IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application under
Article 126 of the Constitution of the Democratic
Socialist Republic of Sri Lanka.

S.C. (F/R) No. 326/2008

Edward Sivalingam,
No. 176, Aanai Vilundan,
Killinochchi,
Presently at,
The 'H' Ward of New Magazine Remand
Prison, Colombo 8.

Petitioner

Vs.

1. Sub Inspector Jayasekera,
   CID, Colombo 1.
2. Officer-in-Charge,
   CID, Colombo 1.
3. The Inspector General of Police,
   Police Headquarters,
   Colombo 1.
4. Hon. Attorney General,
   Attorney General's Department, Colombo 12.

Respondents

BEFORE : **SHIRANEE TILAKAWARDANE.J**
SALEEM MARSOOF.J &
S.I. IMAM.J

COUNSEL : M.A. Sumanthiran with Ms. Sharmaine Gunaratne for the Petitioner.
S.L. Gunasekera with Suren De Silva instructed by D.L. and F. De Saram for the 1st Respondent.
Riyaz Hamza, S.S.C., for the 2nd to 4th Respondents.

ARGUED ON : 08.06.2009.

WRITTEN SUBMISSIONS OF THE PETITIONER TENDERED ON : 20.08.2009

WRITTEN SUBMISSIONS OF THE 1ST RESPONDENT TENDERED ON : 23.07.2009

DECIDED ON : **10.11.2010**

SHIRANEE TILAKAWARDANE J.

Leave to proceed was granted on the Application filed by the Petitioner on the alleged violation of his Fundamental Rights under Articles 11, 12(1), 13(1) and 13(2) of the Constitution.

During the course of the submissions Counsel for Petitioner conceded that he would not be proceeding under Article 13(1) of the Constitution. This was also challenged by the Attorney General in so much as the Vavuniya Police who allegedly effected the arrest of the Petitioner as stated in paragraph 4 (a) of the Petition, had not been made parties to the case.

The Petitioner in his Petition (dated 7th August 2008) stated that he was a resident of Killinochchi. When he was 13 years old he had been forcibly taken by the Liberation Tigers of Tamil Eelam (LTTE) but had been later released when his parents pleaded on his behalf but no details or specific

facts have been given with regards to the date or the release. On or about August 2006 the Petitioner had come from Killincochi to Vavuniya in order to travel to Colombo. On 04th August 2006, at around 5.00 a.m., while he was lodged at the YMHA in Vavuniya, he was arrested with several others by the Vavuniya Police and on 6th August 2006, he was handed over to officers of the Criminal Investigations Department, who had transferred him to Colombo.

The Petitioner alleged that he was brutally assaulted with clubs at the Criminal Investigations Department (hereinafter referred to as the CID) and within the first week he suffered an injury to his right arm. After about two weeks in the custody of the CID he claims that his right arm was badly wounded and dislocated with severe paint and swelling. He also had received back and head injuries. The Petitioner alleges that an officer, whose name was not known to him, assaulted him while the 1st Respondent subjected him to interrogation.

He claimed that he was assaulted as he was being forced by such officers to say that three others persons arrested were suicide cadres of the LTTE. It is to be noted that though the 1st Respondent recorded the statements of the Petitioner, he made no mention therein of any of the persons arrested, as being suicide cadres of the LTTE [Vide document marked H].

After two weeks of continuous torture and interrogation the Petitioner stated that he was forced to sign a paper with something written in Sinhala and he states that as he could not speak or read in Sinhala he could not understand any of the contents of the statement which were never explained to him.

Whilst he was in custody, and due to the assault the Petitioner alleged that the officers of the CID took him to an Ayurvedic Physician at Minuwangoda, a private hospital and the National Hospital at Colombo for treatment for his wounds. This evidence was neither corroborated by medical evidence or records, nor was any specific details of the Ayurvedic physician or Medical Officer furnished to Court. No contemporaneous medical reports confirming injuries of the nature described by the Petitioner were ever furnished to the Court.

