SAMAN
V.
LEELADASA AND ANOTHER

SUPREME COURT
RANASINGHE C.J., FERNANDO, J. and AMERASINGHE, J.
S. C. APPLICATION NO. 4/88
OCTOBER 6 and 7, 1988.

Fundamental Rights — Infliction of cruel, inhuman and degrading treatment and punishment — Article 11 of the Constitution — Application out of time — Lex non cogit ad impossibilia — Responsibility of public official in authority — Standard of proof — Sections 10 (1) and 13 of the Prisons Ordinance and Rules 121 and 155 of the Prisons Rules — Liability for infringement — Principles of liability — Assessment of damages.

The petitioner was arrested on 29.07.87 and produced before the Elpitiya Magistrate on 18.10.87 and remanded to the Galle prison on his orders made from time to time. While in prison custody on 1.12.87 the petitioner was bathing at a water tank near the prison cell when the 1st respondent was alleged to have assaulted the petitioner saying he was not entitled to bathe there at that time.

Held:

(1) Though the application was filed only on 7.1.88 — more than one month after the alleged infringement took place (1.12.1987) — yet being a remand prisoner the petitioner's lack of easy-access to a lawyer and his hospitalisation from 2.12.1987 in the remand prison till his release on 11.12.1987 must be taken into account. The principle lex non cogit ad impossibilia applies in the absence of any lapse or fault. Time here did not begin to run till 11.12.1987.

(2) (i) A case of assault by the 1st respondent (a Prison Guard) had been established where the petitioner suffered a fracture of his left arm and other injuries on being attacked by a baton by the 1st respondent for failure to comply with his orders not to bathe at the tank near cell C of the Prison.

(ii) Regardless of Rule 11 of the Prison Rules and the absence of any assignment of specific duties regarding the petitioner, the 1st respondent was acting in the course of his employment or duty when he gave directions to the petitioner and used force upon him for non-compliance. It was done by the 1st respondent in the performance of his master's business and not merely during such performance.

The assault was an unauthorised or unlawful act which was so connected with 1st respondent's duties as a Prison Guard and in the exercise of the powers conferred upon him and in the performance of the duties he was

given under S. 10(1) and S. 13 of the Prisons Ordinance and Rules 121 and 155 of the Prisons Rules, that he was acting within the scope of his duties and powers and therefore performing an executive act under Article 126 of the Constitution.

Per Amerasinghe, J. "The test of liability relates to the performance or purported performance of his official duties and not to his rank or position in the official hierarchy. If the act was done within the scope of the express or implied sense of the authority of the public officer concerned, there is executive or administrative action in the relevant sense."

"To become executive or administrative action within the meaning of Article 126 of the Constitution, the act must be done in the course of that business so as to form part of it, and not be merely coincident in time with it." "Where there is no express or implied authority, the act of the public officer may nevertheless be regarded as executive or administrative action if it could be inferred from the circumstances that the act was done with the intention of doing good to the State and not for his own purpose. In such a case of ostensible authority it may be no defence that the officer concerned was acting beyond his power or authority and even in disregard of a prohibition or special direction provided, of course, that the act was incidental to what the officer was employed to do.

(iii) The 2nd respondent (Chief Jailor) and 3rd respondent (Superintendent) took prompt action to have the petitioner treated for his injuries and interdicted the 1st respondent. The 2nd to 4th respondents were not responsible for what the 1st respondent did nor did they condone, ratify or seek to cover up what was done.

(iv) Public officials are not apart from actual authorisation responsible for the delicts of their subordinates and the relationship of master and servant does not exist between a public official and his subordinates.

(v) Per Amerasinghe J. (Ranasinghe C. J. agreeing)
The first respondent acting within the scope of his duties and acting within his powers violated the fundamental rights of the petitioner guaranteed by Article 11 of the Constitution by subjecting him to cruel, inhuman or degrading treatment or punishment and for this the State is liable to pay Rs. 15,000/- as compensation to the petitioner.
(Fernando J. held that the 1st respondent and the State are jointly and severally liable to pay compensation in Rs. 15,000/-.

(3) *Semble Basis* of liability for infringement of Article 11 — is it delictual or a new right sui generis created by the Constitution? On this point—

(i) Ranasinghe C. J. said it was not necessary to enter upon an analysis of the earlier judgments in view of the consensus of the Court that the State

was liable upon the established facts and circumstances of this case but he would agree with the view taken by Amerasinghe J. founded as it is upon the opinion expressed hitherto by this Court.

(ii) Fernando, J. An impairment of personality — the violation of those interests which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation, and whether it be a public or private right — committed with wrongful intent established liability in the *achio injuriarum;* patrimonial loss, as well as damages for mental pain, suffering and distress can be recovered. When the Constitution recognised the right set out in Article 11, even if it was a totally new right, these principles of the common law applied, and the wrongdoer who violated that right became liable, and his master too, if the wrong was committed in the course of employment. It was not necessary for a new delict to be created by statute or judicial decision.

The violation of the Fundamental Rights under Article 11 of the Constitution by 1st respondent involved not only him but also the State in liability as the cruel, inhuman and degrading treatment and punishment were inflicted in the course of 1st respondent's employment under the State.

(iii) Per Amerasinghe, J. "Our Court has preferred to treat a violation of a Fundamental Right as something *sui generis* created by the Constitution and not as a delict. Their Lordships of the Supreme Court have consistently steered away from the vicarious liability approach."

The State must pay compensation to the petitioner.

(4) Assessment of compensation for violation of a Fundamental Rights.

(i) Per Fernando, J. The petitioner is entitled to compensation in respect of the injury, hospitalization, and pain, suffering and humiliation suffered by him. In view of the custodial relationship between the 1st respondent and the petitioner his (1st respondent's) conduct was high handed and in flagrant disregard of the petitioner's rights. It is however not desirable to assess the damages under each of these heads. Compensation is assessed at Rs. 15,000/-.

(ii) Per Amerasinghe, J. (Ranasinghe C.J. agreeing): When in an appropriate case compensation is awarded for the violation of a Fundamental Right, it is, I think, by way of an acknowledgement of regret and a *solatium* for the hurt caused by the violation of a Fundamental Right and not as a punishment for duty disregarded or authority abused.

Deterrence is not a relevant element in the assessment of such compensation. In a case such as this where the 1st respondent was guilty of outrageous behaviour it is not a punitive element that must enter into the

enhancement of compensation payable, but the need to assuage the petitioner's hurt feelings by a recognition of the enormity of the wrong complained of. What is sought to be done by increasing the amount of the award is to give the petitioner the consolation of knowing that this Court acknowledges the seriousness of the harm done and that it has tried to establish some reasonable relation between the wrong done and the solatium applied.
The whole process of assessing damages where they are 'at large' is essentially a matter of impression and not addition.

Cases referred to

1. *Maharaj v. Attorney-General of Trinidad and Tobago* (No. 2 (1978) 2 All ER 670, 679, 687, 688; (1979) AC 385, 399.
2. *Gamaethige v. Siriwardena* — (1988) 1 SRI LR 384, 400-402.
3. *Velmurugu v. Attorney-General* — 1FRD - 180, 204, 212, 223, 224, 225.
4. *Bater v. Bater* — (1951) P. 35, 36-37
5. *Hornal v. Neuberger Products Ltd.* — (1957) 1QB 247, 266.
6. *Kapugeekiyana v. Hettiarachchi* — (1984) 2 SRI LR - 153, 164.
7. *Thadchanamoorthi v. A. G. & Mahenthiran v. A. G.* — 1FRD 129.
8. *Vivienne Goonewardene v. Hector Perera and Others* — 2FRD 426, 436, 437.
9. *Collettes v. Bank of Ceylon* — (1984) 2SRI LR 253, 311-316.
10. *Mariadas Raj v. A. G.* — (1982) 2FRD 397, 404-407.
11. *Daramitipola Ratnasara Thero v. Udugampola & Others* — 2FRD 364; (1983) 1 SR LR 461, 471.
12. *Perera v. University Grant's Commission* — 1FRD 103, 111, 112.
13. *Eheliyagoda v. J. E. D. B.* — 1FRD 243, 250.
14. *Jayanetti v. L. R. C.* — (1984) 2SRI LR 172.
15. *Nallanayagam v. Gunatilake* — (1987) 1SRI LR 293.
16. *Kumarasinghe v. A. G.* — S. C. Appln. 54/82 — S. C. Minutes of 6.9.82.

17. *Dayananda v. Weerasinghe* 2FRD 292, 298.

18. *Fernando v. A.G.* — (1985) 2 SRI LR 341.

19. *Jayasinghe v. Mahendran* — (1987) 1 SRI LR 206.

20. *Mallikarachchi v. Shiva Pasupati, Attorney-General* (1985) 1SRI LR 74.

21. *Home Telephone Co. v. City of Los Angeles*- 227 US 278, 287.

22. *Virginia v. Rives* — 100 US 313.

23. *Ex parte Commonwealth of Virginia* — 100 US 339

24. *Neal v. Delaware* — 103 US 370.

25. *Raymond v. Chicago Union Tractor Co.* 207 US 20

26. *Iowa-Des Moines National Bank v. Bennet* 284 US 239.

27. *Ex parte Young* 209 US 123, 156, 160.

28. *Larson v. Domestic & Foreign Commerce Corporation* 337 US 682.

29. *United States v. Classic* 313 US 299, 326.

30. *The Civil Rights Cases* 109 US 3, 11, 113.

31. *Gunaratne v. People's Bank* (1986) 1 SRI LR 338, 353.

32. *Jayanetti v. The Land Reform Commission and others* (1984) 2 SRI LR 172, 186, 192-3.

33. *Rajaratne v. Air Lanka* (1987) 2 SRI LR 128, 145, 149.

34. *Nimal Tissa Wijetunga v. The Insurance Corporation of Sri Lanka* (1982) 2FRD 265, 279.

