b) of section 32(1) of the Code of Criminal Procedure Act. Accordingly the court held that the arrest of the petitioner was not in accordance with the procedure established by law and therefore resulted in a violation of Article 13(1) of the Constitution.

Nevertheless since the petitioner had been produced before the Magistrate within a period of 24 hours the Court held that the detention of the petitioner was in accordance with the procedure established by law and therefore Article 13(2) of the Constitution was not violated. Thus although the initial arrest was invalid the subsequent detention was valid because the petitioner was produced before a Magistrate within 24 hours.

Furthermore, since none of the other occupants of the six rooms of the Sirisevana Guest House were taken into custody, the court rejected the respondents' averment that they were searching for LTTE suspects.

The court also discussed the Magistrate's function of issuing remand orders. Justice Bandaranayake stated that;

> *Remanding a person is a judicial act and as such a Magistrate should bring his*

[2] (1920) 22 NLR 206.
[3] (1950) 52 NLR 47.
[4] At p. 5.

*judicial mind to bear on that matter before depriving a person of his liberty.*[5]

**6. Comment**

The UN Body of Principles For the Protection of all Persons Under any form of Detention Or Imprisonment,[6] defines "arrest" as the act of apprehending a person for the alleged commission of an offence or by the action of an authority. It defines "detained person" as any person deprived of personal liberty except as a result of conviction for an offence, and "detention" as the condition of detained persons as defined above.

Arrest and detention are interconnected. A detention always stems from an arrest, and in fact arrest is the beginning of detention. A legal arrest could be followed by an unlawful detention if the proper procedure of detention has not been followed. But an illegal arrest could not be followed by a lawful detention because its origin, namely the arrest, was illegal. It is submitted that a detention which follows an illegal arrest cannot be a lawful one.

According to Article 13(1) of the Constitution an arrest could also be illegal if no reasons for the arrest were given to the person arrested at the time of arrest. But in this case the Supreme Court did not consider whether or not the constitutional requirement of reasons had been given to the arrestee.

The respondents argued that they searched the Guest House to investigate information that several LTTE suspects were residing in it. This makes it clear that the Police Officers knew beforehand that they were going to search the Guest House. Despite this, they failed to obtain a search warrant.

According to Section 6(1) of the Prevention of Terrorism Act of 1979, any Police Officer not below the rank of Superintendent or any other Police Officer not below the rank of Sub-Inspector of Police authorized in writing in that behalf, may, without a warrant not withstanding anything in any other law to the contrary; (a) arrest any person, (b) enter and search any premises, (c) stop and search any individual or any vehicle, vessel, train or air craft; and (d) seize any document or thing, connected with or concerned in or reasonably suspected of being connected with or concerned in unlawful activity.

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[5] At. P. 6.
[6] Adopted by General Assembly resolution 43/173 of 9 December 1988.

Since the respondent Police Officers searched the Guest House to investigate the information that several LTTE terrorists resided in it, they could have followed the procedure set out in Section 6(1) of the PTA. However, it is clear that the reasonableness of the suspicion is a must both for the Criminal Procedure code and the PTA. The Police Officers had no information to the effect that the particular persons who were arrested were LTTE suspects. An arrest made on a vague general suspicion is illegal.[7]

In the case of *Campbell and Hartley* v. *United Kingdom*[8] the European Court stated that "a reasonable suspicion" which would satisfy an objective observer that the person concerned might have committed the offence, must exist. However, accepting the difficulties inherent in the investigation and prosecution of terrorist offences the Court said the "reasonableness" of the suspicion justifying such arrests could not always be judged according to the same standards, which are applied when dealing with conventional crimes. Nevertheless the Court said that at least some facts or information capable of satisfying the court that the arrested person was reasonably suspected of having committed the alleged offence should be furnished. It was held in this case that previous convictions of the applicants for terrorist offences was insufficient to justify their arrest after seven years without further evidence to support the reasonableness of the suspicion.

The case raises another issue. Can the Police break into a room of unmarried consenting adults? The sexual freedom of men and women is restricted by the criminal law of this country. However, if an unmarried man and woman were to stay within the law, then does the police have a right to invade their privacy? If the Sri Lankan Constitution recognized the right to privacy then perhaps the petitioner's arguments may have been different.

The case also highlights the need to educate the police officers on the proper application of law. The fact that the Brothels' Ordinance has been in force for more than a century makes the need more demanding.

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[7] *Piyasiri* v. *Fernando* [1988] 1 Sri LR 173.
[8] 13 EHRR 157 (1990).

*In the Court of Appeal*
*of the Democratic Socialist Republic of Sri Lanka*

**Addararachchige Gunendra Kamal alias Kamal Addararachchi**

Court of Appeal
Case No. 90/97
High Court Colombo
Case No. 7710/96

**v.**

**State**

| | | |
|---|---|---|
| BEFORE | : | Hector Yapa, J. (P/CA) &<br>P.H.K. Kulatilaka, J. |
| COUNSEL | : | D.S. Wijesinghe, P.C., with Wijaya Wickramaratne, P.C., Dr. Jayampathy Wickremaratne, Chandrika Silva, Priyadharshani Dias and Chamindi Samaranayake for the Accused-Appellant.<br><br>Palitha Fernando D.S.G. for the Attorney-General. |
| ARGUED ON | : | 27.03.2000, 28.03.2000, 29.03.2000, 25.05.2000, 30.05.2000, 02.06.2000, 21.06.2000, 12.07.2000, 19.07.2000, 20.07.2000, 21.07.2000, 24.07.2000, 26.07.2000, 02.08.2000, 03.08.2000, 28.08.2000, 30.08.2000 & 31.08.2000 |
| DECIDED ON | : | 15.12.2000 |

**Hector Yapa, J.**

The accused-appellant in this case was indicted in the High Court of Colombo under two counts. In the first count he was indicted with the abduction of Inoka Gallage on 25.08.1993, in order that she may be forced or seduced to illicit intercourse, an offence punishable under Section 357 of the Penal Code. In the second count he was indicted with having committed rape on Inoka Gallage, on the said date an offence punishable under Section 364 of the Penal Code. Learned High Court Judge after trial, sitting without a jury, convicted the accused-appellant on both counts and sentenced him to a term of two years rigorous imprisonment on the 1st count and to a term of 10 years rigorous imprisonment on the 2nd count, both sentences to run concurrently. In addition accused-appellant was order to pay a fine of rupees one million with a default term of 2 years rigorous imprisonment. It was further ordered that out of the said fine of rupees one million a sum of Rs. 900,000/- to be paid to the prosecutrix Inoka Gallage as compensation. The present appeal is against the said conviction and the sentence.

At the trial prosecution led the evidence of the prosecutrix Inoka Gallage, Dr. Abeysinghe, Devika Subashini, Indrani Thirimanna, Police Matron Karunawathie, Sub Inspector of Police Randeniya and Court official Kinsley Udaya. When the defence was called, the accused-appellant gave evidence and called two witnesses namely Mulin Seneviratne and Miriyan de Silva to testify on his behalf. The prosecution case as stated by the prosecutrix Inoka Gallage briefly is as follows: According to her, on 25th August 1993, she was living with her aunt Dhammika Thirimanna at Rajagiriya. She was 16 years of age then and was attending school. On the said date she decided to run away from her aunt's house in order to go to her grandmother's house situated at 4th Lane Pitakotte. She decided to leave her aunt's house as there were constant quarrels between her and her aunt, since her aunt's husband who was employed in the Middle-East did not like Inoka staying in their house. Furthermore, her aunt's husband was scheduled to return home shortly. When the prosecutrix left her aunt's house in the morning of 25.08.1993, she had carried with her a travelling bag containing some of her clothes and an exercise book which contained the names and addresses of cricketers and film stars which included the name and address of the accused-appellant. After leaving her aunt's house, she proceeded first to her friend Devika Subashini's house at Angoda and spent some time there. Around noon after lunch she left Devika's place to visit her grandmother who was at 4th Lane, Pitakotte. When she reached her grandmother's place at Pitakotte, she found that her grandmother's house demolished and the place deserted.

On further inquiry from a passerby she was informed that the grandmother had left the house after the death of her husband. At that stage prosecutrix had disclosed to a passer-by, a lady, that she was in search of employment, even though her original plan when she left her aunt's house was to go to her grandmother for schooling. The passer-by had then given her an address in the same lane i.e. 26/1, 4th Lane and told her to look for a job there. Prosecutrix having gone to the said address and finding that there was no one in that house, had made inquiries from the lady next door, who had referred her to the front house. When she inquired from the lady in the front house, she had informed the prosecutrix that the inmates of 26/1, 4th Lane had moved house and given her the new address, which was No. 66, Rampart Road, Pitakotte. It was then that the prosecutrix had come to know that the accused-appellant Kamal Addararachchi had been occupying the house No. 26/1, 4th Lane. According to the prosecutrix the house No. 66, Rampart Road was about ¾ mile away from the house No. 26/1, 4th Lane and she had walked to the said house No. 66, Rampart Road, knowing that she was going in search of the accused appellant. Having gone to the accused-appellant's house at No. 66, Rampart Road, she had inquired from the lady in the house for a job. When the lady in that house told her that there were no jobs available, prosecutrix did not go away, since it was getting late and the lady in the house had agreed to keep her there that night.

At about 9.00 or 9.30 p.m. the accused-appellant had come home and on seeing the prosecutrix, inquired from his aunt, as to who the visitor was and the aunt informed him that she had come to meet him. Thereafter the accused-appellant had spoken to the prosecutrix and their discussion lasted for about two hours. At this discussion the prosecutrix had informed the accused-appellant that she was looking for a job. The accused-appellant had discouraged her for seeking employment and advised her to continue with her studies promising to help her, and had infact given her Rs. 1000/- on that occasion. At the discussion the prosecutrix had not told the accused-appellant that she had left her aunt's house in search of her grandmother and how she ultimately came to the accused appellant's house.

According to the prosecutrix the lady in the house who had initially agreed to keep her for the night had told the accused-appellant to drop the prosecutrix at her house. However, the prosecutrix had refused to go to her aunt's house and requested the accused-appellant to drop her at her friend Devika Subashini's house. At that point of time the accused-appellant had asked the prosecutrix to get into the front seat of his car. While proceeding the prosecutrix had observed the car going towards Nugegoda and so

she told the accused-appellant that it was not the road to Devika's house. At that stage the accused-appellant had told the prosecutrix that he would take her to Devika's place on the following day, because the people at Devika's house might be suspicious if she was dropped at that time of the night. Therefore, accused-appellant told her that he would take her to a friend's house. Since accused-appellant was not willing to take her to Devika's house she kept silent and finally the accused-appellant stopped the car at a friend's place. He left the car and came back after about five minutes and told her to get down from the car saying that she could stay in the friend's house that night and on the following morning he would drop her at her house. Accused-appellant took her to a room where there was a table, two chairs, two beds and then left the room saying that he would meet the friend and come back. After about 15 minutes he came back with a bag, which was marked P3 at the trial. At that time she was dressed in a T-shirt, skirt, under skirt, brassiere and a nicker. The nicker was marked P4. In the room they talked about tele dramas where the accused-appellant had acted. Thereafter accused-appellant pulled out an over-sized denim shirt from the bag and requested her to wear it. Despite several requests when she refused to oblige a struggle ensured as the accused-appellant had tried to pull out the T-shirt the prosecutrix was wearing. Then only she realized that he was trying to molest her. But since he said there was nobody there, she did not raise cries. In the course of the struggle at one stage she fell from the bed. Ultimately he managed to pull out her T-shirt and then forced her to put on the denim shirt to cover herself. Accused-appellant who was wearing a T-shirt and shorts was then wearing a white bed sheet.