After having been held in detention at the CID headquarters for eight months the Petitioner had been taken to the Boossa Detention Camp wherein he was detained for a further four months. The Petitioner alleged that while there he was in detention assaulted by officers of the CID, who visited the camp regularly.

Thereafter he was produced before Magistrate Balapitiya under B report bearing number BR 90282 and remanded.

The Petitioner claimed that he informed the Magistrate about the assault on him and the injury to his head and the Magistrate directed that he be produced before the Judicial Medical Officer of the Karapitya Teaching Hospital. Accordingly he was examined by such Medical Officer on 18th March 2007 and 27th July 2007. The Petitioner states further that he narrated the incidents of torture to all medical officers including the Judicial Medical Officers who examined him.

The Petitioner states that he suffered much pain as a result of the injuries caused to him by the officer of the CID and further he was rendered unable to attend to his day-to-day needs due to his right arm been injured and bandaged for a long time.

In **Fox, Campbell and Hartley V. U.K. 1990** the accused were arrested in Northern Ireland by a constable exercising a statutory power allowing him to arrest for up to 72 hours, 'any person whom he suspects of being a terrorist'. This had been interpreted by the Courts as incorporating a subjective test, so that an arrest was permissible if the policeman had 'honestly held suspicion'; it was not necessary to show that a person in his position would have had a reasonable suspicion. (**McKee V Chief Constable for Nother Ireland 1984)**

It was held in **Abhinandan Jha V. Dinesh Mishra, AIR 1968 SC 117** that the actions to be taken by the police in the course of investigation are clearly laid down in the Code of Criminal Procedure. The Supreme Court in this case, has also categorically dictated way back in 1968 that investigation is the exclusive domain of the police who is to form an independent opinion on the result of investigation without any intervention from the executive or non executive. The tendency of some High Courts to disclose the contents of the case diaries at the time of passing an Interim Order during the stage of investigation of Criminal cases has been deprecated by the Supreme Court. [**Director, C.B.I V. Niyamavedi, 1995 AIR SCW 2212**]

When considering the allegations made by the Petitioner against officers of the CID it is important to bear in mind that the burden of proving these allegations lies with the Petitioner. This court has held repeatedly that the standard required is not proof beyond reasonable doubt but must be of a

higher thresh hold than mere satisfaction. The standard of proof employed is on a balance of probabilities test and as such must have a high degree of probability and where corroborative evidence is not available it would depend on the testimonial creditworthiness of the Petitioner.

Therefore in its deliberation on the violation of rights as alleged, there must necessarily be an accurate deliberation and careful assessment of the Petitioner's case. Assertions or statements by the Petitioner which are *per se* or *inter se* inconsistent or improbable will significantly weaken the Petitioner's case and assail his creditworthiness if they pertain to a material point and taints the credibility of the Petitioner, and /or discloses that a deliberate falsehood has been stated in the unfolding of the narrative of the Petitioner's case. The Court must scrutinise and look for the cogent element of facts that are the foundation of the allegation.

Testimonial creditworthiness has an added significance in the absence of any independent records to substantiate the Petitioner's assertions, especially where the Police have maintained consistent and contemporaneous records of the facts before and after the Petitioner's arrest and detention. When such records are ex facie unassailable, the presumption under Section 114 of the Evidence Ordinance operates in favour of the police. This presumption is rebutted only by cogent, concise and consistent evidence which creates a strong case in favour of the Petitioner. Additionally there must be *Uberrima fides* evident in the disclosures made and there must be an overall credibility and creditworthiness attached to the Petitioner's testimony based on the affidavits and documents submitted before Court.

As for example, where the Petitioner's allegation of torture is supported by documents and records that must necessarily be maintained by the various officials who came into contact with the Petitioner since his arrest, including the Magistrate, medical officers, prison officials, police etc., then the presence of such documents would militate against the presumption in favour of the validity of official acts and help the court reach a verdict in favour of the Petitioner on the cumulative value, even if his testimony taken independently, may be weak and contain minor inconsistencies.