35. *Amal Sudath Silva v. Kodituwakku Inspector of Police and Others* (1987) 2 SRI LR 119, 127.

36. *Roberts v. Ratnayake* (1986) 2 SRI LR 36, 69, 104.

37. *Chandrasena and Others v. National Paper Corporation and Others* (1982) 1 SRI LR 19.

38. *Gunasena Thenabadu v. University of Colombo and Others* (1979) 1 FRD 63.

39. *Gamini Samarasinghe v. Bank of Ceylon and Another* (1980) 1FRD 165.

40. *Ganeshanathan v. Vivienne Goonewardene and Others* (1984) 1 SRI LR 319, 331, 351.

41. *K. Visvalingam and Others v. Don John Francis Liyanage* (1983) 2FRD 452.

42. *Elmore Perera v. Major Montague Jayawickrema and Others* (1985) 1 SRI LR 285, 364, 390.

43. *Katunayakege Damesius Perera and Another v. R. Premadasa and Others* (1979) 1FRD 70, 72.

44. *Palihawadana v. Attorney-General and Others* (1979) 1FRD 1.

45. *Edirisuriya v. Navaratnam and Others* (1985) 1 SRI LR 100, 106.

46. *Ranatunge v. Jayewardene and Others* (1970) 1 FRD 77, 80.

47. *Jayewardene v. Attorney-General and Others* (1981) 1 FRD 175.

48. *Siriwardene v. Rodrigo* (1986) 1 SRI LR 384, 387.

49. *Visvalingam v. Liyanage and Others* (1983) 1 SRI LR 203, 281, 304.

50. *Victoria Park Racing and Recreation Grounds Co. v. Taylor* (1937) 58 CR CLR 479, 505.

51. *Nimmno-Smith v. Burgess Garages Ltd. and London County Council.* (1958) C. A. No. 272 reported in Kemp and Kemp: The Quantum of Damages 2nd Ed. Vol. 1. page 159-165 (1961)

52. *Laxamana and Others v. G. P. S. Weerasooriya, General Manager of Railways and Another* — (1987) 1 SRI LR 172.

53. *Gooneratne and Others v. Chandrananda de Silva, Commissioner of Elections* (1987) 2 SRI LR 165, 178.

54. *M'Leish v. Fulton and Sons* — 1955 SC 46, 49.

55. *Weld-Blundell v. Stephens* (1920) AC 956, 986.

56. *Cassell & Co. v. Broome and Another* (1972) 1 ALLER 801, 873.

57. *Rookes v. Bernard* (1964) 1 AllER 269.

58. *Fielding and Another v. Variety Incorporated* (1967) 2 AllER 497, 500.

59 *Greenlands v. Wilmshurst* (1913) 3 KB 507, 532.

60 *Uren v John Fairfax & Sons Pty Ltd.* (1967) 117 CLR 150.

61 *Ley v. Hamilton* (1935) 193 LT 384, 386.

APPLICATION for infringement of Fundamental Rights.

A. A. de Silva with *Kalyananda Thirangama Nimal Punchihewa* and *G. P. Dissanayake* for Petitioner.
Saleem Marsoof, S.S.C with *F. N. Goonewardene, S.C.* for 2nd, 3rd & 5th Respondents.
Kanchana Abeyapala for 1st Respondent.

Cur. adv. vult.

December 12, 1988

RANASINGHE, C.J.

I have had the advantage of reading, in draft, the judgments of both Fernando, J., and Amerasinghe, J.,

I agree with their findings on the questions of fact which are in issue in these proceedings.

Fernando, J., has considered an interesting aspect of the earlier judgments delivered by this Court, which have drawn heavily from the views expressed by the Privy Council in the case of *Maharaj vs. A. G.* (1) in regard to the basis of the liability of the State for infringements of Fundamental Rights by "executive or administrative action."

Fernando, J., is, however, of the view that — whatever be the real basis upon which liability is so affixed upon the State — the State is, in law, liable to the petitioner in this case upon the facts and circumstances which have been established. It is, therefore, not necessary to enter upon an analysis of the earlier judgments of this Court from the standpoint that has weighed with Fernando, J. Such a discussion could be left to a more appropriate case where this matter is raised directly before a specially constituted larger Bench which would have the benefit of a full argument from the Bar.

I agree with the view taken by Amerasinghe, J., founded as it is upon the opinions expressed hitherto by this Court in regard to the basis of such liability.

I also agree with Amerasinghe, J., in regard to the relief to be granted to the petitioner, and in regard to the orders for costs.

FERNANDO, J.

The Petitioner, a school teacher, claims relief in respect of the alleged violation of his fundamental rights under Article 11. He was arrested on 29.7.87,and was produced before the Magistrate, Elpitiya, on 18.10.87; orders for remand, at the Galle Prison,were made and extended later. On 3.12.87 when the case was called, the Court was informed that he was receiving treatment in hospital, and a further order for remand was made until the next calling date, namely 17.12.87. On 11.12.87 a motion was filed by an Attorney-at-law on his behalf that the case be called in open court. The Court was informed that by letter dated 8.12.87 — also journalised on 11.12.87 — the Attorney-General had consented to bail; the same day he was released on personal bail.

Relief is sought not in respect of the Petitioner's arrest or detention, but in regard to an assault by the 1st Respondent, a Prison guard, at about 5.00 p.m. on 1.12.87. The Petitioner was bathing at a water tank a short distance away from the block of cells ("Ward G") to which he was assigned. The 1st Respondent had been assigned duties that day in connection with Wards C and D; finding that some of the prisoners in those Wards were missing, he, searched for them, and saw several prisoners bathing at the water tank. Having told them that they were not permitted to bathe at that time, he ordered them to go to their Wards; while the others complied with that order, the Petitioner continued to bathe. The 1st Respondent states that he repeated his order more firmly, raising his hand and shouting at the Petitioner to go away, whereupon the latter got ready to leave but slipped and fell; he was not aware that the Petitioner suffered any injury. However, the Petitioner states that he told the 1st Respondent that he had obtained permission to bathe at that

time, but the 1st Respondent told him to get out, and then kicked and assaulted him, despite his pleas; he then left, but the 1st Respondent followed, picked up a baton from a table in the Library, and hit him repeatedly, despite his cries that his hand was broken. The Petitioner and other Prison officers and prisoners have made statements, some of which are substantially consistent with the Petitioner's version; some of them do not mention any incident whatsoever; and none of them make any mention of a fall. All these statements, as well as statements made to the Police, were filed with the affidavits of the 2nd and 3rd Respondents, and no objection was taken to their admissibility or relevance; all parties referred to and relied on portions of these statements.

The Petitioner complained of the assault to the 2nd Respondent, the Chief Jailor, on the later's routine visit to the Ward that evening, which was recorded the same evening by a jailer on his instructions; on the next day he directed that a full inquiry be held; and the statements of other witnesses were recorded on 2.12.87 and 3.12.87. The 2nd Respondent and the 3rd Respondent (the Superintendent of Prisons, Galle) also took prompt action to have the Petitioner treated at the Prison hospital, and then sent to the Galle Hospital for treatment and for examination by the Judicial Medical Officer. The Petitioner was accordingly admitted to the Galle Hospital on 2.12.87; the 3rd Respondent wrote to the Judicial Medical Officer on 3.12.87; but as the Petitioner was discharged from the Galle Hospital on 3.12.87, the Judicial Medical Officer was unable (as appears from his reply dated 8.12.87 to the 3rd Respondent) to submit a report on the Petitioner as the Petitioner was not there. That reply was received on 10.12.87, and on 11.12.87, the 3rd Respondent again sent the Petitioner to the Galle Hospital specifically for examination by the Judicial Medical Officer. Two medical reports submitted by the latter establish that the Petitioner had suffered a fracture of his left arm, below the elbow, and that he had other injuries consistent with an assault with a baton. From 3.12.87 to 11.12.87, the Petitioner was in the Prison Hospital.

It is common ground that the 1st Respondent was promptly interdicted, and that disciplinary proceedings as well as a criminal prosecution are pending against him.

A preliminary objection was taken that the petition filed on 7.1.88 was out of time as more than one month has elapsed after the alleged infringement on 1.12.87. It was submitted that visits by lawyers and relatives were not restricted, and that the Petitioner had the opportunity to consult lawyers. There are two independent reasons why this contention cannot succeed. A remand prisoner cannot contact a lawyer with the same ease and facility as other persons; additional time has necessarily to be spent in sending messages to, or in awaiting a visit from, a relative, who would then have to contact a lawyer ; and more time would be necessary to give proper instructions. The period of time necessary would depend on the circumstances of each case. Here, the Petitioner was hospitalised from 2.12.87 until his release, and was thus prevented from taking immediate action to petition this Court for redress : an impediment, to the exercise of his fundamental right (under Article 17) to apply to this Court, caused by the very infringement complained of. Further, the fact that he had been assaulted, or that an injury had been inflicted on him, would not *per se* bring him within Article 11 ; whether the treatment meted out to him would fall within Article 11 would depend on the nature and extent of the injury caused ; until the Petitioner had knowledge, or could with reasonable diligence have discovered, that an injury sufficient to bring him within Article 11 had resulted, time did not begin to run. I need mention only *Gamaethige v. Siriwardena* (2) where I had occasion to refer to several decisions of this Court which support the application of the principle *lex non cogit ad impossibilia* in the absence of any lapse or fault. On the application of that principle, time did not begin to run in this case until 11.12.87, and the preliminary objection fails.