Then he held on to her and removed her under skirt (P4) using his toes. As they struggled on the bed her brassiere came out. Further he removed her nicker in the same way as he removed the under skirt by using his toes. Thereafter the accused-appellant had pulled her on to the bed and after some struggle he had sexual intercourse with her against her will. After the sexual act both of them had fallen asleep and in the morning when she got up she found the accused-appellant already up. Sometime later he went out and had brought her toothpaste and a brush and told her to wash herself and to take a bath, which she did. Later a person in a white dress had brought two cups of tea and the accused-appellant requested her to have tea. Both of them had tea together and left the place in the accused-appellant's car.

On the way the accused-appellant wanted to drop her at her aunt's house but since the prosecutrix was not willing to go there, he agreed to drop her at Devika's house. Even at

that point of time since the accused-appellant had promised to help her in her studies she still believed and trusted him. Finally the accused-appellant drove her through Kirulapana Road and dropped her at Nugegoda and she was asked to go to Devika's house and continue her studies. He further told her to meet him later so that he could help her. Thereafter she had taken a bus to Devika's place and reached there by about 10.00 a.m. on 26.08.1993. The prosecutrix did not disclose to Devika or to her sister the alleged act of rape committed on her by the accused-appellant. All that she told Devika was that since her grandmother was not there, she had been directed by some lady to the accused-appellant's house, in order to look for a job. Thereafter she went to the accused-appellant's house and stayed there for the night and was able to talk to the accused-appellant. She further said that she did not tell Devika about the incident of rape due to fear of embarrassment. The prosecutrix was at Devika's house the whole day until the evening, when at about 7.00 p.m. Devika's father had come with some police officers. Thereafter she had been taken to the Welikada Police Station. That night she was at the Welikada Police Station with the Police Matron, seated on a bench and then she was produced before a Senior Police Officer who recorded a statement from her. Sometime later she was examined by a doctor. Prosecutrix further said that she continued to remain at the Police Station for about 11 days.

Dr. Nilukshi Abeysinghe in her evidence stated that she examined the prosecutrix on 27.08.1993 and observed that her vagina was an unusual one. It was so because her vaginal channel was unusually wide and could admit two fingers with ease. On examination her labia minora and majora and the wave indentations on the walls of the orifice revealed that the prosecutrix was not a person who had had regular acts of sexual intercourse. Further according to the doctor the prosecutrix had a "convoluted hymen" where the first act of intercourse may not cause any bleeding. In fact the doctor said that at the time of the examination the prosecutrix was a virgin and her hymen was intact, and this situation was due to the unusual nature of her hymen. Dr. Abeysinghe also said that she examined the accused-appellant on 06.09.1993 and he had no injuries.

Devika Subasinghe gave evidence and admitted the position that on 25.08.1993, the prosecutrix came to her house in the morning at about 11.00 a.m. and left her house after lunch stating that she was going to her grandmother's place. She did not bring anything with her. On the following day i.e. on 26.08.1993 she came at about same time as on the previous date and told her that her grandmother was not there and further that she went to the house of the accused-appellant and stayed there that night talking to the accused-

appellant and his aunt. The accused-appellant had given her Rs. 1,000/= asking her to go to school from her (Devika's) house. Prosecutrix never told her that the accused-appellant had committed rape on her that night or even the fact that she had left her aunt's house for good. Later in the evening the police had come and taken her away. Indrani Tirimanna the mother of the prosecutrix testified to Court that the prosecutrix stayed in her sister's house and attended school. She used to visit the prosecutrix once a week. When she found that the prosecutrix was missing, she made a complaint at the Welikada Police Station on 25.08.1993, and later on 26.08.1993, the police had informed her that the prosecutrix was found. However, the police did not allow her to speak to her daughter. According to this witness she had no relation at 4th Lane, Pitakotte. However, she had heard of a grandmother with whom she had no contact. Further she stated that she had no knowledge as to why the prosecutrix ran away from her sister's place.

Karunawathie, the Police Matron testified that on the evening of 26.08.1993 she went with the police to Walpola and brought the prosecutrix to the Welikada Police Station. Prosecutrix was in her custody on the night of 26.08.1993, till the following morning. On that night prosecutrix did not talk with her. However, on the following night i.e. on 27.08.1993 prosecutrix started crying and when she questioned her, she told the witness how she went in search of her grandmother and then how she was directed to the house of the accused-appellant in order to find a job. The accused-appellant had taken her in his car saying that he would drop her at her house and had taken her somewhere else and had committed rape on her. When the witness had informed the O.I.C. about this incident a statement was recorded from the prosecutrix. SI Randeniya of the Welikada Police gave evidence in relation to the conduct of the investigations in respect of this case and the recording of the statements of various witnesses and the fact of the accused-appellant surrendering to the police on 06.09.1993. He admitted that the prosecutrix was kept at the Welikada Police Station for 11 days after she was brought to the Police Station on 26.09.1993. Finally the Court official Kinsley Udaya gave evidence referring to the contradictions marked V2 and V3, and the medical report of the accused-appellant marked V5. Thereafter the prosecution case was closed leading in evidence P1 to P8.

When the defence was called the accused-appellant gave evidence to the following effect. The prosecutrix had come to his house in search of a job. He had advised her to study and gave her Rs. 1,000/- on that occasion. When he wanted to drop her at her aunt's house on the night of 25.08.1993 she had refused and wanted her to be dropped at her friend Devika's house. When he had taken her close to her friend's house, she had

refused to get down giving him the impression that she wanted to stay with him for the night. Hence he took her to a room in a guest house and spent the night there with her. On that night both of them willingly had sexual intercourse. He had sexual intercourse with her twice and on both occasions he wore a contraceptive. Next morning both of them after a bath had a cup of tea and left the guest house and the prosecutrix was dropped at the Nugegoda Junction. He denied the two charges against him in the indictment. Accused-appellant also called two other witnesses to give evidence on his behalf, i.e. Mulin Seneviratne and Mirian de Silva. Mulin Seneviratne said that one day the prosecutrix came to her gate and asked for the accused-appellant's address and so she gave her the Rampart Road address of the accused-appellant. Mirian de Silva stated that on 25th August at about 3.30 – 4.00 p.m. the prosecutrix came to her gate looking for the accused-appellant's house and she told her that the accused-appellant was not living there and wanted her to ask the front house for his address. Thereafter the defence case was closed leading in evidence V1 to V5.

At the hearing of this appeal learned Counsel for the accused-appellant submitted that the central issue in this case revolves on the question of the credibility of the prosecutrix Inoka Gallage. Counsel contended that whatever test one applies to assess her evidence, it would appear that her evidence is untrustworthy and unreliable. Therefore he submitted that it is unsafe to act on her evidence, and that a conviction based on her testimony cannot be allowed to stand. Initially it would be necessary to consider whether the story of the prosecutrix is true when she says, that she ran away from her aunt's house to her grandmother to continue her schooling. On the other hand can it be said that the prosecutrix left her aunt's house for the sole purpose of meeting the accused-appellant as suggested by the defence. In this connection the evidence of the prosecutrix that she carried the note book which contained the name and the address of the accused-appellant cannot be ignored Besides she thought it fit to carry this note book but not her school books. This note book was marked by the defence as V1. It is also significant that this note book though marked by the prosecution at the non-summary inquiry had been deleted from the list of productions attached to the indictment. The defence had to go out of its way to have this note book marked and produced at the High Court trial. This note book contained the name and address of the accused-appellant admittedly written in her own handwriting. However, she tried to make out that the note book had no relevance to her on that occasion, since her meeting the accused-appellant was a chance meeting. On this point the evidence of the defence witnesses Mulin Seneviratne and Mirian de Silva appears very significant. Mirian de Silva testified that on 25th August when the

prosecutrix came to her looking for the accused-appellant's house, she told her that he was not living there and to inquire from the front house. The evidence of Mulin Seneviratne the lady in the front house was that when the prosecutrix came to her asking for the accused-appellant's address she had given her the Rampart Road address. Therefore, the evidence of these two witnesses is indicative of the fact that the prosecutrix having failed to locate the accused-appellant at 26/1, 4th Lane, had sought help from Mirian de Silva and Mulin Seneviratne to get at his new address. Even though the evidence of these two witnesses appeared to be very favourable to the defence, the learned trial Judge has taken a contrary view, when she stated in her judgement as follows: "the defence called two witnesses Mirian Silva and Mulin Seneviratne who corroborated the prosecutrix in her evidence as to the events that proceeded her meeting with the accused." (Vide Page 608 of the Judgement). This in our view is a serious misdirection on the part of the learned trial Judge. She has failed to appreciate the defence evidence which was most favourable to the accused-appellant. The evidence of these two witnesses ruled out the prosecution story that the meeting of the accused-appellant by the prosecutrix on that day in question was a chance meeting and supported the defence suggestion that the meeting of the accused-appellant by the prosecutrix on 25.08.1993 was a thought out act. Trial Judge's failure to appreciate this position has undoubtedly prejudiced the case of the accused-appellant from the very beginning.

It was submitted by learned Counsel for the accused-appellant that the story of the prosecutrix that she went in search of "a grandmother" to stay with her for the purpose of schooling was highly improbable. According to Indrani Tirimanna the mother of the prosecutrix, she had no relation living at 4th Lane, Pitakotte. She had heard of a grandmother with whom they had no such contact. According to the prosecutrix herself, the woman described by her as grandmother is not her mother's mother but a distant relative. Therefore, there was the possibility that the prosecutrix was really unaware whether such a grandmother was among the living when she allegedly set off in search of her house on 25.08.1993. Further it would appear from the evidence of the prosecutrix that her grandmother was living in a shanty type of house and the question would arise as to whether the prosecutrix could have attended school from there and that whether the grandmother could have spent for her schooling and other needs, a consideration which cannot be overlooked. Also one cannot be blind to the fact that here was a girl who had an aunt to look after her, she had her mother living close by visiting her every week, leaving the aunt and the mother for good, in search of a distantly connected grandmother, about whom she had not heard for more than three years. Surprisingly the prosecutrix

who was keen on continuing her studies from her grandmother's place never carried a single book except the note book containing the address of the accused-appellant. This conduct is highly improbable. Therefore, her alleged trip to "a grandmother" appears to be a pretext to meet the accused-appellant.

Another matter referred to by Counsel for the accused-appellant was the subsequent conduct of the prosecutrix after finding that her grandmother was not there at 4th Lane, Pitakotte. The prosecutrix who wanted to attend school from her grandmother's place suddenly changed her plans and wanted to find a job. It is in search of a job that she proceeded on foot from 4th Lane, a distance of ¾ mile to the new residence of the accused-appellant. Since the accused-appellant was not in the house, she met his aunt who told her that there were no jobs available. If her idea was to find a job, there is no reason why she should remain there for four long hours waiting for the accused-appellant even after she became aware from the aunt that there were no jobs available. Thus to wait for the accused-appellant who was a total stranger to her to get a job was a remote possibility. This conduct of the prosecutrix showed that even going in search of a job appears to be a cover up.