However, it must be stressed that material inconsistencies in the Petitioner's testimony before Court, which indicate palpable falsehood and improbable assertions will militate against the Petitioner and may result in his testimony being discarded in its entirety.

The 1st Respondent filed a statement of objections, dated 14th November 2008, where in he specifically denied the allegations of wrongdoing made by the Petitioner.

He alleged that at all times pertinent the Petitioner was an active member of the Liberation Tiger's of Tamil Eelam and at the time of arrest was in possession of an identity card issued by the LTTE (produced, annexed to the affidavit and marked as Z).

Such complicity was even *ex facie* evident in his confession to Wimal Samarasekara, Assistant Superintendent of Police of the CID, made on 8th February 2007[A].

When considering the facts leading up to the Petitioner's arrest and detention, the official notes maintained by the CID which have been produced in this case divulge that on 03.08.2006, in terms of certain information provided by the Police Officers of the Karandeniya Police Station, a lorry bearing No. 41-1281 was taken into custody. The real evidence that was discovered pursuant to the information given by the informant establishes that the lorry had been used for the purpose of transporting arms and ammunitions in a specially constructed hidden compartment. The large cache of arms, ammunition and explosives recovered from the lorry are more-fully described in Schedule (1) to the Statement of Objections dated 14.11.2008 filed by the 1st Respondent - who at all pertinent times in this case was a Sub Inspector attached to the CID. Consequent to this recovery, the property described in Schedule 1 was handed over on 04.08.2006 to the Sri Lanka Police.

Based on information received the Petitioner was admittedly arrested on 04.08.2006 from the Young Men's Hindu Association in Vavuniya by a team of officers of the Vavuniya Police led by Sub Inspector Ranaweera. The Petitioner was detained at the Vavuniya Police Station until the 5th August 2006, before he was handed over to the CID.

Significantly, at the time of his arrest, the Petitioner had in his possession several identity cards - one issued by the LTTE bearing No. 0600876 valid up to 09.08.2006 (document marked as Z), another issued by the Methodist Church issued on 20.07.2004 and valid up to 19.07.2005 (document marked as Z1) and a National Identity Card (document marked as Z2).

The documents Z, Z1 and Z2 have been produced before Court and the identifying photograph in the national identity card and the card carrying the emblem of the LTTE are similar and the picture of the Petitioner visibly appears recognizable. Arresting Officer Ranaweera in his Affidavit dated November 2008, confirms the recovery of the above mentioned identity cards from the Petitioner's possession at the time of his arrest on 04.08.2006. Contemporaneous records of the arrest of the Petitioner and the recoveries made thereon.

The three identity cards recovered from the Petitioner were produced and entered in the List of Property bearing receipt No. 275/06 by the Vavuniya Police (Vide, Document marked C). Contemporaneous entries have also been made in the Police Information Book, Vavuniya on 04.08.2006 (Document marked B) regarding the Petitioner's arrest and the recovery of three identity cards from the Petitioner's possession. It is important to note that the dates mentioned in the Police Information Book (marked B) and the List of Property (marked C) are consistent and tally with the confession made by the Petitioner to the Police. It appears that the recovery of the three identity cards together with the entries made in the Police Information Book have formed the basis for a reasonable suspicion that the Petitioner was involved in terrorist acts linked to the LTTE movement.

My attention was drawn to the identity card issued by the LTTE marked Z which was recovered from the Petitioner at the time of his arrest. This document, which clearly carries the emblem of the LTTE, appears to be issued by an authorized officer of the said proscribed organization and permits the Petitioner to travel within and out of LTTE controlled areas up to 09.08.2006. The Petitioner contends that he was a member of the Christian Church and used this travel permit to serve people in that capacity. It is significant in this regard that the Petitioner's Methodist Church identity card had lapsed on 19.07.2005 (according to the photocopy made available to this Court) and appears not to have been extended. The Petitioner also contends that travel permits are

regularly issued by the LTTE to every person living within LTTE controlled areas in order to facilitate travel.