Counsel for the Petitioner strenuously contended that the 2nd and 3rd Respondents were also culpable and liable because they had participated in a " cover-up ", although admittedly they had not instigated the assault and were not even present when it occurred. It was his submission that there had been a deliberate attempt to prevent the Petitioner being medically examined, and that it was only when they knew he was to be released that he was sent for examination ; because they realised that thereafter they would not be able to have him examined. This contention is

not supported at all by the documentary evidence referred to earlier. As far as the Respondents were concerned, 17.12.87 was the next calling date, and it is likely that on 11.12.87 they were unaware that the Petitioner was to be released. Further, commendably prompt action was taken, throughout, firstly, to have him treated and examined by the Judicial Medical Officer (and it was through sheer inadvertence that this got delayed), and secondly, to take disciplinary action against the 1st Respondent. In these circumstances, they were neither responsible for nor did they condone, ratify or seek to " cover-up " the act of their subordinate : public officials are not, apart from actual authorisation, responsible for the delicts of their subordinates, and the relationship of master and servant does not exist between a public official and his subordinate. (a)

I now turn to the incident of 1.12.87. In his affidavit in this Court, the Petitioner says that the 1st Respondent asked him why he was on remand ; on being told that he was in custody under the Emergency Regulations, the 1st Respondent stated

> " You dogs are the fellows who are trying to bring the *Government down* and *we are here on duty* to teach you dogs a lesson so that you will not have your limbs to do anything in future. "

This was supported by an affidavit sworn by one Shantha who had been on remand till 23.12.87. Counsel for the 1st Respondent referred to the principle of liability enunciated in *Velmurugu v Attorney-General* (3) :

> " The State should be held strictly liable for any acts of its high state officials . . . . . if the allegations against the 2nd Respondent had been proved, this would have constituted an act of the State itself and entailed the liability of the State for such acts.
>
> The liability in respect of subordinate officers should apply to all acts done under colour of office, i.e. within the scope of their authority, express or implied, and should also extend to such other acts that may be ultra vires and even in

disregard of a prohibition or special directions provided that they are done in the furtherance or supposed furtherance of their authority or done at least with the intention of benefiting the State. " (b)

Counsel submitted that the words emphasised in the averments quoted above had been falsely attributed to the 1st Respondent in an attempt to show that he acted in the " furtherance of his authority " and " with the intention of benefiting the State ", and thus to bring him within this principle of liability ; that the Petitioner's original statement, and his statement to the Police on his release as well as the other statements recorded on 2.12.87 and 3.12.87, make no mention of any such utterance by the 1st Respondent ; that Shantha made no statement either to the Prison authorities or to the Police. On the available evidence, I have no hesitation in rejecting this part of the Petitioner's story.

It remains to consider whether the Petitioner suffered these injuries as a result of a fall, or as a result of an assault by the 1st Respondent. Apart from the 1st Respondent's statement and his affidavit in this Court, there is no material supporting his version. The standard proof in these cases is usually expressed as involving the " preponderance of probability ". There are, undoutedly, degrees of probability within that standard, and there must be, as Denning, L.J., said in *Bater v. Bater,* (4) " a degree of probability which is commensurate with the occasion ". Morris, L.J., in *Hornal v. Neuberger Products Ltd* (5) said that " the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities ". In the end, as observed by Wanasundera, J., in *Velmurugu's* case (3), " the petitioner must prove his allegations to the satisfaction of the Court " ; and in *Kapugeekiyana v. Hettiarachchi,* (6) Wimalaratne, J., agreed that " the civil, and not the criminal, standard of persuasion applies, with this observation that the nature and gravity of an issue must necessarily determine the manner of attaining reasonable satisfaction of the truth of that issue ".

In considering the Petitioner's version, his attempt to distort the facts cannot be ignored. I am nevertheless of the view that an assault by the 1st Respondent, as alleged in the Petitioner's original statement, has been established. There is no doubt that the Petitioner did suffer serious injuries that evening ; the only dispute or altercation involving the Petitioner was with the 1st Respondent ; no reason has been suggested why other officers and prisoners should falsely implicate the 1st Respondent ; and the medical evidence that the fracture and other injuries were the result of repeated blows with an instrument such as a baton has not been challenged. It is much more probable that these injuries were caused by blows with a baton, rather than by a fall, and I so hold.

Prison Rule 132 in requiring all Prison officers "without exception, to treat the prisoners with kindness and humanity", may well be a counsel of perfection. The enforcement of discipline may occasionally warrant the use of some force, and some latitude is, perhaps, permissible in deciding whether in the circumstances of a particular case the force used was excessive. Action and reaction can seldom be nicely balanced where a decision to use force has to be taken on the spur of the moment, and a strict application of Rule 132 may not always be practicable. A single blow even with a baton, would be unlawful, but, arguably, would seldom amount to cruel or inhuman or degrading treatment : but a brutal assault as in this case, commencing with kicks and blows, and continued in an aggravated form — by repeated blows with a baton — even after the Petitioner complied with the order given to him, amounts to cruel, inhuman and degrading treatment. As it was inflicted for a supposed breach of discipline, it may also amount to "punishment" I am of the view that it does not amount to "torture", which seems to me to require a further element : an objective of forcing a confession, or of facilitating an interrogation, or otherwise influencing future statements or behaviour.

It was submitted on behalf of the Respondents that the 1st Respondent had not been assigned any duties in relation to the Petitioner or Ward G. Further, that a Prison Guard had no power to enforce discipline by giving orders to prisoners, or to use

force in connection therewith, as Rule 11 (of the Prison Rules) provides that a guard " shall not take any part in the *discipline* of the jail ". In reply to questions from us as to the duty of a prison guard to maintain order, even by using force, in situations such as a fight among prisoners, an attempt to start a fire, or damage to property, it was submitted that (apart from situations where persons sought to break in or break out of the jail), a prison guard's duty was primarily to watch, and to report any breach of discipline to the appropriate officer ; he could take action in respect of such breaches only upon orders from a superior officer. In the context of the Ordinance and the Rules, " discipline of the jail " in Rule 11 cannot be given the meaning contended for. It is unnecessary to consider the precise meaning of this phrase in that Rule, for other provisions of the Ordinance and the Rules indicate that the maintenance of order is within the scope of employment, and duty, of a prison guard :

> " Every *prison officer* shall, for the purposes of this Ordinance, be deemed to be always on duty. " (S. 10 (1))
>
> " It shall be the duty of every prison officer to preserve *order and discipline* among the prisoners in accordence with the provisions of this Ordinance and the rules made under section 94 . . . . . and for such purpose it shall be lawful for a prison officer to use all such means, including such degree of force, as may reasonably be necessary to compel obedience to any lawful directions given by him. " (Section 13)
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> " Each *subordinate officer* shall perform such duties as may from time to time be prescribed by the Jailer for the purpose *of preserving discipline* and enforcing diligence, cleanliness, order and conformity to the rules of the prison. " (Rule 121)
>
> " No jailer or *subordinate officer* shall — (18) fail to maintain *order and discipline* " (Rule 155)

A " prison officer " includes a " subordinate officer " (section 7), and a prison guard falls into that category (Rule 119). Regardless of the precise meaning of Rule 11, the maintenance

of order and discipline, and the enforcement of lawful directions, is within the scope of employment of a prison guard. I therefore hold that the 1st Respondent was acting in the course of his employment, or duty, when he gave directions to the Petitioner, and used force upon the Petitioner's non-compliance therewith. Even though he had not been assigned any specific duties in relation to the Petitioner, his act was within the general scope of his employment ; it was not an act done " while on his own business and for his own purposes ", nor was it an unauthorised and wrongful act so unconnected with the authorised act as to be an independent act ; it was done *in* the performance of his master's business and not merely *during* such performance ; although it amounted to wilful wrongdoing, it was nevertheless in the course of his employment, and not for his own business, purposes or benefit ; even assuming that there had been a prohibition on the use of excessive force by prison guards, that would not have been a prohibition which limited the sphere of employment, but a prohibition which only dealt with conduct within the sphere of employment. These are the basic principles of our law applicable to determining whether an act was " in the course of employment ". (b)

However, Counsel for the Petitioner submitted that the question of liability of the State was to be determined by the principles laid down in *Thadchanamoorthi v. A.G.* (7), *Velmurugu v. A.G.* (3) and *Goonewardene v. Perera* (8) and it becomes necessary to consider the basis, and nature and extent, of liability.

In the *Thadchanamoorthi* case, Wanasundera, J., having held on the facts that an infringement had not been proved, expressed disagreement with the submission that the act of a public officer would not constitute State action unless done within the scope of the powers given to him, " which means that if it is an unlawful act or is an act considered ultra vires, it would not be considered State action ". He found to be more reasonable the approach that " all acts of a public official, whether acting within the terms of his powers or acting under colour of office would be State action ", but felt that this went too far as there could be cases " where an act of a public officer acting under colour of

office ought to be considered purely as an individual or private act of the person concerned and not as an official act ". It must be observed, with respect, that an ultra vires or an unlawful (even criminal) act can be done by a servant " in the course of employment ", and would render the master liable. (c) and accordingly that possibility was, of itself, not a good ground for refusing to apply the common law principles of liability. Observations made in that case also tend to suggest that the existence of an " administrative practice " may be relevant to State liability and to the question whether an infringement was by " executive or administrative action ".

In the *Velmurugu* case, three Judges held on the facts that the infringement had not been established, while the minority took the contrary view. Two of the Judges who constituted the majority, but not the third, agreed with the formulation, quoted above, (3) as to the liability of the State — strictly, for the acts of " high " officers, and for acts done " under colour of office " in the case of other officers. The two Judges who constituted the minority, relying on *Maharaj v. A.G.* (1) took the view that " this is not vicarious liability ; it is the liability of the State itself ; it is not a liability in tort at all ; it is a liability in the public law of the State " (Sharvananda, J.) ; they considered the existence of an " administrative practice " to be irrelevant.