When the accused-appellant came home four hours later, the next thing that happened was a two-hour discussion between the prosecutrix and the accused-appellant. At the discussion the prosecutrix did not say anything about her leaving the aunt's house in search of her grandmother. Any person with common sense in such a situation would have disclosed this fact, for such a disclosure would have got more sympathy towards the prosecutrix. This conduct would support the defence suggestion that her trip to 4th Lane, Pitakotte was to meet the accused-appellant.

After the discussion that night at about 11.00 or 11.30 p.m. the prosecutrix had set off with the accused-appellant in his car to go to Devika's house. It was a late night ride with a man whom she had come to know just two hours earlier, a total stranger but a film star she adored. There was nothing to prevent the prosecutrix staying over the night in the accused-appellant's house and proceeding to Devika's house on the following morning. In fact accused-appellant's aunt had earlier agreed to keep the prosecutrix in the house for the night. Anyway prosecutrix left with the accused-appellant and as she said on the way the plans were changed, accused-appellant deciding to take her to a friend's place and she agreeing to go with him without much ado. The fact that the prosecutrix went into the room of this unknown house with the accused-appellant in the

dead of the night, without making any fuss, makes her version that she was an unwilling party to sexual intercourse highly improbable, having regard to the normal conduct and behaviour patterns of women and girls in Sri Lankan society. It is common sense that both of them went into this room for sexual enjoyment. Therefore, when the prosecutrix says that accused-appellant had sexual intercourse with her against her will or without her consent, her story becomes unacceptable.

It was also submitted by Counsel that in the room after two acts of rape, both the prosecutrix and the accused-appellant slept and then they brushed their teeth, had a bath, enjoyed a cup of tea served by a waiter and left the place in the car. Finally the prosecutrix was dropped at the Nugegoda Junction. Prosecutrix then proceeded to Devika's house and told her that she spent the night at the accused-appellant's house chatting with him and his aunt. Not one word about rape being committed on her by the accused-appellant. She spent the whole day at Devika's place but never cared to tell Devika, Devika's sister or Devika's father about her plight. Surely this is not the behaviour of a rape victim. Perhaps, if Devika's father did not contact the police due to some unknown reason, this case may not have seen the light of day. It would appear that the conduct of the prosecutrix in relation to the events that took place after meeting the accused-appellant on the night of 25.08.1993, till she was removed by the Welikada Police from Devika's house on the following day, i.e. 26.08.1993 around 7.30 p.m., cannot be the conduct expected of a person who had been subjected to an act of abduction and rape. On the contrary it would appear to us as the learned Counsel for the accused-appellant commented, that their conduct was more analogous to the conduct of a "honeymoon couple." Only sensible conclusion that could be arrived at is, that, the prosecutrix had lied to Court when she said she was abducted and raped.

In judging the testimonial trustworthiness of the prosecutrix one of the possible tests that could safely be applied would be the test of probability and improbability. The defence made the submission that the evidence of the prosecutrix was untrustworthy in that her conduct was most improbable. It was contended by Counsel that the learned trial Judge has not correctly applied this test of probability and improbability in order to determine the creditworthiness of the prosecutrix as evident from the following passage of her judgement which reads as follows: "In this case, Inoka's evidence when taken in conjunction with the evidence of the two defence witnesses and other witnesses of the prosecution, reveal that the "probabilities factor" echo's in favour of the version narrated by the witness." (Vide page 619 of the Judgement). Learned Counsel submitted that this

finding of the learned trial Judge that the "probabilities factor" echoes in favour of the version of the prosecutrix is totally erroneous, unwarranted and do not find support from the evidence in the case. This finding of the learned trial Judge in our view is unrealistic and does not reflect the correct conclusion one could come to on the evidence of the prosecutrix. It is very unfortunate that the Court has misapplied the test of probability and improbability. If this test was properly applied there was no difficulty in coming to the conclusion that the evidence of the prosecutrix was untrustworthy and hence cannot be acted upon. It would appear that she had lied to Court on several material issues. As learned Counsel submitted the approach of the learned trial Judge in applying the test of probability and improbability is flawed by reason of applying a subjective test. This is clear from the following passage cited by Counsel from the judgement of the trial Judge which reads as follows: "The defence suggested that her version of the incident was improbable, when considered in the light of the probability improbability test, as it went against the behaviour of any reasonable person. He clearly based this on the stereotype accepted and expected behaviour of women in society." (Vide page 621 of the Judgement.) Counsel submitted that in applying the test of probability and improbability the test to be applied is an objective test and not a subjective test, which has been erroneously applied by the learned trial Judge. In support of this contention Counsel cited the observation of Justice Mackenna referred to by E.R.S.R. Coomaraswamy, The Law of Evidence Vol. II (Book 2) Page 1052 which reads as follows: "When I have done my best to separate the truth from the false by these more or less objective tests, I say which story seems to me the more probable, the plaintiff's or the defendant's, and if I cannot say which, I decide the case, as the law requires me to do in the defendant's favour."

In our view there is no other way to apply the test of probability and improbability except by considering the yardstick of accepted and expected behaviour of women in society. In other words it is the application of the test of normal human conduct. As Jayasuriya J. observed in the case of *Wickramasuriya* v. *Dedoleena & others* [1996] 2 Sri LR 92. "A judge in applying the test of probability and improbability relies heavily in his knowledge of men and matters and the patterns of conduct observed by human beings both ingenious as well as those who are less talented and fortunate."

In this case it would appear that both the trial Judge and the learned Senior State Counsel who prosecuted (as observed from his written submissions) seem to have been imbibed with an erroneous notion that when applying the test of probability and improbability it is

the subjective test and not the objective test that has to be resorted to, so much so that the learned Senior State Counsel seems to have pleaded before the trial Judge not to reject the evidence of the prosecutrix by applying the objective test when he stated in his written submissions as follows: "Hence it is submitted that through an objective assessment of the prosecutrix's conduct her evidence should not be rejected." What is inherent in this submission of learned Senior State Counsel is that if an objective test was applied in assessing the evidence of the prosecutrix, then her evidence had to be rejected. This is where the confusion arose.

A submission was made by Counsel for the accused-appellant that the two contradictions (V2 & V3) marked in relation to the use of the contraceptives and the two acts of sexual intercourse committed by the accused-appellant, had the effect of showing or highlighting the probability of consent on the part of the prosecutrix. In cross-examination when the prosecutrix was asked whether any contraceptives were used by the accused-appellant, her reply was proved at the trial that at the non-summary inquiry she had stated to Court "He took from the bag a yellow elastic thing. He took it out of the packet. I saw it as a circular thing. He put it to his male organ". This contradiction was marked as V2. The other contradiction arose in view of her evidence in the High Court that she was subjected to one act of rape, where as in the Magistrate's Court she has stated that there was a second act of sexual intercourse using a contraceptive. This contradiction was marked V3.

It is strange that prosecutrix having told the Magistrate that the accused-appellant used contraceptives at the time of rape, to have forgotten this vital fact when she gave evidence before the High Court, for the reason that according to her this was the first time she had ever slept with a man. Further according to her evidence, it would appear that she had seen a contraceptive for the first time only on that night. It is to be noted that the prosecutrix would have seen a contraceptive for the second time, when the accused-appellant used a contraceptive for the second act of sexual intercourse. It is also very surprising that after having told the Magistrate about the second act of sexual intercourse using a contraceptive the prosecution has forgotten it and said one act of rape at the trial before the High Court. To us it would appear that the reason for her forgetfulness lies elsewhere. As Counsel submitted if the prosecutrix admitted the use of contraceptives and the second act of sexual intercourse, the probability of consent would have been far greater. Besides the second act of sexual intercourse took place after they had slept for some time, a type of conduct, which is very suggestive of sexual intercourse having taken

place with consent. Surely any woman after the first act of rape would not think of sleeping with the rapist again unless at gunpoint. Further if the accused-appellant attempted to ravish her for the second time, prosecutrix would have yelled and cried for help. Human conduct is such, that, when there is danger it is natural for a human being to cry for help whether there were people around or not. In this case prosecutrix tried to tell the world that she did not raise cries because the accused-appellant had told her earlier that there were no one around. This evidence and the reasoning is unacceptable. Common sense will tell us that the prosecutrix did not shout or cry as she was a willing party to the sexual conduct. Even though these two contradictions were very suggestive of the sexual acts having taken place with the consent of the prosecutrix, it was most unfortunate that the trial Judge has glossed over the two contradictions when she stated in her judgement as follows: "The learned Counsel for the defence also submitted that the prosecutrix in her testimony, under cross examination denied that the accused had worn a contraceptive during intercourse and marked a contradiction in her testimony given at the non summary trial on this point. In considering this contradiction, I hold that it is not a material contradiction." ... "Be that as it may according to the facts of this case and taking into consideration the several traumatic events that had occurred from 25th to 26th of August 1993, in the life of the prosecutrix I hold that she may have with time reasonably forgotten the exact number of the several acts of sexual intercourse." (Vide pages 609 and 610 of the Judgement). With very great respect to the judge, we cannot agree with her. Trivial contradictions can be ignored, but not contradictions which go to the very core of the accused-appellant's case. (Vide *Wickremasuriya* v. *Dedoleena and others* [1996] 2 Sri LR Page 95). In this case, the two contradictions were material contradictions which go to the very root of the accused-appellant's case of consent and therefore very favourable to the accused-appellant. However the two contradictions were grievously overlooked by the trial Judge. Further on a reading of the judgement it would appear that the learned trial Judge has been misled and dazzled by some wrong notion of gender inequality.

Another important submission that was advanced by learned Counsel for the accused-appellant which was very supportive of the theory of consent was the absence of injuries on the prosecutrix. This submission has to be considered in the light of the evidence that was elicited from the prosecutrix. It was her evidence that she struggled with the accused-appellant when she realized that he was trying to molest her and at one stage she even fell from the bed. To escape from his grip she even had scratched the accused-appellant. She had put up a fierce resistance before he managed to enter her. Hence one

would expect some injury, even a scratch mark, on some part of her body or even on the body of the accused-appellant. Absence of such tell-tale marks is a circumstance that was strongly supportive of the sexual act having taken place with her consent. (Vide the case of *Karunasena* v. *Republic of Sri Lanka* 78 NLR 64 at 65). Therefore, we are of the view that there is much merit and substance in this submission of Counsel and very clearly supportive of the defence case that the sexual act was committed with the consent of the prosecutrix. If that be the case the resulting position would be that the prosecutrix has lied to court when she painted a picture of grim and fierce resistance inside the room prior to the act of rape.

Another matter that was raised by the learned Counsel was the absence of corroboration to show that the sexual act was committed on the prosecutrix against her will or without her consent. The law regard to the requirement of corroboration in rape cases is well settled. As observed by Gratiaen J. in the case of *King* v. *Attukorale* 50 NLR 256 at 257, "The corroboration which should be looked for in cases of this kind is some independent testimony which affects the accused by connecting or tending to connect him with the crime, and it is settled law that although the particulars of a complaint made by a prosecutrix shortly after the alleged offence may be given against the person 'as evidence of the consistency of her conduct with her evidence given at the trial,' such complaint 'cannot be regarded as corroboration in the proper sense in which that word is understood in cases of rape and it is misdirection to refer to it as such'... such evidence is not corroboration because it lacks the essential quality of coming from an independent quarter." These are much hallowed principles enunciated by erudite Judges of our Superior Courts which cannot be and should not be just ignored. In this case where the sexual act has been admitted and the matter in issue is whether it was done with consent or without consent one possible area which could have provided independent corroboration was the medical evidence. However according to medical evidence there being no injuries either on the prosecutrix or on the accused-appellant there appears to be no independent corroboration relating the act of sexual intercourse having been committed on the prosecutrix against her will or without her consent. This vital aspect has not been considered by the trial Judge.