Certainly as far as the facts are concerned it can be inferred that the Petitioner was in a favoured position to carry one of these cards, even after he no longer had the relevant valid permit as a Methodist priest, He offered no explanation of his need to travel into these areas even after the expiry of the card given by the Methodist Church. It is pertinent to note that the Petitioner admits that he was a resident of Killinochchi and that he had been working with the LTTE from the age of 13, but was later released. Significantly, he does not give the date of his release. The fact that he was at one time admittedly working with the LTTE, leads to a reasonable conclusion that he seemed to have a freedom of approved movement inside terrorist held areas pointing significantly to the allegation of the Respondents that he was an active member of the LTTE, even at the time of his arrest.

Under the circumstances that prevailed in 2006, possession of a travel pass issued by the LTTE may plausibly give rise to the conclusion that the Petitioner maintained linkages with the LTTE. This fact combined with information received from the Karandeniya Police linking the Petitioner to the stash of explosives, arms and ammunition recovered from the lorry recovered on 03.08.2006 has reasonably triggered his arrest and inquiry into possible terrorist activities committed or planned by the Petitioner. In light of the circumstance of the Petitioner's arrest on 04.08.2006 I hold that there has been no violation of the Petitioner's rights under Article 12(1) of the Constitution by the arrest and detention of the Petitioner..

The Petitioner also claims that he was severely tortured by official of the CID while being detained at the CID Headquarters in Colombo. Specifically the Petitioner claims that he was tortured by an unnamed CID officer while being interrogated by the 1st Respondent. The Petitioner claims that he was badly wounded as a result of the torture and that he was taken to an Ayurvedic Physician, a private hospital and finally the National Hospital in Colombo where he received treatment. The Petitioner was detained at CID Headquarters for 8 months before being transferred to the Boosa Detention Camp where he was detained for a further 4 months.

Significantly the Petitioner was examined by AJMO, Colombo, Dr. Ganesh on or about 08.02.2007 and the Medico-Legal Examination Report dated 09.02.2007 does not disclose any injuries consistent with the alleged assault and torture suffered by him during his incarceration at the CID Headquarters (Vide, documents marked K and L). The Petitioner has also failed to provide the name or details of the private hospital at which he purportedly received treatment while in CID custody.

(a) The Petitioner having expressed willingness to make a confession was produced before Dr. Ganesh, the Assistant Judicial Medical Officer, Colombo, both before and after the recording of the confession i.e. on 8th February 2007 and 9th February 2007. Dr. Ganesh found no injuries on him [Medico Legal Examination Forms J & K].

(b) Thereafter, the Petitioner was examined by two Assistant Judicial Medical Officers of Galle, on 16th March 2007, when he was transferred to Boossa, and thereafter on 27th July 2007, upon the Petitioner being committed to remand custody. Both the said doctors found no injuries on him [Medico Legal Examination Forms – L & M].

During his incarceration at the CID Headquarters, the Petitioner was visited by officers of the International Committee of the Red Cross (hereinafter referred to as the 'ICRC') on two separate occasions. Entries made in the Routine Information Book Records maintained by the CID indicate that ICRC officials visited the Petitioner on 01.09.2006 and 11.10.2006. I am satisfied that these entries are contemporaneous records. The records contain no mention of torture or ill treatment with respect to the Petitioner and it appears that the Petitioner had failed to bring the alleged acts of torture to the attention of the ICRC officials nor had the officers noted any observations of ill health or injuries in the register maintained at the time.

Furthermore, though produced before the Magistrate, Balapitiya on every day on which case No. BR 90282 was called, the Petitioner made no complaint of assault or ill-treatment [Journal Entries G].

The Petitioner also contends that following his transfer to the Boosa Detention Center he was tortured by CID officers who visited the Detention Center on or about July 2007. However, the

Medico Legal Examination Forms of Dr. K.S. Dahanayake and Dr. Amararatne of the Karapitiya Hospital dated 16.03.2007 and 27.07.2007 respectively, did not refer to any injuries or dislocation of the arm as claimed by the Petitioner. Only the presence of scars or 'old scars' but provided no indication of how or when these scars or whether they were in any way related to the injuries. (Vide documents marked as M and N).