In *Goonewardene v. Perera* (8) processionists were directed to disperse by a Police Officer who wrongly believed that a permit was required by law ; upon failure to disperse, the Petitioner was arrested. The test suggested by the Respondents — " that the State has either expressly or impliedly authorised or ratified or adopted or condoned or acquiesced in the acts constituting the infringement " — was held to have been satisfied, and the State was held liable for the wrongful arrest. Although that concluded the matter, Soza, J., proceeded to consider the formulations in the previous decisions. He considered the distinction drawn by Wanasundera, J., between " high " and " subordinate " officials, to be *obiter*, and did not agree that any distinction should be drawn on the basis of rank. (However neither Judge made any reference to the recognised distinction between the primary representatives of a corporate body, and its servants (d), (9). He

agreed with the minority view, as formulated by Sharvananda, J., as well as the further elaboration thereof in *Mariadas v. A.G.* (10) :

> " What the petitioner is complaining of is an infringement of his fundamental right by executive or administrative action, that the State has through the instrumentality of an over-zealous or despotic official committed the transgression of his constitutional right. The protection afforded by Article 126 is against infringement of fundamental rights by the State, acting by some public authority endowed by it with the necessary coercive powers. The relief granted is principally against the State, although the delinquent official may also be directed to make amends and/or suffer punishment. "

The Petitioner in *Mariadas Raj v. A.G.* had been found in a house which was being searched by a Police Officer ; he was suspected to be an illegal immigrant, and was arrested. As he had not been informed of the reason for such arrest, the arrest was held to be in violation of Article 13 (1). Clearly, the arrest had been made in the course of duty of that Police Officer.

In both these cases, the Police Officer who actually made the arrest had not been made a Respondent to the petition filed, and the arrest had been wrongly attributed to another officer ; the State was ordered to pay compensation.

In other cases (6, 11) relief has been granted against the persons actually guilty of the infringement, and not against the State ; in cases alleging violations by corporate bodies, relief has been granted against such bodies, and not against the State (12, 13, 14). In *Nallanayagam v. Gunatilake* (15) the Petitioner had been illegally kept in custody for three days longer than authorised, and the State was ordered to pay compensation for the violation of his fundamental right under Article 13 (2).

The Petitioner is entitled to relief ; is the liability, primarily and principally, or solely, that of the State ? Is the liability of the State in respect of an infringement of fundamental rights by its agent

or employee more extensive than the liability of a master for a like infringement by his servant ? Or is the 1st Respondent alone liable ? The principles laid down in some of the decisions referred to above are *obiter* ; to some extent they are mutually inconsistent : in some orders were made only against the State, in others only against the wrongdoer, and in yet others against both.

It is necessary to refer to *Maharaj v. A.G.* (1) The Appellant, a member of the Bar of Trinidad and Tobago was sentenced to 7 days imprisonment for contempt ; as later held by the Privy Council (13), the Judge (of the High Court) had failed to observe a fundamental rule of natural justice prior to making his order, and there thus resulted a deprivation of liberty otherwise than by due process of law, (which was a fundamental right guaranteed by the Constitution). The Constitution entitled a person to apply to the High Court for redress in respect of a contravention of that right ; such an application was made by the Appellant the same day, resulting in a stay order being granted by another High Court Judge. The matter ultimately came up before yet another Judge, who dismissed the application ; and the Appellant served his sentence. He had no right of appeal against the original order. After serving his sentence, he applied to the Privy Council for, and obtained, special leave to appeal ; it was held on appeal that the original order was bad. In the meantime, he also appealed to the Court of Appeal in respect of the second order (refusing redress), and, upon that appeal being dismissed, appealed to the Privy Council once again. There was no suggestion that the original order was made totally without jurisdiction, or in bad faith ; it was an error in the course of the exercise of the judicial power of the State. Although the original order was wrong, the judge who made it enjoyed complete immunity from suit. The constitutional provision for redress (by the High Court) in respect of a contravention of a fundamental right had to be applied ; as the Appellant had already served his sentence by the time the Privy Council heard the appeal, a mere reversal of the second order, or a declaration that it was unconstitutional, was no redress — as it certainly would have been had the Appellant not served any part of the sentence.

In that context, the Privy Council (by a majority) held that although the Judge was immune, the State was liable to pay compensation, as the Constitution created a new liability

> " . . . no change is involved in the rule that a judge cannot be made personally liable for what he has done when *acting or purporting to act in a judicial capacity*. The claim for redress . . . . . for what has been done by a judge is a claim against the State for what has been done in the exercise of the judicial power of the State. This is not vicarious liability ; it is a liability of the State itself. It is not a liability in tort at all ; it is a liability in the public law of the State, not of the judge himself, which has been newly created by . . . the Constitution. "

A further distinction was drawn :

> " The order of Maharaj, J. committing the appellant to prison was made by him in the exercise of the judicial powers of the State ; the arrest and detention of the appellant pursuant to the judge's order was effected *by the executive arm* of the State. So if his detention amounted to a contravention of his rights . . . . . it was a contravention by the State against which he was entitled to protection. "

This decision did not deal with acts done ultra vires, or in violation of directions. Further, although the Judge was named as a Respondent, he was never served, and the matter proceeded throughout with the Attorney-General as the sole Respondent ; this was held to be quite proper.

If the *Maharaj* principle applies to infringements of fundamental rights under our Constitution, it must follow that in a successful application under Article 126 the liability for such infringement is solely that of the State ; that such liability is direct, and not vicarious or in any manner derivative ; that the immunity from suit of the actual wrongdoer is irrelevant ; that, whether the wrongdoer is immune or not, liability is that of the State alone ; that the State is liable for a deprivation of liberty by executive action, where such action is consequent upon an

infringement of fundamental rights by a judicial act ; and that the Attorney-General is the proper Respondent in all such cases. Apart from my own doubts as to the applicability of that principle to the very different formulation of the fundamental rights recognised by our Constitution, and the remedy provided by Article 126, I find that several other decisions of this Court are incompatible with that principle and its necessary corollaries.

Situations similar to the *Maharaj* case arose in *Kumarasinghe v. A.G.*, (16) *Dayananda v. Weerasinghe*, (17) *Fernando v. A.G.* (18) and *Jayasinghe v. Mahendran*. (19) Infringements of fundamental rights were alleged to have resulted from judicial acts ; while upholding the principle of judicial immunity from suit, this Court did not consider or hold the State to be liable. In *Fernando v. A.G.* (18) there was a detention by a Prison officer consequent upon a wrong order by a Magistrate ; a Bench of five Judges held that an officer of the State who violates the fundamental right of a person while carrying out a judicial order is not liable if he acted in good faith not knowing the order to be invalid. The reasoning in Lord Hailsham's dissent in *Maharaj* commended itself to my Lord the Chief Justice rather than the majority view. This decision may possibly be explained as consistent with other aspects of the *Maharaj* case on the basis that the act of detention was ancillary to, and therefore part of, the judicial act, and was thus not really " executive or administrative action " within the meaning of Article 126. However, *Kumarasinghe v. A.G.* (16) and *Dayananda v. Weerasinghe* (17) cannot be explained on that basis, for there the judicial orders were the consequence of false and misleading reports by Police Officers, and " executive action " was thus the cause of the detention.

But even assuming that all those decisions may be explained on the basis that the alleged infringement was not by " executive or administrative action ", the *Maharaj* principle would yet cast liability on the State in a case where the alleged infringement was clearly by executive action, although the alleged wrongdoer was immune from suit. When that very situation arose in *Mallikarachchi v. Shiva Pasupati, Attorney-General* (20) a Bench of five Judges held that a petition alleging that a proscription order made by the President, under the Emergency Regulations,

was in violation of fundamental rights could not be entertained, because of the immunity conferred on the President by Article 35 (1). While agreeing that the President enjoys immunity from suit, Wanasundera, J., held that having regard to the provisions of Article 35 (3) the Attorney-General was the proper respondent. The other Judges held that the impugned act did not relate to a matter coming within Article 35 (3), and therefore the Attorney-General was not the proper respondent in terms of that Article. The Court did not apply the *Maharaj* Principle and hold that the act of the President (clearly " executive action ") in violation of the Petitioner's fundamental rights would cast liability on the State, despite the immunity from suit of the President himself. I am therefore of the view that under Chapter 111, read with Article 126, of the Constitution, no direct liability is cast upon the State in respect of a violation of fundamental rights, and that the principles enunciated in the *Maharaj* case are inapplicable to our Constitution. Despite *dicta* as to their applicability, this Court has, more often than not, acted on the contrary basis ; views expressed in some decisions that the wrongdoer is also liable represent an uneasy compromise between *sole* liability on the *Maharaj* principle and the principles of vicarious liability which have been repudiated.

Although several decisions of the Supreme Court of the United States have been cited, particularly in the *Velmurugu* (3) case, they do not establish that a violation of fundamental rights by a State officer results in direct, as distinct from vicarious, liability of the State. The corresponding American Constitutional provisions are very different to ours; and the principles formulated in those decisions cannot be considered applicable to our Constitutional provisions without close scrutiny. Six of the decisions cited relate to proceedings against State officers, acting wrongfully and in excess of their authority, but the State was not held liable for their acts. The Federal judicial power was held competent " to afford redress for the wrong *by dealing with the officer* and *the result* of his exertion of power " (21, 22, 23, 24, 25, 26), and not against the State. Indeed, it is doubtful whether any such theory of State liability could have been advanced on the basis of the Constitution, and the Amendments guaranteeing fundamental rights : it would appear that the doctrine of sovereign immunity

was recognised (see also the Eleventh Amendment) so as to preclude a State being directly impleaded in respect of the acts of its officers. Even State officers may have been entitled to that plea, and it was to mitigate the consequences of that doctrine that a State officer seeking to enforce an unconstitutional enactment is " stripped of his official or representative character, and is subjected *in his person* to the consequences of his individuel conduct " ; such " individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten . . . . . to enforce . . . . . an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court . . . . . " (27, 28)

United States v. Classic (29) has been cited as authority for the principle that —

> " misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with the authority of State law, is action taken *under colour of* State law ".