Another matter of significance referred to by learned Counsel was the prosecutrix's delay in making a prompt complaint about the incident of rape. She kept mum when the waiter brought tea to the room in the morning. She spent the whole day at Devika's house on 26.08.1993, without telling anybody of the incident of rape. Even when she was taken to

the Welikada Police Station at about 7.30 p.m. on the 26th night, in her short statement recorded by the police she did not refer to the act of rape. It was on the following day i.e. on 27.08.1993, in her second statement that the prosecutrix had thought it fit to mention about the act of rape. Under normal circumstances, one would have expected the prosecutrix to have come out with the incident of rape to the police at the first opportunity and that is what the test of spontaneity and contemporaneity requires. Surprisingly it did not happen in that way. It happened only on 27th night as stated by the police matron Karunawathie in her evidence, a fact not corroborated by the prosecutrix herself. According to the prosecutrix on the 26th night when she was seated on a bench at the Police Station she said she spoke to the police matron Karunawathie. Nobody knows what she spoke to Karunawathie. All that the learned Senior State Counsel elicited amidst objections from the defence was the affirmative answer "yes" to the leading question put to the prosecutrix whether what she told the matron was true. Thus there was no evidence from the prosecutrix that she told Karunawathie about an incident of rape committed on her by the accused-appellant. On the other hand Karunawathie's evidence was that on the 27th night at the Police station prosecutrix told her that she was raped by the accused-appellant. This evidence of the matron is heresay, since the prosecutrix did not say what she told the police matron. Hence this item of evidence elicited from the police matron is inadmissible evidence. The next thing the police matron stated in her evidence was that she brought it to the notice of the O.I.C. Wekadapola next morning and that would be 28th morning. On this matter police matron Karunawathie was very clear that on the 26th night prosecutrix did not talk to her. It was on the 27th night that the prosecutrix cried and came out with the story of rape by the accused-appellant. However as learned Counsel pointed out that these contradictory positions have not been resolved or considered by the trial Judge. Learned trial Judge has simply taken things for granted, when she considered the case on the basis that on the 26th night the prosecutrix was seated on a bench at the Police Station with the police matron, the prosecutrix started crying and stated that the accused-appellant had raped her, that on the following morning the police matron brought it to the notice of the O.I.C. With all these inconsistencies, we are at a loss to understand how the trial Judge could have stated in her judgement as follows: "The evidence to the sequel of events that had occurred after she had been dropped off by the accused was corroborated in great detail by both Devika and the matron." (Vide page 607 of the Judgement). Far from corroborating, the prosecutrix stands contradicted by the matron. In our view it is a serious misdirection by the trial Judge having regard to the evidence in the case.

Learned Counsel complained that the trial Judge has meted out special treatment to the prosecutrix at the trial. It was to the following effect (A) That the trial was held in camera, (B) That when the prosecutrix did not come out with the story of rape an adjournment was given for the following day in spite of the objections raised by the defence Counsel, followed by a change of prosecuting Counsel on the next date of trial, (C) That the court facilitated the prosecutrix to adduce evidence from the platform occupied by the Registrar without using the witness box, (D) That the prosecutrix was informed that if necessary she could even have her mother or a close relation accommodated in the Court, (E) That the Court gave the prosecutrix an assurance that she had the protection of the Court, (F) Finally inquiring from the prosecutrix when she became tongue-tied whether the accused had threatened her.

In view of the special treatment afforded to the prosecutrix, learned Counsel complained that the accused-appellant was deprived of a fair trial. In our view, holding the trial in camera was unnecessary for the reason that the prosecutrix had earlier given the same evidence in a crowded Court house before the Magistrate. Infact the learned Magistrate had disbelieved her then. Further at the High Court trial prosecutrix was a woman of 20 years of age. We cannot approve these steps taken by the learned trial Judge to give special treatment to the prosecutrix at the expense of the accused-appellant who was entitled to a fair trial. No court should try to molly-coddle a witness as has happened in this case. The result would be very dangerous in that the prosecutrix would have got wrong signals to lie in Court. It is very important in a criminal trial that an accused should have a fair trial and therefore situations should be avoided so that no complaint of discrimination, bias or injustice could be made. It may be that the Court involuntarily allowed these things to happen with a feeling of sympathy to the prosecutrix. However the net result is that the Counsel for the accused-appellant complained that his client was denied a fair trial.

It was also contented by the Counsel for the accused-appellant that with all the proddings in the High Court the prosecutrix was evasive, there was reluctance and silence on her part to give evidence, there were times when she became tongue-tied, there were two serious contradictions in her story and there was a very high degree of improbability in her story. All these features in her conduct collectively reflected the demeanor of the prosecutrix. However with all these weaknesses in her evidence, we are unable to appreciate the reasoning of the learned trial Judge when she stated in her judgement as follows: "The testimony of the complainant Inoka was in my findings a testimony that

was truthful and honest. Her demeanor, conduct and the manner in which she gave her testimony was straight forward and she was never evasive nor did she appear to hide anything ...." (Vide page 618 of the Judgement). This is certainly not a realistic assessment of the evidence of the prosecutrix.

Another argument advanced by Counsel was that there were several factual misdirections on the part of the learned trial Judge which has caused prejudice to the accused-appellant's case. For example it was submitted that the trial Judge has stated in her judgement that the prosecutrix had left the house with the consent of the aunt, a fact not borne out by her evidence. Trial Judge has also stated in her judgement that the prosecutrix had left home to seek employment when the evidence was that the prosecutrix left home for the purpose of schooling. Similarly there were several other factual inaccuracies referred to by Counsel (vide written submissions). However it is unnecessary to go into all these details here. Suffice to state that these fatal misdirections have caused serious prejudice to the accused-appellant as submitted by Counsel.

Learned Counsel for the accused-appellant complained that the trial Judge has rejected the evidence of the accused-appellant for two reasons. Firstly, that the defence of consent taken by the accused-appellant was belated, in that it was taken for the first time after the close of the prosecution case. It was said that the suggestion of consent was not put to the prosecutrix though she was cross-examined at great length. Counsel submitted that even though there is no burden on the accused-appellant to put forward his defence to the prosecutrix, it is clear from the nature of the cross examination done relating to what took place in the room, detailed questioning was done to show that there was consensual intercourse when defence elicited material such as brushing her teeth, having a bath, partaking of tea and leaving the room without a fuss.

The second ground for rejecting accused-appellant's evidence was that he had denied it in his police statement that he had sex with the prosecutrix. However accused-appellant's evidence was that he advisedly did not admit it at that stage. It would appear from her judgement that the trial Judge seems to have gone on the basis that the prosecution could profit from this alleged weakness in the defence case. It is an imperative requirement in a criminal case that the prosecution case must be convincing, no matter how weak the defence is, before a Court is entitled to convict an accused. What the Court has done in this case is to bolster up a weak case for the prosecution by referring to the weakness in the defence case. This cannot be permitted. The prosecution must establish its case

beyond reasonable doubt. There is no escape from this requirement. (Vide the case of *Karunadasa* v. *O.I.C. Nittambuwa Police* [1967] 1 Sri LR 155 at 160).

Besides a comparison of the defence case and the prosecution case is not permissible. In the case of *James Silva* v. *The Republic of Sri Lanka* [1980] 2 Sri LR page 167, the trial Judge stated that "I had considered the evidence of the accused and I hold that it is untenable and false in the light of the evidence led by the prosecution." The Court held that there is a serious misdirection in law. It is a grave error for a trial Judge to direct himself that he must examine the tenability and truthfulness of the evidence of the accused in the light of the evidence led by the prosecution. To examine the evidence of the accused in the light of the prosecution witnesses is to reverse the presumption of innocence. It is to be observed that the trial Judge in this case too has done the very same error which is not permitted in law when she stated in her judgement as follows: "Having carefully considered his evidence, and having evaluated it with the rest of the evidence I reject his testimony as being unworthy of credit." (Vide page 620 of the judgement). This is a serious misdirection in law. Therefore by reason of the learned trial Judge misdirecting herself on the law as stated above, she has failed to consider whether the evidence of the accused-appellant created a reasonable doubt in the prosecution case. Undoubtedly this erroneous approach of the trial Judge has seriously prejudiced the accused-appellant's case.

One other matter that needs our attention relates to the complaint of learned Counsel for the accused-appellant that the learned trial Judge has made use of inadmissible material referred to by learned Senior State Counsel in his written submissions on the subject of disorders known as "Post traumatic experience." However no such material was elicited from the doctor or from any other medical witness. Such behavioural patterns attributed to rape victims surfaced for the first time in the written submissions of learned Senior State Counsel. It would appear that the trial Judge has profited from this inadmissible material when she stated in her judgement as follows: "State Counsel made reference to several well known concepts relating to the offence of rape which describe how rape victims go into denial or seek escape or oblivion in order to deliberately erase the event from their mind." (Vide page 610 of the judgement). It is well to remember that in the case of *Regina* v. *Pinhamy* 57 NLR 169 at 176 it was held in very clear terms that Counsel is not entitled to read to the jury extracts from any scientific treaties unless such extracts had been introduced by way of evidence in the course of a trial.... Hence it is to

be noted that the trial Judge has used inadmissible evidence in coming to an adverse finding against the accused-appellant.

On a careful consideration of all these matters it is absolutely clear that the evidence of the prosecutrix is unreliable and untrustworthy. The learned trial Judge has totally misdirected herself in the assessment of her evidence. Further the judgement is unreasonable and cannot be supported having regard to unsatisfactory nature of evidence in the case. Besides the learned trial Judge has misdirected herself on the law relating to consent in rape cases by holding that "the law has no place for tacit consent." It is a serious misdirection in law. This erroneous view on the part of trial Judge prevented her from considering even a single item of the numerous items available in this case to decide the issue of consent. This was a grave non-direction amounting to a misdirection. The notion of tacit consent or implied consent was too glaring in this case to be disregarded. Hence it has caused very serious prejudice to the accused-appellant.

There were other submissions made on matters such as keeping the prosecutrix in police custody for 11 days, the refusal by Court to forward the letter marked P4 (alleged to have been written by the prosecutrix to the appellant) to the E.Q.D. as requested by the defence. However it is unnecessary to go into all these matters in view of the material already considered. We have given our careful consideration to the submissions made by learned Deputy Solicitor General in his customary thoroughness of facts and presentation. However, we are unable to accept his submissions in view of the unsatisfactory nature of the evidence given by the prosecutrix.

One last word relating to the conduct and the behaviour of the accused-appellant on this occasion would be appropriate in the circumstances of this case. Undoubtedly the accused-appellant in the situation he was placed did not conduct himself as a cultured man to say the least. After all, the prosecutrix was a young school girl immature and foolish, trying to force herself on him. Accused-appellant being a more mature person should have acted with restraint. Indeed that was his failing. However, in the final analysis, the law is not so unkind as to call him a rapist, for his failure to behave as a cultured man which the situation grievously demanded.