In the meantime, the Petitioner has been produced before the Learned Magistrate of Balapitiya on several occasions in relation to case bearing No. M.C. Balapitiya BR 90282, filed with respect to the recovery of explosives, arms and ammunition by the Karandeniya Police on 03.08.2006. Journal entries of the Magistrate's Court, Balapitiya (Document marked as H) confirms this. I am satisfied with the genuineness of those journal entries which contain no indication and or observation that the Petitioner appeared to have any injuries or complained of being tortured or receiving ill-treatment while in detention.

There appear to be no public records or documentary evidence that has been produced to substantiate the Petitioner's allegation of torture against officers of the CID. On the other hand, the Medico-Legal Examination Forms dated 09.02.2007; 16.03.2007 and 27.07.2007 do not suggest injuries which are consistent with the acts of torture alleged by the Petitioner. Furthermore, the Journal Entries of the Magistrate's Court, Balapitiya and the CID Records pertaining to visits by ICRC officials, indicate that the Petitioner repeatedly failed to bring these alleged acts of torture and ill-treatment to the attention of the Magistrate or the Red Cross even though he had the opportunity to do so. In light of the weight of evidence produced by the Respondents I find that there has been no violation of the Petitioner's rights under Article 11 of the Constitution.

With respect to the confession made to the CID, the Petitioner contends that following two weeks of torture and interrogation the CID compelled him to sign a statement written in Sinhala, the contents of which were not explained to the Petitioner. The Petitioner contends that at the time, he could not read or write in Sinhala. As the confession was recorded in Sinhalese the issue arises as to whether it was a voluntary confession, especially since the Petitioner is a Tamil by race.

The 1st Respondent has submitted that the Petitioner is fully conversant in Sinhala and that the Petitioner had no objection to being questioned in Sinhala. It is not disputed that the Petitioner was born in Elpitiya, Galle, a predominantly Sinhala area where the Petitioner lived and schooled until he was 9 years old. A statement by Rev. M.S. Padmakumara, (Marked J) dated 26.09.2006 discloses that after becoming an Evangelist he returned to Elpitiya and lived in his sister's house for about five months. During this period he participated in services at the Smyrna Church, Divithurai Estate, Elpitiya. The Petitioner, having been born in 1974 in Elpitiya, the population whereof is predominantly Sinhalese, and lived there for 9 years prior to moving to Kilinochchi, was conversant with Sinhala.

This statement is consistent with and supports the position taken by the 1st Respondent as to the Petitioner's fluency in Sinhala and that the Petitioner both understood and expressed his willingness to have his statement recorded in Sinhala.

Notes maintained by the CID dated 30.11.2006 has been explained that he could record his confession and a period of time has been given for him to consider, as has been specified under the law, whether he wanted to make a confession and the gravity of such a confession and ruminate on its consequences .Although an officer that by the name of Raheem had been present in the room in order to translate and assist in any language difficulties faced by the Petitioner, he appears not to have sought any assistance from him but had subsequently opted to make his statement in Sinhalese. According to the entries on 08.02.2007 at the time indicate that the Petitioner had expressed a willingness to have his statement recorded in Sinhala and that based on his consent the confession was so recorded by Assistant Superintendent Wimal Samarasekera (Documents marked as A).

He had been produced immediately before and after the recording of his confession before a Judicial Medical Officer who recorded no complaint, or observed any injuries. On this date, Assistant Superintendent Wimal Samarasekera, upon examining the Petitioner noted contemporaneously, that the Petitioner had no visible injuries and that all relevant warnings had been issued to the Petitioner in terms of the law.