That was not a principle derived from an interpretation of any Constitutional provision, but was simply an application of a *statute* making it an offence for anyone " under colour of any law " to subject another to the deprivation of Constitutional rights.

Many of the principles developed in the American decisions appear to have been necessitated by the more restricted form of protection of fundamental rights — " Congress shall make no law . . . ", " No State shall make or enforce any law . . . . ". Consequently it has been held in relation to the Fourteenth Amendment —

> " It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. " (30)

Even the right of Congress to legislate was held to be circumscribed —

> " It is absurd to affirm that, because the rights of life, liberty, and property . . . . . are by the amendment sought to be protected against invasion on the part of the state without due process of law, Congress may, therefore, provide for due process of law for their vindication in every case; . . . . . that Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorised to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation. " (30)

Unfortunately, such statements appear to have influenced the assumption in some decisions of this Court that —

> " Chapter 3 on Fundamental Rights in our Constitution is concerned with public law. The protection afforded is against contravention of these rights by executive or administrative action of the State and its organs. " (8)

On the contrary, in truth our Constitutional guarantees of fundamental rights are not only against State action, but even against violations by individuals. (31) It may well be that in the United States the concept of " State " and " State action " had to be broadly interpreted, as otherwise there might have been no other remedy for infringements of rights, but we face no such difficulty.

Under our Constitution, if the infringement is by " executive or administrative action " the remedy is by petition under Article 126; if it is not by " executive or administrative action ", the common law or statutory remedies are available. There is thus no need to seek to strain the meaning of that expression, or to expand the scope of Article 126, on the assumption that otherwise there would be no remedy. It is clear that even without Article 126, common law remedies would be available: otherwise in *Gunaratne v. People's Bank* (31) no relief could have been granted. Article 126 does not define an ingredient of an

infringement of fundamental rights ; it merely ousts the jurisdiction of all other Courts and tribunals in respect of one category of such infringements, namely those committed by " executive or administrative action. " It follows that the question whether there has been an infringement must be determined independently of whether such infringement was by executive action ; likewise, the question whether such an infringement by an employee casts liability on his master, a master's liability for an infringement by his servant cannot vary accordingly as he is a private individual or the State ; the same principle of liability — vicarious or otherwise — must apply. If in circumstances constituting a violation of Article 12 (3) a citizen is refused access to two neighbouring shops one privately owned, the other State-owned — by a shop employee, and if the private owner and his employee are sued for damages, and a petition is filed under Article 126 against the State and its employee, can it ever be contended that the principles to be applied to determine the liability of the respective owners, and employees, would be different ? If as Article 12 (1) requires, all persons are entitled to the equal protection of the law, can a person discriminated against by a private shop-owner's employee be differently treated to a person discriminated against by a State employee ?

I am unable to accept the submission of Counsel for the Petitioner that the principles of liability applicable are these laid down in the decisions in *Thadchanamoorthi* (7), *Velmurugu* (3) and *Goonewardene v. Perera* (8) ; the observations of Soza, J., in the latter case were *obiter*, and in the other two cases it was held on the facts that there was no infringement. Indeed, in all the cases in which infringements were established, the wrongdoer was acting in the course of, and within the scope of, his employment or duty; and the State would thus have been liable on the ordinary principles of vicarious liability. To that extent only could the wrongdoer be said to have been acting " under colour of office "; or as an instrumentality of the State. Further, decisions of Benches of five Judges in *Fernando v. A.G.* (18) and *Mallikarachchi v. Shiva Pasupati, Attorny-General* (10) necessarily involve a rejection of the *Maharaj* principle of State liability. In *Kapugeekiyana's* (6) case too there was no order against the State. Considering that Chapter 111 of the

Constitution protects fundamental rights against infringements by all persons, and not only by the State, I think that the question whether such a right has been infringed by a Respondent, and if so whether any other person is also liable in respect of such infringement, must be determined by the same legal principles. The principles whereby an employer or a principal is to be made responsible for the act of an employee or agent have not been laid down in the Constitution, and hence must be determined by reference to other (statutory or common law) principles of our law ; those principles do not vary (except perhaps in terms of the State (Liability in Delict) Act). Questions relating to acts which are ultra vires or done in violation of prohibitions, do arise, but the common law principles are sufficiently virile and flexible to deal with these. I am conscious that the time limits fixed by Article 126 may create difficulties of proof of loss or damage, but the power of this Court under Article 126 (4) is extensive, and enables the Court to give appropriate directions (even after an infringement has been held to have been committed) to obtain the material necessary to quantify the loss or damage.

A wrongful act — the invasion of a right, or the violation of a legally protected interest — causing pecuniary loss to the plaintiff, committed wilfully, is sufficient to establish liability in the Aquilian action ; in the modern law, patrimonial loss need not be proved where the object of the action is not to obtain compensation for harm done but to establish a right. An impairment of personality — the violation of those interests which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation; and whether it be a public or a private right — committed with wrongful intent establishes liability in the *actio injuriarum* ; patrimonial loss, as well as damages for mental pain, suffering and distress can be recovered (I). When the Constitution recognised the right set out in Article 11, even if it was a totally new right, these principles of the common law applied, and the wrongdoer who violated that right became liable ; and his master, too, if the wrong was committed in the course of employment. (b) It was not necessary for a new delict to be created by statute or judicial decision. The 1st Respondent is thus liable in respect of the infliction of cruel, inhuman and

degrading treatment and punishment on the Petitioner, for which the State is also liable as it was inflicted in the course, and within the scope, of his employment under the State.

The Petitioner is entitled to compensation in respect of the injury, hospitalization, and pain, suffering and humiliation which is not easy to assess due to the paucity of evidence suffered by him ; in view of the custodial relationship between the 1st Respondent and the Petitioner, his conduct was high handed and in flagrant disregard of the Petitioner's rights. While I was at first inclined to attempt to assess the damages under each of these heads separately, I agree with my brother Amerasinghe, J., that this is not desirable. I hold that the Petitioner is entitled to compensation, which I assess at Rs. 15,000, together with costs in a sum of Rs. 1,500, from the 1st Respondent and the State jointly and severally.

The Petitioner's claim against the 2nd and 3rd Respondents fails, and the application is dismissed as against them, without costs. Their conduct has been unexceptionable, and had they been compelled to retain private Counsel, we would have been inclined to award them costs.

TEXTBOOK REFERENCES :

(a) McKerron, Law of Delict, 6th ed, p. 78 ; Salmond, Law of Torts, 18th ed, p. 437 ; Halsbury, Laws of England, 4th ed, vol. 1, para. 192.

(b) McKerron, Law of Delict, 6th ed, pp. 90-96.

(c) McKerron, pp. 95-96, 101-2 ; Street, Law of Torts, 3rd ed, pp. 444, 475-6 ; Salmond, pp. 404-5.

(d) McKerron p. 102 ; Salmond p. 405 Street p. 476 ; *Collettes v. Bank of Ceylon*, (1984) 2 Sri L.R. 253, 311-316.

(e) McKerron, pp. 2, 11, 49, 59.

AMERASINGHE, J.

I have had the advantage of reading the draft judgment of my brother, Fernando, J. and I entirely agree with his views on the question of the burden of proof in cases of this sort and the scope of the authority of prison guards. I am in complete agreement with his reasoning and the conclusion which he has reached with regard to the delinquent conduct of the First Respondent and the liability of the State to pay compensation to the Petitioner. I also concur in dismissing the application against the Second and Third Respondents and agree with the order of my brother Fernando, J. with regard to costs.

I am unable, however, to extend my concurrence to the legal reasoning of my learned brother in the expository part of his judgment dealing with the manner in which the State becomes responsible for the wrongful conduct of the First Respondent. I am also unable to agree that the First Respondent is jointly and severally liable with the State. I should also like to add a word on the question of compensation.

Article 126 of the Constitution empowers the Supreme Court, among other things, to grant such relief or make such directions as it may deem just and equitable where any person alleges that a fundamental right or language right recognised by the Constitution and relating to such person has been infringed or is about to be infringed by executive or administrative action.

Relief is only available in respect of an executive act. No relief is available in respect of a legislative or judicial act. (E.g. see *Peter Leo Fernando* v. *Attorney-General and Two Others,* (18) *Jayasinghe* v. *Mahendran & others,* (19) *Dayananda* v. *Weerasinghe and Others,* (17) In *Velmurugu* v. *Attorney-General and Another,* (3) Sharvananda, J. said that Article 126 " is directed against the executive and is designed as a corrective for executive excess only. "

The expression " executive or administrative action " has not been defined in the Constitution, but it has been explained in several decisions of this Court. It is clear that the words have not

been narrowly construed to mean the acts of the President of the Republic merely because Article 4 of the Constitution says that " the executive power of the people shall be exercised by the President. " (See *Jayanetti* v. *The Land Reform Commission and Others*, (32) The expression embraces local as well as central authorities and includes any individual officer who exercises executive functions of a public nature. (*A.K. Velmurugu* v. *The Attorney-General and Another*, (3). As Atukorale, J. observed in *Rajaratne* v. *Air Lanka*, (33) :

> " An examination of our decisions indicate that this expression embraces actions not only of the Government itself but also of organs, instrumentalities or agencies of the Government. The Government may act through the agency of its officers. It may also act through the agency of juridical persons set up by the State by, under or in accordance with a statute. "

In *S. C. Perera* v. *University Grant Commission*, (12) Sharvananda, J. said that :

> " In the context of fundamental rights, the ' State ' includes every repository of State power. The expression ' executive or administrative action ' embraces executive action of the State or its agencies or instrumentalities exercising governmental functions. It refers to exertion of State power in all its forms. "

Justice Sharvananda quoted these words two years later in *Nimal Tissa Wijetunga* v. *The Insurance Corporation of Sri Lanka*, (34)

In the *Velmurugu case (supra)* at pp. 224 *in fin.* — 225 (3) Sharvananda, J. said :

"The 'Executive' may be broadly defined as the authority within the State which administers the law, carries on the business of the Government and maintains order within and security from without the State . . . . Executive functions thus include, in addition to execution of the law, the conduct of military operations, the provision of supervision of such welfare services as education, public health transport etc."