For the aforesaid reasons we allow the appeal, set aside the conviction and sentence. The accused-appellant is acquitted.

P.H.K. Kulatilaka, J.( JUDGE OF THE COURT OF APPEAL) I agree.

*Supreme Court of the Democratic Socialist Republic of Sri Lanka*

In the matter of an application under Article 126 of the Constitution

**R.P.A.L. Weerawansa**,
No. 3, Nelum Mawatha,
Srimal Uyana, Ratmalana,
(presently, Remand prison,
Colombo)

SC Application
No. 730/96

**v.**

1. **The Attorney-General**,
   Attorney-General's Department,
   Colombo 12.

2. DIG Sumanasekera, DIG, CID,
   Police Headquarters,
   Colombo 1

3. C.I.M. Nanayakkara, OIC, CID,
   Police Headquarters,
   Colombo 1.

4. H.L.A. de Silva,
   Deputy Director of Customs,
   Department of Customs,
   Colombo 1.

5. A. Lankadeva,
   Asst. Superintendent of Customs,
   Department of Customs,
   Colombo 1.

6. M.D.A.J. Gunetilleke,
Asst. Superintendent of Police,
Department of Customs,
Colombo 1.

7. Director General of Customs,
Sri Lanka Customs,
Department of Customs,
Colombo 1.

8. A.L.B.K. Atapattu,
Magistrate,
Harbour Court,
Colombo 1.

**Respondents**

BEFORE: Fernando, J,
Amerasinghe, J. and
Dheeraratne, J.

COUNSEL: T. Marapana, PC, with Jayantha Fernando and
P.H. Ranatunga for the Petitioner;
S. Rajaratnam, SSC, for the1st to 7th Respondents.

ARGUED ON: 26th June 2000.

DECIDED ON: 3rd August 2000.

**FERNANDO, J:**

The Petitioner is an Assistant Superintendent of Customs. He complains that his fundamental rights under Articles 13(1) and (2) were infringed by reason of (I) his arrest on 30.4.96 by the CID purporting to act under section 6(1) of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (the "PTA"), (II) his detention from 30.4.96 to 2.5.96 under section 7(1) of the PTA, and from 2.5.96 to 2.10.96 under two detention

orders purportedly made under section 9(1) of the PTA, (III) his transfer into custody of the Customs on 2.10.96, and (IV) his detention from 3.10.96 to 31.12.96 under a purported Magisterial remand order.

**PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT**

The relevant provisions of the PTA are as follows:

> "6. (1) Any police officer not below the rank of Superintendent or any other police officer not below the rank of Sub-Inspector authorized in writing by him in that behalf may, without a warrant and with or without assistance and notwithstanding anything in any other law to the contrary –
>
> **(b) arrest any person:**
>
> (c) enter and search any premises;
>
> (c) stop and search any individual or any vehicle, vessel, train or aircraft; and
>
> (d) seize any document or thing,
>
> **connected with or concerned in or reasonably suspected of being connected with or concerned in any unlawful activity ....**
>
> 7. (1) Any person **arrested under subsection (1) of section 6** may be kept in custody for a period not exceeding seventy two hours and shall, unless a detention order under section 9 has been made in respect of such person, be produced before a Magistrate before the expiry of such period and the Magistrate **shall**, on an application made in writing in that behalf by a police officer not below the rank of Superintendent, **make order that such person shall be remanded until the conclusion of the trial of such person:**
>
> Provided that, where the Attorney-General consents to the release of such person from custody before the conclusion of the trial, the Magistrate shall release such person from custody.

(2) Where any person **connected with or concerned in or reasonably suspected to be connected with or concerned in the commission of any offence** under this Act appears or is produced before any court other than in the manner referred to in subsection (1), such court **shall order the remand of such person until the conclusion of the trial**:
provided that …

9. (1) Where the Minister **has reason to believe or suspect** that any person is **connected with or concerned in any unlawful activity**, the Minister may order that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister, and any such order may be extended from time to time for a period not exceeding three months at a time …" [emphasis added]

Articles 13(1) and 13(2) provide two valuable safeguards with: that a person may be arrested only "according to procedure established by law," and must be told the reason for arrest; and that a person deprived of liberty must be ***brought before the judge*** of the nearest competent court according to procedure established by law, and must not be further deprived of liberty, except upon and in terms of the order of such judge made in accordance with procedures established by law.

The procedure for arrest established by section 6(1) is not significantly different to the procedure established by law for arrest for other offences, and does not dispense with the need to give reasons. However, sections 7(1) and 9(1) authorize detention by the executive without a prior judicial order and for longer periods than under the general law (but those provisions did not expressly dispense with the need to bring a detainee before a judge). When the PTA Bill was referred to this Court, the Court did not have to decide whether or not any of those provisions constituted reasonable restrictions on Articles 12(1), 13(1) and 13(2), permitted by Articles 15(7) (in the interests of national security etc.) because the Court was informed that it had been decided to pass the Bill with a two-thirds majority (SC SD No. 7/79, 17.7.79). The PTA was enacted with a two-thirds majority, and accordingly, in terms of Article 84, the PTA became law despite any inconsistency with the Constitutional provisions.

I have therefore to consider whether the Petitioner's arrest was "in accordance with procedure established by law", namely by section 6(1), and whether he was informed of

the reason for arrest; and also whether his detention was in accordance with Article 13(2), read with sections 7(1) and 9(1).

**1. ARREST ON 30.4.96**

The CID had been investigating allegations of malpractices in the Port of Colombo relating to imports - in particular, that containers were being taken out of the Port on forged documents with the connivance of Customs officers. On 4.3.96, the 2nd Respondent (DIG, CID) reported to the Director, CID, that:

> "Reliable information has been received that the *suspects* involved in the smuggling of containerized cargo had smuggled into the country, a large number of *sophisticated weapons* and *a dismantled aircraft* for the use of the LTTE.
>
> 2. This informant has given me credible information earlier which when checked were found to be correct. Hence all efforts should be taken *to interrogate the persons involved* in these illegal operations to unearth material owing to the security risk involved beside the colossal loss of revenue to the Government." [emphasis added]

I will assume that the 2nd Respondent did in fact receive some information from an informant. However, it is also clear that his report was not a contemporaneous record of that information, but only a summary which he made subsequently. At no stage did he produce a contemporaneous record (withholding, as he was entitled to, the name of the informant). In the affidavit which the 2nd Respondent filed in these proceedings he did not assert that that the "*suspects*" or "*the persons involved*" included the Petitioner; he stated that he had directed investigations, and interrogated – but not the Petitioner. The "information" had been received just five weeks after the Central Bank bomb explosion, and if it had actually implicated the Petitioner it would have been a serious dereliction of duty for the 2nd Respondent to have delayed questioning him for eight weeks.

Thus we do not know what exactly the informant did tell the 2nd Respondent. It is very likely that the informant did not implicate the Petitioner, and I hold that at that stage the 2nd Respondent had no reason to suspect, and did not suspect, the Petitioner of any offence.

By letter dated 18.3.96 the 7th Respondent, the Director-General of Customs, sent the Petitioner (and three others) on compulsory leave, without stating any reason. The Petitioner and the other three officers submitted appeals dated 27.3.96 and 8.4.96, but received no response. The 7th Respondent has not filed an affidavit explaining the reason for that order nor has he produced the documents which led him to make it. I have therefore no reason to think that order was based on a suspicion that the Petitioner was guilty of any offence. The 2nd Respondent did not rely on that order.

On 23.4.96, the CID arrested one Hasheem, *alias* Nazeer, for "forging Customs documents and illegal importation of containers into Sri Lanka which are suspected to have contained *military hardware.*" No material has been placed before us which justified any suspicion that Hasheem was involved in the importation of "*military hardware.*"

That there was a link between Hasheen and the Petitioner is not disputed. The Petitioner acknowledged that Hasheem was one of his informants, and that on several occasions Hasheem had given him information which had led to successful detections.

Hasheem made two statements, on 23.4.96 and 25.4.96. He confirmed that he has given information to the Petitioner. He stated that he was an importer of textiles and other merchandise, and that he had made payments to certain Customs Officers, including the Petitioner, in connection with the removal of containers from the Port on forged documents. However, he denied the allegation that there had been any weapons or aircraft parts in any of those containers.

Claiming to act under section 6(1) of the PTA, Chief Inspector Mudannayake (on the 2nd Respondent's instructions) arrested the Petitioner at the CID office at 4.00 p.m. on 30.4.96. He made an entry that the charges against the Petitioner were explained as being aiding and abetting the illegal importation of containers into Sri Lanka and their release from the Port on forged documents, there being information that some of the items in those containers were *weapons* and *light aircraft parts*. Those charges contained three distinct elements: that containers had been illegally imported, that they had been released on forged documents, and that they had contained weapons, etc. Only the third could have been termed a "PTA offence." However, in his affidavit in these proceedings, Mudannayake averred that the arrest was because "he was suspected of aiding and abetting the illegal **import** of containers containing *explosives* and *light aircraft parts*"

i.e. on account of the "PTA offence" alone. He made no mention of the **release** of containers. The 2nd Respondent's affidavit was to the same effect, except that he made no mention of *explosives*.

The 2nd Respondent's affidavit confirms that it was only after Hasheem's "disclosures" that the Petitioner was asked to report to the CID on 30.4.96. His own summary of Hasheem's "disclosures" was as follows: Hasheem "was able to import illegally several containers of **merchandise** with the connivance and assistance of the Petitioner and some others"; "some containers which arrived at the Colombo Harbour had been cleared illegally with the connivance of some Customs officials"; and "the contents of these containers are **unknown**". However, he added:

> "There was *reasonable information* that container loads of arms and ammunition and light aircraft parts have surreptitiously reached the LTTE after arriving at the Colombo Harbour."... [emphasis added]

No details were given about that "*information.*" When questioned, Hasheem had denied that particular allegation, and it was unreasonable to have believed or suspected from his statements that the Petitioner was connected with or concerned in any "unlawful activity" as defined in the PTA. The Respondents did not produce any other material to support that allegation.

It is probable that the Petitioner was told the reason for arrest., namely that he was suspected of "unlawful activity." However, neither the alleged informant's disclosures on 4.3.96 nor Hasheem's statements gave rise to a reasonable suspicion of "unlawful activity." I hold that the Petitioner's arrest was not in accordance with the procedure established by law (i.e. section 6(1) of the PTA), and that the 2nd Respondent procured the infringement of his fundamental right under Article 13(1).

Possibly, Hasheem's statements to the CID may have given rise to a suspicion that the Petitioner was involved in the illegal import and removal of containers from the Port. I do not have to determine whether that was a reasonable suspicion justifying an arrest on that basis because the affidavits filed by the Respondents in this case establish that that was not the real reason for his arrest. In any event, an arrest on that basis would have required prompt production before a Magistrate, and would not have justified detention under the PTA.

## 2. DETENTION

### (1) Detention under section 7(1)

The Petitioner was kept in CID custody, without being promptly produced before a Magistrate. The validity of his detention up to 2.5.96 depends on whether there was compliance with section 7(1) of the PTA, which permits a person "arrested **under** section 6(1)" to be kept in custody for a period not exceeding seventy two hours.