In light of the circumstances detailed above, it appears that the Petitioner was conversant in Sinhala and that he had consented to have his statement recorded in Sinhala. The confession itself contains details that could only have been given by the Petitioner especially relating to his early life. The Petitioner's stand that he could not understand Sinhala is contradicted by the statement of an independent and impartial priest who has stated that the Petitioner conducted sermons at his parish in a predominantly Sinhala area in the South of Sri Lanka. Such an attempt to mislead the Court on a threshold issue in order to invalidate his previous confession to the CID has assailed the Petitioner's evidence and has damaged his testimonial creditworthiness before this Court.

Despite his testimonial creditworthiness being assailed and the Petition should be dismissed for the lack of uberrima fides, I have nevertheless considered for posterity his other complaints in this case. The Petitioner has also alleged the violation of his Fundamental Rights under Article 13(1) and 13(2) of the Constitution by his wrongful detention.

Even though in his arguments the Learned Counsel for the Petitioner abandoned his allegation of wrongful arrest, I have nevertheless considered this fact as it affects the cherished liberty of the person.

In considering the Petitioner's arrest, the Court must consider the circumstances leading up to his arrest, particularly the discovery of a large containment of arms and ammunition by the Karandeniya Police and the allegation that the Petitioner was complicit in the transport of such ammunition, coupled with the recovery of three separate identity cards, including an LTTE travel permit from the Petitioner at the time of his arrest. The facts detailed above on their own would satisfy the threshold for initiating an investigation into the Petitioner's conduct and possible involvement with the LTTE. It is significant to note that the ammunition was found on the date prior to the Petitioner's arrest and the identity cards were recovered at the time of arrest. In evaluating the evidence the court must consider the totality of evidence including the recoveries made on 03.08.2006 and 04.08.2006 and the contemporaneous records maintained by the CID on the one hand, and the bald testimony of the Petitioner on the other. Under the circumstances this Court does not find that the Petitioner's arrest violated Article 13(1) of the Constitution.

Following the Petitioner's arrest by the Vavuniya Police on 04.08.2006 the Petitioner was produced before a Magistrate on 31.08.2006. The Petitioner was arrested and detained under the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2005 and under a Detention Order dated 04.08.2006 under which the Petitioner could be detained for a period of Ninety days from the date of the Order. Between 04.08.2006 and 30.06.2007, the Petitioner was served with a total of 6 Detention Orders (Dated 4.08.2006, 02.11.2006, 02.12.2006, 01.01.2007, 16.03.2007, 01.04.2007, and 30.06.2007) by which his detention was extended validly under the Emergency Regulations. It appears that on the face of the serious nature of the offences against the Petitioner that the detention had been regularized with a Detention Order which had been signed by the then Additional Secretary of Defence at the Ministry of Defence, Public Security Law and Order and are valid in law. The Petitioner was so kept in detention as per the said Detention Orders up to 22nd July 2007, on which day he was remanded to fiscal custody.

Regulation 19(1) of the Emergency Regulations reads as follows;

"19(1) Where the Secretary to the Ministry of Defence is of opinion with respect to any person that, with a view to preventing such person:
-from acting in any manner prejudicial to the security or to the maintenance of public order, or to the maintenance of essential services; or
-from acting in any manner contrary to any of the provisions of sub-paragraph (a) or sub-paragraph (b) of paragraph (2) of Regulation 40 or Regulation 25 of these Regulations, where it is necessary so to do, the Secretary may Order that such person be taken into custody and detained in custody :
Provided however that no person shall be detained upon an Order under this paragraph for a period exceeding one year."

Regulation 21(1) of the Emergency Regulations provides that where any person has been arrested and detained under the provisions of Regulation 19, such person shall be produced before magistrate within a reasonable time, having regard to the circumstances of each case, and in any event, not later than 30 days after such arrest. The authorities have complied with this provision of the law.

Regulation 21(2) of the Emergency Regulations reads as follows;

"21(2) Any person detained in pursuance of provisions of Regulation 19 in a place authorized by the Inspector General of Police may be so detained for a period not exceeding ninety days reckoned from the date of his arrest under that Regulation, and shall at the end of that period be released by the officer in charge of that place unless such person has been produced by such officer before the expiry of that period before a court of competent jurisdiction; and where such person is so detained in a prison established under the Prisons Ordinance ……: "

Regulation 21(3) stipulates that:

"Where a person who has been arrested and detained in pursuance of the provisions of Regulation 19 is produced by the officer referred to in paragraph (2) before a court of competent jurisdiction, such court shall Order that the person be detained in the custody of the Fiscal in a prison established under the Prisons Ordinance."