It has been decided that the Police (see *Mariadas Raj* v. *Attorney General*, (10) ; *Vivienne Goonewardene* v. *Hector Perera and Others* (8) *Amal Sudath Silva* v. *Kodituwakku Inspector of Police and Others*, (35) the Janatha Estate Development Board, (see *G.A. Eheliyagoda and Others* v. *Janata Estate Development Board and Others*, (13) the University Grants Commission (see *Perera* v. *University Grants Commission*, (12) the People's Bank (see *Ariyapala Gunaratne* v. *The People's Bank*, (31) Municipal Councils (see *Roberts* v. *Ratnayake*, (36) and Air Lanka (see *Rajaratne* v. *Air Lanka*, (33) are state agencies or instrumentalities for the purpose of exercising executive or administrative action within the meaning of Article 126 of the Constitution.

However, not every public institution is such an agency or instrument of Government. It has been held, for instance that the Insurance Corporation of Sri Lanka (see *Wijetunge* v. *Insurance Corporation of Sri Lanka*, (34) and the National Paper Corporation (see *P.G. Chandrasena and Others* v. *National Paper Corporation and Others*, (37) are not Government agencies having the relevant capacity for executive or administrative action. The question whether the University of Colombo (see *Gunasena Thenabadu* v. *University of Colombo and Others* (38) and the Bank of Ceylon are government agencies (see *Gamini Samarasinghe v. Bank of Ceylon and Another*) (39) has been raised but left undecided by this Court.

In the matter before us, the First Respondent is a Prison Guard, the Second Respondent is the Chief Jailor of the Galle Prison and the Third Respondent is the Superintendent of the Galle Prison and the Fourth Respondent (who was later dropped from the

proceedings) was the Commissioner of Prisons. They are, like Police Officers, officials of a Government Department — the Prisons Department — concerned with the vital function of law enforcement. They are all persons who exercise executive functions of a public nature and, therefore, have the capacity to perform executive or administrative acts within the meaning of Article 126 of the Constitution.

However, it is not every act of a public official that would amount to executive or administrative action within the meaning of Article 126 of the Constitution. Where in the circumstances of a case an act is to be considered purely as a private act of the person concerned and not as an official act, such an act would not constitute executive or administrative action which would open the way to relief in terms of Article 126 of the Constitution. (Cf. per Wanasundera, J. in *Aiyathurai Thadchanamoorthi's* v. *Attorney-General and Others*, *Vadivel Mahenthiran* v. *Attorney General and Others*, (7); per Wanasundera, J. in *A.K. Velmurugu* v. *The Attorney-General and Another*, and per Sharvananda, J. in *Velmurugu's case* at p. 230 (3); Sharvananda, J. in *Perera* v. *University Grants Commission*, (12); per Sharvananda, J. in *Nimal Tissa Wijetunge* v. *The Insurance Corporation of Sri Lanka*, (34).

Where the act of a public officer is expressly authorised by the State it has been said that such an act would be an executive or administrative act within the meaning of Article 126 of the Constitution. (See *Vivienne Goonewardene* v. *Hector Perera* and *Others*, (8) Such cases are no doubt rare, for as Wanasundera, J. says in *Thadchanamoorthi's* case (supra) at p. 137 *fin.* — 138.:

> " It seems extremely improbable that a government would openly authorise acts of torture or such other cruel or degrading treatment or punishment unless in war time or in emergency situations. "

There was no express authorisation in this case.

There will be executive or administrative action not only if the act in question was expressly authorised by the State, but also if

the State impliedly authorised it or adopted or condoned or acquiesced in that act. (Cf. Vivienne Goonewardene's case, (*supra*), at p. 436 *fin.* — 437). These cases are few and far between, although, perhaps rather more frequent than those in which the acts complained of are expressly authorised. As Wanasundera, J. in *Thadchanamoorthi's* case, *(supra)* explained at p. 138 :

> " It is more likely that a government may covertly sanction such illegal acts or connive in the perpetration of such acts, or sanction them or tolerate them to such an extent that they become virtual administrative practice. "

This must not be construed to mean that an administrative practice must always be proved in order to establish acquiescence. Approval of even an isolated act would be sufficient (see the *Velmurugu* case, *(supra)*, per Sharvananda, J. at p. 231 *fin.*). Moreover, where the act has been expressly or impliedly authorised there will be executive or administrative action even if the officer concerned used some unauthorised mode of doing the authorised action. There was no implied authorisation in this case.

If the act of a public officer has not been expressly or impliedly authorised or adopted or condoned or acquiesced in by the State, would it be executive or administrative action merely because it was the act of a high official ? In the *Velmurugu* case, *(supra)*, at p. 212 Wanasundera, J. stated that he was " inclined to the view that the State should be held strictly, liable for *any* acts of its high state officials. " With great respect, I think the proposition was somewhat too widely stated. If a police officer raped a woman, after arresting her and taking her to the police station, would that be executive and administrative action ? I believe that Wanasundera, J. would not have drawn any distinction between a rape committed by a humble constable and such a transgression by a high ranking police officer. Indeed, Wanasundera, J. in *Velmurugu's* case,

(supra) at p. 206 *fin.* —207 makes no distinction between high and low officers of the police when he said :

> " Mr. Pullenayagam relied heavily on the above passage for the submission that acts or omissions on the part of a police officer done under colour of office or in the purported exercise of his powers would involve the State in liability. Nevertheless he made a significant concession, namely, that there could be acts which can be regarded as an individual or personal act not entailing liability of the State. As an example he gave the case of a police officer arresting a woman, then taking her to the police station and raping her . . . . . "

In the same case *(supra)*, Sharvananda, J. at p. 224 said :

> " The idea underlying Article 126 is that no one by virtue of his public office or position should deprive a citizen of his fundamental rights without being amenable to Article 126, even though what the official did constituted an abuse of power, or exceeded the limits of his authority. This sweep of State action, however, will not cover acts of officers in the ambit of their personal pursuits, such as rape by a police officer of a woman in his custody as contended by the Additional Solicitor-General ; *such act has no relation to the exercise of the State power vested in him. The officer had taken advantage of the occasion, but not his office for the satisfaction of a personal vagary. His conduct is totally unconnected with any manner of performance of his official functions.* " (The emphasis is mine).

The test of liability relates to the performance or purported performance of his official duties and not his rank or position in the official hierarchy. Was it done under colour of office ? If the act was done within the scope of the express or implied scope of the authority of the public officer concerned, there is executive or administrative action in the relevant sense. (Cf. per

Wanasundera, J. in (*Velmurugu's case, (supra)*, at p. 212 ; per Soza, J. in *(Vivienne Goonewardene's* case, (supra), at p. 439). There would be executive or administrative action even if the acts in question were unauthorised provided they are so connected with the acts that have been authorised that this may be regarded as modes, although improper modes, of doing them.

However, if the unauthorised and wrongful act of a public officer is not so connected with an authorised act as to be a mode of doing it, but is an independent act, there is no executive or administrative action ; for in such a case the officer is not acting in the performance of his official duties but has gone outside of it. He can no longer be said to be doing, although in a wrong and unauthorised way, what he was authorised to do. He is doing what he was not authorised to do at all. There is no executive or administrative action merely because the act was done at a time when the officer was engaged in official business. To become executive or administrative action within the meaning of Article 126 of the Constitution, the act must be done in the course of that business so as to form part of it, and not be merely coincident in time with it.

Although Senior State Counsel maintained that the First Respondent was acting in an unauthorised manner and was, therefore, not acting in the performance of his duties, the First Respondent in this case was not in my view acting privately during the time he was on duty. His assault was an unauthorised or unlawful act but one which was so connected with his duties as a Prison Guard and in the exercise of the powers conferred upon him and in the performance of the duties he was given by Section 10 (1) and Section 13 of the Prisons Ordinance (Cap. 54 L.E.) and by Rules 121 and 155 of the Prison Rules framed under the Prisons Ordinance (Vol. I Subsidiary Legislation) that he was acting within the scope of his duties and within the scope of his powers and was therefore performing an executive act within the meaning of Article 126 of the Constitution. He abused his powers when he laid violent hands upon the Petitioner for the purpose of or for the honestly purported purpose of furthering

his authority to maintain discipline and the State must therefore be held liable for his wrongful conduct.

In the *Velmurugu case, (supra),* at p. 224, Sharvananda, J. said :

> " If the State invests one of its officers or agencies with power which is capable of inflicting the deprivation complained of, it is bound by the exercise of such power even in abuse thereof ; the official position makes the abuse effective to achieve the flouting of the subject's fundamental rights. The State had endowed the officer with coercive power, and his exercise of its power, whether in conformity with or in disregard of fundamental rights constitutes executive action. The official's act is ascribed to the State for the purpose of determining responsibility, otherwise the constitutional prohibition will have no meaning. "

Soza, J. in *Vivienne Goonewardene's* case, (supra), at p. 437 cited and followed Sharvananda, J.'s explanation of the principles on which liability for infringement of fundamental rights is imputed to the State.

Where there is no express or implied authority, the act of a public officer may nevertheless be regarded as executive or administrative action if it could be inferred from the circumstances that the act was done with the intention of doing good to the State and not for his own purposes. In such a case of ostensible authority it may be no defence that the officer concerned was acting beyond his power or authority and even in disregard of a prohibition or special direction provided, of course, that the act was incidental to what the officer was employed to do.