A "person arrested **under** section 6(1)" necessarily means a person arrested because he was "connected with or concerned in any unlawful activity." That phrase does not include a person arrested for **other** reasons (e.g. under the Customs Ordinance), or for no reason: such persons will continue to enjoy the full protection of Article 13. A pre-requisite for detention under section 7(1) is a valid and proper arrest under section 6(1): an arrest in conformity with section 6(1), and not one which is **contrary** to that section, or which is only a **pretended** or **purported** arrest under that section. "Under" in this context has the same meaning as "in pursuance of" which was similarly interpreted (in relation to Emergency Regulations 18 and 19) by Amerasinghe, J, in *Channa Pieris* v. *A.G.*, [1994] 1 Sri LR 1, 55. In other words, while the general rule is that all arrests and consequent detentions are subject to the Constitutional safeguards in Article 13, the exception created by the PTA will apply only where the stipulated pre-condition of an arrest **under** section 6(1) exists. Those safeguards can never be circumvented by a false assertion or a mere pretence that an arrest was under section 6(1).

I hold that the Petitioner was not arrested "under" section 6(1), but otherwise than in accordance with section 6(1). Accordingly, the 2nd Respondent and the other CID officers did not have the right to keep him in custody in terms of section 7(1), but were obliged to comply with Article 13(2). The Petitioner's fundamental right under Article 13(2) was thus infringed by the 2nd Respondent.

### (2) Detention under section 9(1)

An arrested person must be produced before a Magistrate, before the period of seventy-two hours allowed by section 7(1) comes to an end, **unless** a detention order has been made "under" section 9(1). Such an order can only be made if "the Minister has *reason to believe or suspect* that [such] person is connected with or concerned in any unlawful

activity." Not only must the Minister of Defence, subjectively, have the required belief or suspicion, but there must also be, objectively, "reason" for such belief. While Article 13(2) permits detention only upon a judicial order, section 9(1) allows a Ministerial order. However, being an order which results in a deprivation of liberty, it must be made with no less care and consideration.

The Minister's order does not depend on the validity of the preceding arrest and detention. Even if such arrest and detention were invalid, nevertheless if at the time the detention order was made the Minister did have reason to believe or suspect that the detainee was "connected with or concerned in any unlawfully activity", the detention order and subsequent detention would be lawful.

By letter dated 2.5.96 the 2nd Respondent informed the Minister of Defence (who is H.E. the President) that the Petitioner had been taken into custody under section 6(1) of the PTA, and applied for a three-month detention order under section 9(1), claiming that:

> "2. Investigations conducted by the C.I.D. had revealed that this person is suspected to be connected with or concerned in unlawful activity to wit:
>
> 'Aided and abetted the illegal importation of *military hardware* and *light aircraft parts* to Sri Lanka by processing the documents portainting [sic] of the Customs Department at the time of clearing the suspected container said to have been [sic] contained the send [sic] article [sic].'
>
> 3. It is necessary to detain him further, with a view to probe into his unlawful activities under the provisions of the Prevention of Terrorism Act." [emphasis added]

He did not forward – or even mention – any information, statements or other material on which he based his conclusions. Obviously, there was none. He thus deceived the Minister into believing that the CID investigations had in fact revealed that the Petitioner was suspected of involvement in unlawful activity. Furthermore, he suppressed the only material facts which he had (namely, the report dated 4.3.96 and Hasheem's statements), obviously because they would have disclosed to the Minister the falsity of his claims.

The Minister issued a detention order the same day, **ordering** that the Petitioner be detained for three months **at the office**, on the ground that she had reason to suspect that he was

> "connected with or concerned in unlawful activity to wit:
>
> Aided and abetted the illegal importation of *explosives* to Sri Lanka by checking and processing the documents pertaining to the Customs Department at the time of clearing the suspected Container said to have contained the said *explosives*." .... [emphasis added]

Dealing with the question whether there was a reasonable suspicion justifying arrest, Amerasinghe, J. held in *Pieris* v. *A.G.,* [1994] 1 Sri LR 1, .... that:

> "A reasonable suspicion may be based either upon matters within the officer's knowledge or upon credible information furnished to him, or a combination of both sources. He may inform himself either by personal investigation or by adopting information supplied to him or by doing both. A suspicion does not become 'reasonable' merely because the source of the information is creditworthy."

Those observations apply with such greater force to the question whether a detention order is valid on the basis that the Minister had "reason to suspect", because *inter alia*, a detention order drastically curtails personal liberty without the protection of a judicial order and for much longer periods. A valid detention order requires the independent exercise of the discretion conferred by section 9(1). Since the Minister had no personal knowledge of the facts, it was essential that she should have been supplied with "credible information." Where such information is contained in documents and statements, those documents and statements must be made available to the Minister. But I will assume for the purposes of this case that a **correct** summary of the relevant portions of those documents and statements, set out in a report made by a responsible officer, may sometimes give the Minister "reason to suspect...." In this case even that did not happen. The 2nd Respondent merely informed the Minister of his **conclusions**. The detention order was therefore flawed. The Minister did not independently exercise her statutory discretion, either upon personal knowledge or credible information: she merely adopted the 2nd Respondent's opinion. That was a patent abdication of discretion. Further, even

if I were to disregard all those flaws, the detention order would nevertheless be invalid because it was founded wholly upon the 2nd Respondent's conclusions which were not merely mistaken but willfully false, perverse, and unreasonable.

There is another unexplained feature in this case. In the detention order the Minister made reference only to the abetment and importation of *explosives*, and made no mention of *weapons and light aircraft parts*. That means that the Minister did not believe or suspect that the Petitioner was implicated in the importation of *weapons* and *light aircraft parts*. But at that point of time there was no material at all pertaining to *explosives*. The 2nd Respondent made no reference to explosives at any stage; and neither did Mudannayake in the contemporaneous entry he made on 30.4.96. It was only **after** this application was filed that Mudannayake fell into line with the detention order by referring to *explosives* in his affidavit in these proceedings. The detention order was flawed because there was no reason for the Minister to have any belief or suspicion about *explosives.*

I hold that the detention order dated 2.5.96 and the Petitioner's detention thereunder for three months were unlawful and invalid, and in breach of Article 13(2), for which infringement the State is liable.

When that period of three months was coming to an end, according to the 2nd Respondent's affidavit:

> "As the investigations into this matter *was concluded* [sic], an application was made to the Minister of Defence to extend the detention order served on the Petitioner. Accordingly, the Minister of Defence *having reviewed the facts placed before her*, extended the Petitioner's detention by detention order dated 1st August 1996 issued in terms of section 9(1)...." [emphasis added]

The affidavit had not another word about those "facts". The Minister stated in that detention order:

> "*.... having reviewed all the facts placed before me* in respect of each person, [1] do hereby extend the Detention Orders issued in respect of the persons whose names appear in the Schedule hereto for a period of three months from the dates mentioned against their names." ... [emphasis added]

About twenty persons were named in the schedule. The schedule referred to D.O. No. 1596 issued on 5.5.**95** and D.O. No. 2024 issued on 4.5.**96** – which suggests that 427 detention orders had been issued in twelve months. The higher the number of such orders, the greater the care to be exercised in regard to requests for, and the grant and extension of such orders.

In this instance, the Respondents have not even produced the request for extension – let alone the "facts" said to have been placed before the Minister. It is very likely that no material or report was submitted, and that the statement in the detention order that the facts were reviewed was not correct. Without considering whether there was in fact any reason further to deprive the Petitioner of his liberty (and if so, for how long, and on what conditions) a three-month extension was granted on request. Detention orders (including extensions), whether under the PTA, or Emergency Regulations, or otherwise, should not be made mechanically (see *Wickremabandu* v. *Herath.* [1990] 2 Sri LR 348, 354, 365, *Rodrigo* v. *de Silva.* [1997] Sri LR 265, 299, and the decisions cited in *Channa Pieris* at 57). One matter which should have been considered was the Petitioner's health. He was being detained at the CID office. According to the 2nd Respondent, he fell ill during the month of June, "and was constantly taken to a private medical clinic for treatment." It does not appear that even his poor health – relevant both to the place and the period of future detention – was brought to the notice of the Minister.

I hold that the extension of the detention on 1.8.96, and the Petitioner's detention thereunder up to 2.10.96, were unlawful and invalid, and in breach of Article 13(2) for which infringement the State is liable.

**(3) The need for production before a Magistrate, notwithstanding the issue of a detention order**

As already noted, Article 13(2) provides two safeguards: first, that a person deprived of liberty must be brought before a judicial officer, and second, that any further deprivation of liberty can only be upon a judicial order. Section 9(1) expressly authorised such further deprivation of liberty upon an executive detention order, and thus nullified the second safeguard – and that is "law", because the PTA was enacted with a two-thirds majority.

However, I am satisfied that the PTA did not take away the first safeguard. That has to be considered in relation to two periods: the period *preceding* the making of an executive detention order has been made, and the *subsequent* period.

If no detention order is made, the detainees must be produced before a judicial officer within seventy two hours of arrest – the safeguard exists, although diluted (by section 7(1)) to the extent that production within twenty four hours is not necessary.

If a detention order is obtained within seventy two hours of arrest, non-production before a judicial officer during that period is excused or ratified by section 7(1).

However, neither section 9(1), nor any other provision of the PTA, dispenses with the need for such production **subsequent** to the making of an executive detention order.

To put in another way, a person detained under such a detention order is "a person held in custody, detained or otherwise deprived of personal liberty"; the first safeguard in Article 13(2) is that he be brought before a judicial officer; and the PTA makes no contrary or inconsistent provision. That safeguard therefore continues undiluted. Accordingly, such non-production *subsequent* to the detention order is not sanctioned by the procedure established by law.

It may perhaps be suggested that such production is "of little consequence or a minor matter," because a judicial officer cannot order the release of the detainee. Nevertheless, it has been held that such production "is more than a mere formality or an empty ritual, but is recognized by all communities committed to the Rule of Law as an essential component of human rights and fundamental freedoms," and "must be exactly compiled with by the executives"(see *Edirisuriya* v. *Navaratnam*, [1985] 1 Sri LR 100, *Nallanayagam* v. *Gunatilake*, [1987] 1 Sri LR 293, and *Rodrigo* v. *de Silva*, at 323-5). That safeguard serves many important purposes. A judicial officer would be able, at least, to record the detainee's complaints (and his own observations) about various matters: such as ill-treatment, the failure to provide medical treatment, the violation of the conditions of detention prescribed by the detention order and/or relevant statues and regulations, the infringement of the detainee's other legal right *qua* detainee, etc. Indeed, he may even be able to give relief in respect of some matters.

Furthermore, many decisions of this Court have drawn attention to the fact that that safeguard is internationally recognised. Sri Lanka is a party to the International Covenant on Civil and Political Rights (as well as the Optional Protocol). Article 9 of the covenant mandates, *inter alia*, that "no one shall be subjected to arbitrary arrest or detention"; that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power", and that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." A person deprived of personal liberty has a right of access to the judiciary, and that right is now internationally entrenched, to the extent that a detainee who is denied that right may even complain to the Human Rights Committee.

Should this Court have regard to the provisions of the Covenant? I think it must. Article 27(15) requires the State to "endeavour to foster respect for international law and treaty obligations in dealings among nations." That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognizes.