On a plain reading of Regulation 19(1) of the Emergency Regulations, specially the proviso thereto, that a person can be detained upon an Order under the said paragraph for a period of up to one year.

When reading Regulation 19(1) together with Regulation 21(2) of the Emergency Regulations it is evident that a Detention Order could be obtained for a period of 90 days at a time, but for a period not exceeding one year in total.
This was the basis on which it appears that the Petitioner was taken into custody under the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2005, and detained for a period of up to one year. At the end of the said one year and prior to the lapse of one year on 22nd July, 2007 he was remanded into fiscal custody.

However, this procedure was challenged in Supreme Court Fundamental Rights Application No.173/08 (SCFR 173/08). This was due to the fact that the provisions of Regulation 21(3) contradicted with the provisions of Regulation 19(1) when read together with Regulation 21(2).

Regulation 21(3) stipulates that where a person who has been arrested and detained in pursuance of the provisions of regulation 19(1) is produced by the officer referred to in Regulation 21(2) before a court of competent jurisdiction, such court shall order that the person be detained in the custody of the Fiscal in a prison established under the Prisons Ordinance.

Thus Their Lordships, by Order dated 29th July 2008, held as follows:

"….Court has also heard Learned President's Counsel in support of interim relief. Court has also heard Learned State Counsel who concedes that in terms of Regulation 19(1) and 21 of the Emergency Regulations No 1 of 2005, the detainee should have been transferred to fiscal custody after 90 days from the date of arrest."

A clear ambiguity in the law up to this point of time. This ambiguity was rectified by the Supreme Court, in SC Application 173/08, only on 29th July 2008. This does not mean that all detentions made under the Emergency Regulations No 1 of 2005 prior to this Order were bad in law and therefore illegal. If that was to be the case it will clearly lead to an absurdity.

In any event, by this Order what was determined by the Supreme Court was that the place of detention of a detainee should change at the expiration of 90 days. There was absolutely no dispute with regard to the period of detention. The period of detention could still extend up to one year. The difference being that originally this period of detention was at any place authorized by the Inspector General of Police. However, consequent to the Judgment it now means that any detainee should now be transferred to fiscal custody after 90 days from the date of his arrest.

Therefore, a Detention Order could still be in force (after 90 days from the date of his arrest) for the balance period of nine months. However, during this period the detainee should necessarily be transferred to fiscal custody. Thus new terminology in the form of ***'D/O Remand'*** has been coined to refer to this balance period of detention, meaning '***on a Detention Order but in Fiscal Custody'***.

In the circumstances it is submitted that there is no violation of the Petitioner's Fundamental Rights guaranteed under Article 13(2) of the Constitution.

There appears to be a disparity between these two provisions. This was considered in SC Application No. 173/2008 on 20.07.2008 and ultimately held that the detainee should be transferred to fiscal custody after 90 days from the date of arrest. This determination, being a decision on the substantive law would be operative from the date of the Judgment and this period of detention in the present case would not be covered as it was before that date.

This Court finds that the facts alleged by the Petitioner were not borne out by the official documents that have been produced in Court. However, the findings of this Court and decision thereon are based on the documents presented before court and I make no attempt to preempt or prejudge the truthfulness or lack thereof of the facts contained in the Confessional Statement made by the Petitioner to the CID.

Accordingly the trial court will not be bound by the findings of this Court on the facts as presented on pleadings and affidavits. Under these circumstances, the Application of the Petitioner is dismissed. No costs.

JUDGE OF THE SUPREME COURT

SALEEM MARSOOF.J

I agree.

JUDGE OF THE SUPREME COURT

S.I. IMAM.J

I agree.

JUDGE OF THE SUPREME COURT