Wanasundera, J. in *Velmurugu's* case *(supra),* at p. 212 said :

> " The liability in respect of subordinate officers should apply to all acts done under colour of office, i.e., within the scope of their authority express or implied, and should also extend

to such other acts that may be *ultra vires* and even in disregard of a prohibition or special directions provided that they are done in furtherance or supposed furtherance of their authority or done at least with the intention of benefiting the State."

I agree with my brother Fernando, J., for the reasons he has given, that the Petitioner's attempt to show that the First Respondent was acting with the intention of benefiting the State must fail. It was, I think, an ex post-facto pretence on his part. Perhaps it was an inspired fabrication ?

My brother Fernando, J., arrives at his decision on the question of responsibility by way of the Law governing vicarious liability, and regards the petitioner's rights to compensation as one of several common law rights in the field of delict. This seems to have been the approach favoured by Lord Hailsham of St. Marylebone in his dissenting judgment in *Maharaj* v. *Attorney General of Trinidad and Tobago*, (No. 2), [1978] 2 All E.R. 670 especially at p. 687 and p. 688 (1) : However, our Court has preferred to treat a violation of a fundamental right as something *sui generis* created by the Constitution and not as a delict. Their Lordships of the Supreme Court have consistently steered away from the vicarious liability approach.

In *Velmurugu's* case, *(supra)*, at p. 210 Wanasundera, J. said :

" The learned Deputy Solicitor-General sought to advance his argument further by relying on certain decisions relating to vicarious liability of a master for the acts of his servant in the sphere of the law of tort. I am in agreement with Mr. Pullenayagam that the test of liability formulated in those cases is not an appropriate or safe test for application in the present case. We are here dealing with the liability of the State under public law, which is a new liability imposed directly on the State by the constitutional provisions. While the decisions relating to the vicarious liability of a master for

the acts of his servant may be useful to the extent that all cases where a master can be held liable in tort would undoubtedly fall also within the liability of the State under the constitutional provisions, the converse need not be true unless we are to give a restricted interpretation to the constitutional provisions. The common law test of tortious liability therefore cannot provide a sufficient test and we have to look elsewhere for the appropriate principles."

Soza, J. in *Vivienne Goonewardene's* case, *(supra)*, at p. 438 expressed a similar view. He said :

"The nature of the liability has been neatly explained by Lord Diplock in the Privy Council decision in *Maharaj* v. *The Attorney-General of Trinidad and Tobago*, No. 2 — [1979] A.C. 385, 399 (1) — in the following words :

> 'This is not vicarious liability ; it is a liability of the State itself. It is not a liability in tort at all ; it is a liability in the public law of the State . . . . . which has been newly created.'

Lord Hailsham of St. Marylebone in his minority judgment in this case did not agree with this formulation because he found it 'difficult to accommodate within the concepts of the law a type of liability for damages for the wrong of another when the wrongdoer himself is under no liability at all the wrong itself is not a tort or delict.' His Lordship found it equally difficult to understand that this was 'some sort of primary liability.' But what Lord Diplock was emphasising was that this was a new liability in public law created by the Constitution of Trinidad and Tobago, not to be considered from the angle of the existing bases of liability. In Sri Lanka too our Constitution has, created a new liability in public law."

This view is also supported by the decision of Sharvananda, J. (with whom Ratwatte, J. agreed) in the *Velmurugu* case (supra). In that case (*op. cit.* p. 224) Sharvananda, J. says :

> " It is to be noted that the claim for redress under Article 126 for what has been done by an executive officer of the State is a claim against the State for what has been done in the executive power of the State. This is not vicarious liability ; it is not a liability in tort at all ; it is a liability in the public law of the State — vide (*Maharaj* v. *Attorney General of Trinidad* [1978] 2 AER 670 at 679 PC)."

These words were quoted with approval by Sharvananda, J. in *Mariadas Raj* v. *Attorney-General ; and Another*. (10).

In *Ganeshanathan v. Vivienne Goonewardene and Three Others*. (40) Ranasinghe, J. said :

> " The nature of the liability incurred upon an infringement of a fundamental right by a State Officer and the real basis upon which relief or redress is granted to him has been set down by Lord Diplock in the Privy Council in the case of *Maharaj* v. *The Attorney General of Trinidad and Tobago* as:
>
> > ' This is not vicarious liability. it is liability of the State itself. It is not a liability in tort at all, it is the liability in the public law of the State . . . ' This view of the underlying principle has also been hitherto followed by this Court. "

The fact that the agent of the State is required by Rule 65 of the Supreme Court Rules to be named in a petition for relief for violation of Fundamental Rights is not an indication that the State is vicariously liable for the act of the wrongdoer. The identity of the alleged transgressor is, as explained by Ranasinghe, J. in the *Ganeshanathan* case *(supra)* at p. 351 in fin. — 352, required for two purposes : (1) Before liability " is brought home to the State, it is necessary for the aggrieved persons to establish that his fundamental right has been infringed by an executive or administrative act. Any such act has to be committed by a State Officer or by any other person who could be held to be an organ of the State. It is only on

account of such an act by such an individual that the liability cast upon the State would arise. It is in recognition of this position and this principle that Rules 65 (1) (a) and (b) and 65 (4) (ii), in particular, have been framed in the way they have been framed. " (2) The naming of the Respondent and his presence in Court enables the State and the alleged wrongdoer, who will be given particulars of the petitioner's claim, to defend themselves. (See also per Samarakoon, C.J. in the *Ganeshanathan* Case, *(supra)*, at p. 331).

This is all there is to it and as Ranasinghe, J. observed in *K. Visvalingam and Others* v. *Don John Francis Liyanage*, (41)

> " The act or acts in respect of which relief is sought are acts of the officers of the State. The relief granted in the ultimate analysis is an award against the State. "

It is therefore the State that is liable to pay compensation to the Petitioner. (See *Vivienne Goonewardene* v. *Hector Perera and Others* (1983), Fundamental Rights Decisions 426 at p. 440 (8). Although in *Mariadas Raj* v. *Attorney-General and another*, (1983), Fundamental Rights Decisions, Vol. II, 397 Sharvananda, J. at p. 404 (10) said that " The relief granted is principally against the State, although the delinquent official may also be directed to make amends and/or suffer punishment ", he went on to direct (*ibid.* p. 408) the State to pay compensation to the Petitioner. As Wanasundera, J. said in *Ganeshanathan* v. *Vivienne Goonewardene and Three Others*.

> " A proceeding under Article 126 is against the State and the State has to bear the liability for unlawful executive or administrative action. "

It was the State that was ordered to pay compensation in *Amal Sudath Silva* v. *Kodituwakku, Inspector of Police and Others*, (35). And so it was in *Nallanayagam* v. *Gunatillake and Others*. (15) and *semble* in *Elmore Perera* v. *Major Montague Jayawickrama and Others*, 1985 1 Sri L.R. 285 per Wimalaratne, J. at p. 364 and per Colin-Thome, J. at p. 390 (42). I am conscious of the fact that in *Ratnasara Thero* v. *Udugampola*, (11), *Kapugeekiyana*

v. *Hettiarachchi*, (6) and in *Rajaratne v. Air Lanka*, (33) the awards were against the agent of the State. However, I would, with great respect, prefer to follow the decisions in *Vivienne Goonewardene, Mariadas Raj, Amal Sudath Silva* and *Nallanayagam* and make order in this case with regard to the payment of compensation against the State.

My brother Fernando, J. holds that the State and First Respondent be held jointly and severally liable. This is the correct form of an order in an action based on delict where joint tort-feasors are jointly and severally liable for the whole damage, and taking the view he does of the nature of fundamental rights actions, namely that they are delicts, he may, for the sake of consistency, feel constrained to make the order in the form in which he makes it. However, I do not find any decision in our Law Reports which supports such a practice in relation to an award of relief made in terms of Article 126 of the Constitution ; and making the State and First Respondent jointly and severally liable is unnecessary in the context of the bases of liability as I see them.

It is entirely consistent with the view that what is involved is State liability that even where the agent of the State is mistakenly identified in the Petition for redress to this Court for an alleged violation of a Fundamental Right, the State is nevertheless liable if it is established to the satisfaction of the Court that the act in question was in fact done by a State official. Hence, the fact that the wrong Secretary to a Ministry had been named did not end the proceedings in *Katunayakage Damesius Perera and Another* v. *R. Premadasa and Others*, (43). Nor did the fact that a police officer other than the one named as a respondent was responsible for a wrongful arrest or detention in violation of the Fundamental Rights of a Petitioner, stand in the way of redress where the Court was satisfied that the act was that of some police officer and, therefore, State action. (See per Samarakoon, C.J. in *Ganeshanathan* v. *Vivienne Goonewardene, and three Others*, (40). See also *Mariadas Raj* v. *Attorney General and Others*, (10).

If a right created by the Constitutions of 1972 and 1978 is *sui*

generis, does it mean that an old right under the law co-exists ? In the *Kapugeekiyana* case at p. 166 Wimalaratne, J. said that the rights of suspects already enjoyed by them " have now been made constitutional rights." And Soza, J. in *Vivienne Goonewardene* v. *Hector Perera and Others*, (8) says :

> " Fundamental rights were secured and guaranteed even in the 1972 Constitution but no special machinery for enforcement was provided. The Constitution of 1978 spells out in detail the Fundamental Rights it recognises and it has provided a special forum and special machinery for enforcement and for the grant of relief and redress. But the old forms of procedure and the old remedies still co-exist with the new. "

Does it mean that now, in certain circumstances, there are two remedies, one, a remedy in the sphere of public law and another in the sphere of public ? Is it open to a party to obtain relief under both remedies ? It is interesting to note in this connection that the Constitution of Trinidad and Tobago, which was the subject of interpretation in the *Maharaj* case, (supra), and quoted by Wanasundera, J. in the Velmurugu case, (supra), at p. 201 *fin.*, expressly provides in Article 6.11 that the Constitutional Rights are " without prejudice to any other action with respect to the same matter which is lawfully available."