In that background, it would be wrong to attribute to Parliament an intention to disregard those safeguards. The ... cannot be interpreted as dispensing, by implication or in... under and in terms of Article 13(2). Such production is imperative. Since the Petitioner was never brought before a judicial officer during the entire period of detention, I hold that his fundamental right under Article 13(2) was infringed for which infringement the State is liable. (Emphasis added)

**3. TRANSFER TO THE CUSTODY OF THE CUSTOMS**

The Petitioner's wife failed a *habeas corpus* application in the Court of Appeal. Notice was issued, returnable on 25.9.96, on which date State Counsel asked for further time to file objections.

On 2.10.96 the Petitioner was warded at the National Hospital, Colombo. Before that day – probably in consequence of the *habeas corpus* application – the Attorney-General had advised the CID that there was no justification to detain the Petitioner under the PTA. It

must be noted that the detention order (if valid) continued to be operative. It did not merely *authorize* the CID to detain the Petitioner, but *ordered* such detention; and it ordered detention ***at the CID office*** (and not at the National Hospital, or at the Customs office, or elsewhere), and it directed detention for *three months*, and not just for two. On 2.10.96 the CID ignored those provisions.

Although the CID knew full well that there was no justification for the Petitioner's continued detention under the PTA, nevertheless they did not request a revocation or variation of the detention order. Instead of releasing the Petitioner or producing him before a Magistrate, CID officers obtained permission from the Hospital authorities to take him away for two hours. At 12.30 p.m. they took him to the CID office, and from there to the Prosecution office of the Preventive Branch of the Customs. There, at about 2.30 p.m., the 2nd Respondent "produced" him before the 4th Respondent (Deputy Director of Customs) and other Customs Officers – because, they claimed, "the investigations raised a reasonable suspicion that the Petitioner was involved in a large scale revenue fraud which constitutes an offence under the Customs ordinance." The 4th Respondent confirmed that the CID officers so stated, but did not claim either that he himself entertained any suspicion in that respect or that he informed the Petitioner that this was the reason why the Customs took him into custody. He did not produce any material which would have given rise to such a suspicion. He says that he merely instructed the 5th and 6th Respondents to record a statement. The Petitioner avers that he "inquired from the 4th Respondent whether there [were] any allegations against him [and] the 5th and 6th Respondents answered in the negative." The 4th to 6th Respondents have not denied that averment.

The 5th Respondent commenced recording the Petitioner's statement at around 6.00 p.m. He was questioned about his career and performance in the Customs; he fell ill, and when he inquired whether he would not be taken back to Hospital, the 5th Respondent replied that he would be detained at the Customs that day: and he then remarked that the 4th to 6th Respondents would have to take the responsibility if anything happened to his life. In the meantime the 6th Respondent told the Petitioner that the National Hospital was making inquiries about the delay in returning him to the Hospital. None of this denied. It was only thereafter that on the 4th Respondent's instructions the Petitioner was taken back to the Hospital at 10.30 p.m., where he was guarded by Customs officials.

I hold that the 4th Respondent took the Petitioner into Customs custody at 2.30 p.m. on 2.10.96, without entertaining a reasonable suspicion that the Petitioner was concerned in any offence, and without informing him of the reason for the deprivation of his personal liberty.

The 2nd Respondent also failed to comply with section 28 of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996, which came into operation on 21.8.96. That section requires (a) the person making an arrest or an order for detention under the PTA or the Emergency Regulations, and (b) any person making an order for the transfer of a detainee to another place of detention, to inform the Commission. Thus, on 2.10.96, the procedure established by law in respect of the deprivation of liberty – whether upon initial arrest or detention, or upon a transfer of custody – included a requirement that the Commission be notified. The 2nd Respondent does not claim that he did so.

I hold that the 2nd and 4th Respondents infringed the petitioner's fundamental right under Article 13(1).

## 4. DETENTION UPON MAGISTRATE'S REMAND ORDERS

The 4th Respondent averred that he instructed the Customs prosecuting officer "to take necessary action to produce the Petitioner before the Magistrate and make an application in terms of section 127A of the Customs Ordinance." At that time there was pending in the Harbour Magistrate's Court a case against several other Customs Officers. The Customs filed a further report in that case on 3.10.96, seeking to make the Petitioner a party to that case. The 4th Respondent falsely claimed in his affidavit that the Petitioner was produced before the Magistrate on 3.10.96: the Court record confirms the Petitioner's assertion that he was not produced. Despite that, the Magistrate (the 8th Respondent) made order, directing two Prison guards, Jayaweera and Ranjith, to take charge of the Petitioner until he recovered; he also called for a medical report from the Hospital. He recorded that after he had adjourned, Jayaweera met him in chambers and stated that Jayaweera had no authority to be in charge of the Petitioner while he was in the Hospital. The 8th Respondent thereupon made order directing the Superintendent of Prisons, Welikada, "to take steps" in regard to the petitioner. The warrant of detention, if any, was not produced.

Although the Petitioner was never brought before him, the 8th Respondent made several remand orders thereafter, and released him on bail on 31.12.96.

During this entire period, the 8th Respondent did not visit or communicate with the Petitioner, nor did he arrange for an acting Magistrate to do so.

The Petitioner's detention from 3.10.96 to 31.12.96 was not under the PTA, but under the general law. Two distinct questions arise: Was that detention in violation of Article 13(2), and if so can the Petitioner obtain relief in respect thereof in these proceedings under Article 126?

**(1) Violation of Article 13(2)**

Article 13(2) requires that an arrested person be *brought before* the *judge of the nearest competent court. How he should be brought before* the judge can be laid down by ordinary law, but the requirements that he be *brought before* a judge, **and** that it is not any judge but the judge of the *nearest competent court*, cannot be varied or dispensed with. Those are not matters of discretion, but pre-conditions which go to jurisdiction. Section 115 of the code of Criminal Procedure Act and section 127A of the Customs Ordinance require an arrested person to be "forwarded to" or "produced before" – which I regard as synonymous with *bringing before* – a Magistrate. It is not enough to show him to a judge, or to bring him into physical proximity to a judge; he must at least be given an opportunity to communicate with the judge: *Ekanayake* v. *Herath Banda.* SC 25/91, SCM 18.12.91. The present case is virtually identical to *W.K. Nihal* v. *Kotalawela.* SC 126/94 SCM 6.10.94. There, while the petitioner was warded in hospital, in police custody, the Police applied to the Magistrate for an order that he be transferred to Prison custody and produced **ten days later** before the Magistrate. The Magistrate granted that application. Dheeraratne, J. observed that there was no provision of law "granting sanction for a Magistrate to make such a remand order which is capable of so insidiously eroding the liberty of the subject (see Article 13(2))...." See also the other decisions cited in **Channa Pieris** at 76-77. In my view, two things are essential: the suspect must be taken to where the nearest competent judge is, or that judge must go to where the suspect is, **and** the suspect must have an opportunity to communicate with the Judge. If those conditions are not satisfied, the judge would have no jurisdiction in respect of that suspect, to make a remand order.

Discussing section 115(1) of the Code, Wimalaratne, J. observed in *Kumarasinghe* v. *A.G.* SC 54/82 SCM 6.9.82, that, on occasions when a suspect warded in hospital cannot be produced before the Magistrate within the stipulated period, the Police may produce a medical report to the effect that it would be hazardous to move him from hospital. With respect, I cannot agree. Such an exception of that sort cannot be implied in respect of a safeguard for liberty laid down in ordinary law, in the absence of some ambiguity, injustice, absurdity, anomaly, inconvenience, etc. which would justify such an inference. If there is good reason why the Magistrate himself cannot go to the hospital, he can delegate an acting Magistrate. **[Article 13(2) embodies a basic Constitutional safeguard, almost universally recognized: that judge and suspect must be brought face-to-face, before liberty is curtailed.]**

I hold that the first remand order, and the subsequent extensions, were not made in accordance with the procedure established by law. The Petitioner was therefore detained in violation of Article 13(2).

**(2) Relief under Article 126**

Nevertheless, the Petitioner would be entitled to relief in these proceedings only if those remand orders constitute "executive or administrative action."

The act of a judicial officer done in the exercise of judicial power does not fall within the ambit of "executive or administrative action." It does not follow, however, that every act done by a judicial officer is excluded, because a judicial officer may sometimes perform some functions which are not judicial in character: *Jayathevan* v. *AG.* [1992] 2 Sri LR 356, 371. Further, as Amerasinghe, J. observed in *Farook* v. *Raymond.* [1996] 1 Sri LR 217, "Judicial power can only be exercised if the court ... has jurisdiction."

Turning to remand orders in particular, it cannot be said that such orders are intrinsically or necessarily "judicial" in character – because an order that a suspect be detained pending investigation into an offence deprives the suspect of personal liberty in much the same way, whether that order is made by a judicial officer or by an officer of the Executive. It cannot be assumed; therefore, that the impugned remand order were intrinsically judicial in character, and it is necessary to examine the circumstances and the manner in which they were made.

Several decisions of this Court involving remand orders made by judicial officers were analysed in *Farook* v. *Raymond*. I will refer to some of them.

In *Kumarasinghe* v. *A.G.*, the suspect who was in hospital was not brought before the Magistrate, and the Police failed to file a medical report. The Court was of the opinion that the period of remand ordered by the Magistrate was quite excessive. It was held that there was a breach of Article 13(2), but that was "more the consequence of the wrongful exercise of judicial discretion as a result of a misleading Police report." Although no relief was granted, the Petitioner was awarded costs. (The Court did not take the view that the failure to bring the suspect before the Magistrate deprived him of jurisdiction.)

The same principle was applied in *Dayananda* v. *Weerasinghe* [1983] 2 FRD 292. There the suspect had been brought before the Magistrate.

Those two decisions were approved in *Leo Fernando* v. *A.G.*, [1985] 2 Sri LR 341, a decision of a bench of five Judges. The first question that arose related to judicial immunity from suit. Both Collin-Thome, J. and Ranasinghe, J, *(*as he then was), agreed with the observations of Lord Denning, MR, in *Sirros* v. *Moore*, [1974] All ER 776, 785:

"...so long as [a judge] does his work with in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does *may be outside his jurisdiction* – in fact or in law – but as long as he honestly believes it to be within his jurisdiction, he should not be liable ... nothing will make him liable except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it."

Ranasinghe, J. proceeded to consider the further question (see p 369) whether "even though the judge himself is so immune from any liability, the State would yet be liable, in the field of fundamental rights, for any act of a judge which would operate to infringe a fundamental right...." It was contended on behalf of the petitioner (see page 370) that "the impugned act was not an act committed by the [judge] in his capacity as a judge for the reason that [he] had no power or authority as a judge to do what he did and was therefore acting outside his jurisdiction." Ranasinghe, J. dismissed that contention because he took the view that the judge "did undoubtedly have the power to make, upon proper material, an order remanding the petitioner pending further investigation into an offence...."

The petitioner in *Sriyawathie* v. *Siva Pasupathi*, SC 112/86 SCM 28.4.87, had been remanded on a charge of murder, not for the period of 15 days permitted by section 115(2), but *sine die*; no warrant of commitment under section 159 had been issued. No indictment was served on her, and she continued in remand for seven years. Holding that her detention was illegal, the Court directed her immediate release, and compensation in a sum of Rs. 15,000.

In *Joseph Perera* v. *A.G.*, [1992] 1 Sri LR 199, another decision of a bench of five Judges, the three petitioners had been remanded by a Magistrate. The Magistrate had no power under the Emergency Regulations to grant bail except with the consent of the Attorney-General. L.H. de Alwis, J. held (at p 247) that the unlawful detention of the petitioners had been by executive or administrative action, and not in judicial proceedings; the order of remand, though made by the Magistrate, was not in the exercise of his judicial discretion since he had none under the Emergency Regulations.