If two remedies are available in our law also, what is the effect on the *quantum* of compensation ? The provisions of the Constitution are supposed to provide a speedy and efficacious remedy. (See *Palihawadana* v. *Attorney-General and Others*, (44) ; *Velmurugu's* case, (supra), at 223). The remedy is speedy because the short time limits prescribed by the Constitution are rigidly enforced. (See *Edirisuriya* v. *Navaratnam and Others*, (45) ; K.S.S.E. *Ranatunge* v. *A.R.M. Jayewardene and Others*, at p. 80 (46) ; *Thadchanamoorthi's* case, *(supra)* at p. 134 fin. ; *Jayewardene* v. *Attorney-General and Others*, (47) ; *Vivienne Goonewardene* v. *Hector Perera and Others, (supra)* at p. 440 ; *Jayanetti's* case, *(supra)* at p. 192 ; *Siriwardene* v. *Rodrigo*, (48) ; *Viswalingam* v. *Liyanage and Others* (49). However, a speedy remedy may not be always the most efficacious.

If the proceedings in this Court are final and preclude further proceedings elsewhere, would it not be unfair by a party whose damages cannot be assessed within the time prescribed by the Constitution for hearing and determining these matters ? And what of prospective loss ?

These are questions, and no doubt there are necessarily others, that have not been discussed before us in this case, and without the benefit of a sufficient argument by Counsel I am, naturally, reluctant to express even a tentative opinion. If Pandora's box is to be opened, I should, with great respect, in the name of Hope remaining, submit that a fuller bench be invited to consider the remedies for the ills that might have escaped. For the purpose of guiding me to a decision in the present case, I think the principles enunciated by this Court, and the helpful *dicta* that have been expressed from time to time, are more than sufficient, and I do not wish to wittingly depart from them. Nor do I wish to make large generalisations about such principles and *dicta* because no light I think will be shed on this case by doing so. Indeed, it may be improper for me to do so (Cf. per Dixon, J. in *Victoria Park Racing and Recreation Grounds Co.* v. *Taylor* (50).

I must now turn to the question of compensation. Lord Evershed, MR in *Nimmo-Smith* v. *Burgess Garages Ltd., and London County Council;* (1958) C.A. quoted in Kemp and Kemp, *The Quantum of Damages*, 1961, 2nd Edn. Vol. I at p. 159 observed that —

> " The subject-matter of estimation is very much what might be called a series of imponderables ; and that, of course, makes anything in the way of an assertion about what the right figure is a precarious matter. "

I make no assertion about the total sum decided upon by my brother Fernando, J. I agree that a sum of Rs. 15,000 should be awarded to the petitioner.

Some amount it seems must be awarded if there has been an infringement of a Fundamental Right which is regarded as a

delict. Even nominal damages must be awarded in a case of injury without damage — *injuria sine damnum*, for it is practically the only judgment that is appropriate in such a case, although admittedly in technical terms the law requires not damage but an *injuria* or wrong on which to base a judgment for the plaintiff. " (See Mayne and McGregor on Damages, 12th Edition, at p. 191 *et seq.*).

However, if the violation of Fundamental Rights constitutes non-delictual wrongs, then damages need not be awarded in certain cases. And, indeed, our Court has sometimes declared a violation to have taken place and ordered something to be done or not to be done or declared something to be the case as the relief it grants under Article 126. This was what Wanasundera, J. proposed in the *Elmore Perera* case at p. 342 *fin.* — 343. This was also the relief in *Laxamana and Others* v. *G.P.S. Weerasooriya, General Manager of Railways and Another*, (52) ; *Perera* v. *University Grants Commission*, (12) and *Eheliyagoda and Others* v. *Janatha Estate Development Board*, (13). It was also the case in *Jayanetti* v. *The Land Reform Commission*, (32) and in *Gooneratne and Others* v. *Chandrananda de Silva, Commissioner of Elections*, (53).

When, in an appropriate case, compensation *is* awarded for the violation of a Fundamental Right, it is, I think, by way of an acknowledgement of regret and a *solatium* for the hurt caused by the violation of a fundamental right and not as a punishment for duty disregarded or authority abused. (Cf. per Lord Carmont in *M'Leish* v. *Fulton and Sons*, (54) and *Weld-Blundell* v. *Stephens* (55).

Even if the act were a delict, punishment is an irrelevant consideration. The cases point to a rationale not of punishment of the defendant but of extra compensation for the plaintiff for the injury to his feelings and dignity. In *Cassell & Co. Ltd.* v. *Broome & Another*, (56) Lord Diplock said :

> " In common law weapons to curb abuse of power by the executive had not been forged by the mid-eighteenth century. In view of the developments, particularly in the last

20 years, in adapting the old remedies by prerogative writ and declaratory action to check unlawful abuse of power by the executive, the award of exemplary damages in civil actions for tort against individual government servants seems a blunt instrument to use for this purpose today. "

Civil action are concerned with reparation rather than punishment (See *Rookes* v. *Bernard,* (57) *Fielding and Another* v. *Variety Incorporated,* (58) and per Scarman L.J. also at p. 500 *in fin* ; and the *Cassell's* case, *(supra).* In a case such as this where the First Respondent was guilty of outrageous behaviour, it is not a punitive element that must enter into the enhancement of compensation payable, but the need to assuage the Petitioner's hurt feelings by a recognition of the enormity of the wrong complained of. What is sought to be done by increasing the amount of the award is to give the Petitioner the consolation of knowing that this Court acknowledges the seriousness of the harm done and that it has tried to establish some reasonable relation between the wrong done and the *solatium* applied. (Cf. per Hamilton L.J. in *Greenlands* v. *Wilmshurst* (59).

It is the Petitioner's point of view that is relevant. Thus in the *Velmurugu* case, *(supra),* Sharvananda, J. commented on the fact that the case disclosed " a shocking and revolting episode in law enforement " and ordered the State to pay compensation " for the distress, humiliation and suffering undergone by the Petitioner " as a result of the cruel, inhuman and degrading treatment meted out to him.

As far as the delinquent officer himself is concerned, the Court may, in an appropriate case, as it did in *Vivienne Goonewardene* v. *Hector Perera and Others; (supra),* at p. 440 and as Sharvananda and Ratwatte J.J. did in the *Velmurugu* case, *(supra),* at p. 242, direct the authorities concerned to take disciplinary action. Such action has been already taken in the case before us and therefore we make no direction with regard to that matter.

In *Daramitipola Ratnasara Thero* v. *P. Udugampola and Others,*

(11) Abdul Cader, J., (Wimalaratne, Ratwatte, Colin-Thomé and Rodrigo JJ. agreeing) said :

> " In my view this is a serious violation of the fundamental rights of a citizen of this country which calls for the award of substantial damages. A mere declaration without more in the form of some penalty . . . will not deter such future abuse of fundamental rights of citizens. "

With the greatest respect I am unable to agree that deterrence is a relevent element in the assessment of compensation in a Fundamental Rights action. Being as they are actions against the State, an attempt by this Court to punish the State would, I think, be imprudently venturesome. To attempt to deter it would be hopelessly futile, for the State, in truth, I believe, has a long pocket, the depths of which we must know, if we are to make a meaningful, punitive award. It is extemely unlikely that we shall ever know the deepness of the treasury pocket and it is therefore hardly ever likely that we would be so placed as to make a proper assessment of punitive damages. It behoves us also to be mindful of the fact that large awards will only increase the burden of the tax-payer and that of the ordinary man in the street to whom the burden of the tax-payer will, lamentably, be passed on eventually. Therefore, we need to act with restraint in awarding compensation in these matters.

The variety of the matters we have to consider in assessing damages for a violation of fundamental rights means that a verdict in such a case with regard to the amount to be awarded is the product of a mixture of inextricable considerations and, therefore, in expressing it, a separate assessment of the various elements, ought not to be made or disclosed. (Cf. per Vindeyer, J. in *Uren* v. *John Fairfax & Sons Pty Ltd.*, (60) quoted with approval by Lord Hailsham in *Cassell & Co. Ltd.* v. *Broome and Another* (56), Lord Hailsham *(ibid)* said :

> " The next point to notice is that it has always been a principle in English Law that the award of damages when awarded must be a single lump sum in respect of each separate cause of action. Of course, where part of the

damage can be precisely calculated, it is possible and desirable to isolate part of it in the same cause of action. It is also possible and desirable to isolate different sums of damages receivable in different torts . . . . But I must say I view with distrust the arbitrary subdivision of different elements of general damages for the same tort . . . In cases where the award of general damages contains a subjective element, I do not believe it is desirable or even possible simply to add separate sums together for different parts of the subjective element, especially where . . . . . the subjective element relates under different heads to the same factor, in this case the bad conduct of the defendant. I would think with Lord Atkin in *Ley* v. *Hamilton* (61) :

> " The punitive element is not something which is or *can* (the italics are mine) be added to some known factor which is non-punitive. "

In other words the whole process of assessing damages where they are " at large " is essentially a matter of impression and not addition. When exemplary damages are involved, and even though, in theory at least, it may be possible to winnow out the purely punitive element, the danger of double counting by a jury or a judge are so great that, even to avoid a new trial, I would have thought of the dangers usually outweighed the advantages. "

For the reasons stated in my judgment, I make order as follows :

(1) The First Respondent acting within the scope of his duties and acting within his powers violated the fundamental rights of the Petitioner guaranteed by Article 11 of the Constitution by subjecting him to cruel, inhuman or degrading treatment or punishment ;

(2) The State shall be liable to pay a sum of Rs. 15,000 to the Petitioner by way of compensation ;

(3) Costs shall be paid as ordered by my brother, Fernando, J.

Application allowed
Compensation ordered