In *Farook* v. *Raymond* the suspects had been remanded to Police custody. Since the Magistrate had no power to remand to Police custody. It was held that detention was not in accordance with the procedure established by law. Turning to the question whether the order constituted "executive or administrative" action, and after reviewing the case law. Amerasinghe, J. drew a distinction which I respectfully adopt.

If an officer appointed to perform judicial functions exercised the discretion vested in him, but did so erroneously, his order would nevertheless be "judicial" if he had not exercised his discretion, for example, if he had abdicated his authority, or had acted mechanically, by simply acceding to or acquiescing in proposals made by the police – of which there was insufficient evidence in that case.

On the other hand, if a judicial officer was required by law to perform some function in respect of which the law itself had deprived him of any discretion, then his act was not judicial.

The principal circumstance which distinguishes this case is the failure to bring the Petitioner before the 8th Respondent. That resulted in a patent want of jurisdiction. It also caused a failure of natural justice, because the 8th Respondent acted without asking the Petitioner what he had to say.

Further, on 3.10.96 the detention order made under the PTA had not expired. It had neither been revoked nor declared invalid. Nevertheless, the 8th Respondent did not even consider whether that order affected his jurisdiction: e.g. Whether it took away his power to release the Petitioner on bail? Whether he could have ordered detention in a different place?

Having regard to the patent want of jurisdiction, and the failure to consider whether he had jurisdiction, I hold that the remand orders made by the 8th Respondent were not "justicial" acts done in the exercise of judicial power. It was the executive which had custody of the Petitioner from 3.10.96, and so the petitioner's detention was by "executive or administrative action", not sanctioned by a judicial act. Detention was in violation of the Petitioner's fundamental right under Article 13(2), and for that the State is liable.

**ORDER**

I hold that the Petitioner's fundamental rights under Articles 13(1) and 13(2) have been infringed as set out above, and award the Petitioner a sum of Rs. 300,000 as compensation and costs, payable on or before 30.9.2000. Of this sum, Rs. 200,000 shall be paid by the State, Rs. 75,000 by the 2nd Respondent personally, and Rs. 25,000 by the 4th Respondent personally.

JUDGE OF THE SUPREME COURT

AMERASINGHE, J:

I agree.

JUDGE OF THE SUPREME COURT

DHEERARATNE, J:

I agree.

JUDGE OF THE SUPREME COURT

*In the Supreme Court Democratic Socialist Republic of Sri Lanka*

In the matter of an application under Article 126 of the Constitution

**Hewagam Koralalage Maximus Danny,**
Nattandiya Road,
Nanalindawatta,
Dankotuwa.

SC (Application) No. 488/98

**v.**

1. **IP Sirinimal Silva,**
   Police Station, Chilaw.

2. IP Jayathilaka,
   Police Station, Chilaw.

3. Police Sergeant Kapukotuwa,
   13846,
   Police Station,
   Chilaw.

4. PC Bandara, 29768,
   Police Statian,
   Chilaw.

5. RPC Deepal, 16638,
   Police Station,
   Chilaw.

6. Head Quarters Inspector,
   Police Station,

Chilaw.

7. The Attorney General,
Attorney-General's Department,
Colombo 12.

**BEFORE** : Dheeraratne, J.
Perera, J.
Shirarni A. Bandaranayake, J.

**COUNSEL** : S.C.Weliamuna for petitioner

A.H.M.D. Nawaz, SC, for respondents

**ARGUED ON** : 12.09.2000

**DECIDED ON** : 12.12.2000

**Shirani A. Bandaranayake. J.**

At the time material to this application, the petitioner had a relationship of sexual intimacy with one Leela Perera, a lonely widow. They met on 22.07.1998 and decided to spend a quiet night at the Sirisevana Guest House, Dankotuwa. About 10.50 p.m., their hopes for tranquillity were dashed to the ground, when a group of persons rudely knocked at their bedroom door. The door opened on six intruding police officers, two of whom were in uniform, and among them were the first to fifth respondents. On inquiry by the petitioner they informed him that they were from the Chilaw Police Station. They arrested both of them and took them by a van, first to the Dankotuwa Police Station and thereafter to the Chilaw Police Station. Five women and four men, also taken into custody at the said Guest House, were taken in that van along with the petitioner and his companion. From 2.30 a.m. on the 23rd July they were kept in custody and were produced before the Magistrate, Marawila around 12 noon. An application made for bail was refused and the petitioner was remanded until 29.07.1998 when he was discharged.

The petitioner alleges that his arrest and detention were violative of Articles 12(1), 13(1) and 13(2) of the Constitution. This Court granted leave to proceed in respect of the alleged infringement of Articles 13(1) and 13(2) of the Constitution.

The 1st respondent in his affidavit averred that on the orders of the Senior Superintendent of Police Chilaw, he left the Police Station around 8.35 p.m. with a party of Police Officers to investigate the information that several LTTE suspects were residing at the Siri Sevena Guest House. They reached the Guest House around 10.45 p.m. There were six rooms in the Guest House and all of them were occupied. He spoke to the male and the female occupants separately and requested them to furnish facts to establish their respective identities. None of them were able to do so. A need therefore arose to verify the true identities of the said occupants and all those who were present were arrested and taken to the Police Station, Chilaw. The petitioner was produced before the Magistrate of Marawila along with the other suspects on 23.07.1998, on charges under the Brothels Ordinance.

Unfortunately, the Magistrate has almost mechanically made an order of remand because the police wanted them to be remanded. In terms of the Brothels Ordinance, having sexual intercourse is not an offence. Section 2 of the Ordinance, which stipulates the offences reads thus:

> "Any person who -
>
> a. keeps or manages or acts or assists in the management of a brothel; or
>
> b. being the tenant, lessee, occupier or owner of any premises, knowingly permits such premises or any part thereof to be used as a brothel, or for the purpose of habitual prostitution; or
>
> c. being the lessor or landlord of any premises, or the agent of such lessor or landlords, lets the same, or any part thereof, with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is willfully a party to the continued use of such premises or any part thereof as a brothel,
>
> shall be guilty of an offence, and shall on conviction be liable - "

The word 'brothel' is not defined in the Ordinance, and the ordinary meaning of the word 'brothel' is 'a house or establishment where prostitution is practiced.' The word 'prostitute' ordinarily means 'to devote to, or offer or sell for an unworthy, evil or immoral use; to hire out for sexual intercourse'. The ordinary meaning of 'prostitution' means 'the act or practice of prostitution' (Chambers Dictionary, 1999 reprint.).

Bertram, C.J., in *Coore* v. *James Annu* ((1920) 22 N.L.R. 206), having examined the purpose of the Criminal Law Amendment Ordinance, No.21 of 1919, the legislative predecessor of the Brothels Ordinance, observed:

> 'Speaking generally, the Ordinance and the Ordinances which it amends do not penalize illicit sexual intercourse, except where the act takes place under circumstances which are a public scandal, or an outrageous offence to individual rights, or where it takes place with a girl under the prescribed age. Similarly, the procurement of women for an act of sexual intercourse is not punishable, except in the case of a woman under twenty years of age (see section 6). But what the Ordinance does specially penalize is the making a living out of the corruption and degradation of others. It does this in three ways:
>
> a. it enhances the penalties for brothel-keeping (section 4);
>
> b. it punishes persons who live on the earnings of prostitution (section 9(1) a; and
>
> c. it further punishes persons who systematically procure persons of whatever age for the purpose of illicit intercourse." (at pg. 215)

*Abeykoon* v. *Kulatunga*, ((1950) 52 N.L.R. 47) is a case in which the meaning of section 2(a) of the Brothels' Ordinance was discussed. In this case, 2 appellants were charged, the 1st with having managed a brothel and the 2nd with having assisted the 1st in the management of it. After trial both were convicted; the 1st accused was fined Rs. 500, the 2nd accused a fine of Rs. 250.

There was ample evidence before the learned Magistrate in regard to the 1st accused, that she managed a brothel.

The question which arose in this case was whether a. woman who is or is kept in a brothel for purposes of consorting with men can be said to assist in the management in the brothel. Referring to the role of management, Nagalingam, J., stated that,

> "If however, the prosecution had been able to establish that the 2nd accused did perform any act in regard to the administration or control of the brothel, a case may be said to have been made out against her; but the **mere fact that she surrendered her flesh to enable persons who resorted to that place to gratify their sexual appetite cannot be regarded as indicating that the assisted in the management of the brothel.**" (emphasis added).

It is thus evident that, in the circumstances of the instant case, for the petitioner to be charged under the Brothels' Ordinance, there should have been evidence that he had either managed or assisted in the management of the brothel. As it appears, there is no such evidence against the petitioner; he has only been a passive occupant of the said Guest House, who had wanted to stay overnight with his companion whereby he committed no criminal offence.

The petitioner's grievance is that the respondents had violated his fundamental rights guaranteed in terms of Articles 13(1) and 13(2) of the Constitution.

Article 13(1) of the Constitution reads as follows:

> "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason of his arrest."

Section 32(1)b of the Code of Criminal Procedure Act, specifies the established procedure for arrest and reads thus:

> "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."

The arrest of the petitioner has to be lawful and for it to be lawful, it should be carried out according to the established procedure laid down by law. In this case, there was no complaint against the petitioner and there is no reason at all to suspect that the petitioner

has committed any offence. For the purpose of bringing charges against a person under the Brothels Ordinance, there should be evidence suggesting that such person was engaged in the management of the brothel. There is not even an iota of evidence suggesting that. Although the respondents mentioned that they had to raid the said Guest House as they had information that there were LTTE suspects residing at the said premises, no one other than the 'occupants' of the six rooms was taken into custody. In these circumstances, I hold that the arrest of the petitioner was unlawful and declare that the petitioner's fundamental rights guaranteed by Article 13(1) of the Constitution has been violated by 1st to the 6th respondents.

Admittedly, the petitioner was taken into custody around 2.30 a.m. on 23.07.1998 and was produced before the Magistrate, Marawila around 12 noon of the same day. In the circumstances I hold that there was no violation of Article 13(2) of the Constitution.

I must express my concern over Magistrates issuing orders of remand, mechanically, simply because the police want such orders made. I cannot do better than to quote the words of my brother, Dheeraratne, J., said in connection with Magistrates issuing warrants of arrest (in the case of *Mahanama Tillakaratne* v. *Bandula Wickremasinghe*, [1999] 1 Sri L.R. 372); Magistrates should not issue remand orders "to satisfy the sardonic pleasure of an opinionated investigator or a prosecutor" (at pg. 382). Remanding a person is a judicial act and as such a Magistrate should bring his judicial mind to bear on that matter before depriving a person of his liberty.

I accordingly hold that the petitioner is entitled to a sum of Rs. 25,000/= as compensation costs payable by the State. I direct the 1st to 6th respondents to pay Rs. 5,000/- each, personally, as compensation. In all the petitioner will be entitled to Rs. 55,000/- as compensation and costs. This amount must be paid within three (3) months from today.

The Registrar of the Supreme Court is directed to send a copy of this judgement to the Inspector General of Police.

DHEERARATNE, J. — JUDGE OF THE SUPREME COURT

I agree.

PERERA, J. — JUDGE OF THE SUPREME COURT

I agree

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