Rasammah
V
Major General Perera and others.

Supreme Court
Wimalaratne J. Ratwatte J.
and Victor Perera J.
S.C. Reference No. 2 of 1981.
C.A. Application No. 41/81 (HCA)
December 14, 1981.

Writ of Habeas Corpus – Article 141 of the Constitution – Rules 47 and 49 of the Supreme Court Rules 1978 – production of corpus.

The stage at which the corpus should be produced before the Court of Appeal or before a Court of First Instance is decided by the Court of Appeal by virtue of its inherent powers and not by virtue of any requirement in the Supreme Court Rules. The Court of Appeal in determining this question will exercise its discretion according to well known principles and practice and on a consideration of the circumstances of each case. The discretion remains unfettered by the rules of court. The questions referred to the Court are determined as follows:

(1) When a prima facie case is made out by the petitioner in an application made under Article 141 of the Constitution there is no mandatory requirement that the body of the person alleged to be wrongfully detained should in every case be brought up before the Court of Appeal (or the most convenient Court of First Instance) before proceeding to inquire into the legality of the detention; the Court of Appeal has a wide discretion to determine the stage at which the body should be produced. When the Court of Appeal directs a judge of a Court of First Instance to inquire and report in terms of the first proviso to Article 141, it is lawful for the Court

of Appeal to require the body of the person alleged to be illegally or improperly detained to be brought up before such court of First Instance at the earliest opportunity.

(2) Even when the Court of Appeal is not satisfied that a prima facie case has been made out, the Court is entitled to order the issue of notice to the respondents in terms of rule 49 of the "Supreme Court Rules, 1978".

(3) It is not mandatory under the terms of Article 141 for the Court of Appeal to require the respondent to produce the Corpus before the Court on the date of return to the notice issued under rule 49.

Reference by Court of Appeal in terms of Article 125 of the Constitution.

V.S.A. Pullenayagam with S.C. Chandrahasan,
R. Srinivasan, S. Perinpanayagam, G. Keewaralingam &
Miss. M. Kanapathipillai for Petitioners.
G.P.S. de Silva Addl: S.G.with S. Ratnapala, S.C.
for Attorney General.

Cur. adv. vult

January 11, 1982.

WIMALARATNE J:-

This is a reference made by the Court of Appeal in terms of Article 125 of the Constitution for a determination by the Supreme Court of the following three questions relating to the interpretation of Article 141 of the Constitution:

1. When an application is made to the Court of Appeal under Article 141 of the Constitution, for the grant of an order in the nature of Writ of Habeas Corpus and the Court is satisfied that a prima facie case has been made out, should the Court, in every such case under the terms of Article 141 of the Constitution issue a Writ requiring that the body of the person detained be brought up before the Court of Appeal (or the most convenient Court of First Instance) before proceeding to inquire into the legality of such detention?

2. Where upon application made, the Court is not satisfied that a prima facie case has been made out, is the Court

bound to refuse the application in every case or is the Court entitled to issue notice on the respondents in the first instance and thereafter determine the legality of the detention?

3. If the Court is entitled to issue a notice in the first instance is it mandatory under the terms of article 141 of the Constitution, to require the respondents to produce the corpus before the Court on the notice returnable date?

Article 141 is in these terms:-

"The Court of Appeal may grant and issue orders in the nature of writs of habeas corpus to bring up before such Court-

(a) the body of any person to be dealt with according to law; or

(b) the body of any person illegally or improperly detained in public or private custody,

and to discharge or remand any person so brought up or otherwise deal with such person according to law:

Provided that it shall be lawful for the Court of Appeal to require the body of such person to be brought up before the most convenient Court of First Instance and to direct the Judge of such court to inquire into and report upon the acts of the alleged imprisonment or detention and to make such provision for the interim custody of the body produced as to such court shall seem right; and the Court of Appeal shall upon the receipt of such report, make order to discharge or remand the person so alleged to be imprisoned or detained or otherwise deal with such person according to law, and the Court of First Instance shall conform to, and carry into immediate effect, the order so pronounced or made by the Court of Appeal: ....."

It has been submitted by learned Counsel for the Petitioners that according to its ordinary and natural meaning, the above Article requires that the Court, upon a prima facie case being made out, is obliged to order that the body of the person detained be brought

up before it (or before a court of First Instance) *before* the Court proceeds to inquire into the legality of such detention. The very name of the Writ - Habeas Corpus - means "have his body" and this empowers the Court to cause any person who is alleged to be unlawfully confined to be brought before the Court to enable the Court to inquire into the reason why he is confined, and to set him at liberty then and there, should it see fit. Counsel has referred us to the practice of the Courts, both in England and in Sri Lanka in support of his contention that the body of the person is brought up before the Court commences inquiry into the legality of the detention.

The learned Additional Solicitor General has contended that the above Article contains no imperative requirements that in every case where a prima facie case of illegal detention is made out by the petitioner the Court is obliged to order the production of the body before it. He does not contend that the Court of Appeal has no power to issue a Writ of Habeas Corpus without first hearing the respondents, in appropriate cases. This is, however, a matter left to the discretion of the Court to be exercised according to well established principles of practice and procedure. He submits that the Court would issue the writ forthwith on an ex parte application only in cases of special urgency, where for example there is a danger of the respondent fleeing from the jurisdiction and depriving the prisoner of his remedy.

It has to be remembered that Article 141 only confers a power, just as Article 140 confers a power to the Court of Appeal. In English law that power was derived from the common law, and is best stated in the following passage referred to by Counsel for the petitioner:

> "It is an order issued, in the particular instance, by the Court of Queen's Bench, calling upon a person by whom a prisoner is alleged to be kept in confinement to bring such prisoner - to "have his body" whence the name habeas corpus - before the court to let the court know on what ground the prisoner is confined, and thus give to the Court the opportunity of dealing with the prisoner as the law may require. The essence of the whole transaction is that the court can by the writ of habeas corpus cause any person who is imprisoned to be actually brought before the Court

> and obtain knowledge of the reason why he is imprisoned; and then having him before the court, either then and there set him free or else see that he is dealt with in whatever way the law requires, as, for example, brought speedily to trial."
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> "The High Court of Justice possesses, as the tribunals which make up the High Court used to possess, the power by means of the writ of habeas corpus to cause any person who is alleged to be kept in unlawful confinement to be brought before the court. The court can then inquire into the reason why he is confined, and can, should it see fit, set him then and there at liberty. This power moreover is one which the court always will exercise whenever ground is shown by any application whatever for the belief that any man in England is unlawfully deprived of his liberty."

Dicey – Introduction to the study of the Law of the Constitution (10th Ed) pp 215,216.

The existence or conferment of a power in a Court is one thing; the method of the exercise of that power is another. Now this power is exercised by the Courts according to well established rules of procedure and practice. In England the procedure is regulated by the Rules of the Supreme Court made from time to time. The classical English practice before 1780 was simply to have an ex parte motion for the writ, and if on that application the prisoner made out an arguable case, the writ issued. The case was determined on the return of the body of the prisoner and the cause of detention - Vide *R.J. Sharpe - The Law of Habeas Corpus (1976)* p. 213. Between 1780 and 1938 the initial ex parte application was framed as a request for a rule nisi requiring the respondent to show cause, on a certain day, why the writ should not issue. If the Court was satisfied that the applicant had an arguable case the rule nisi would issue. The applicant would serve the respondent with notice of the rule nisi, and it was then incumbent upon the respondent to make out a case for the detention on the return to the rule; the argument at that stage became the substantial hearing. While the Court could still order the writ to actually issue, the matter could readily be determined at this stage. The rule nisi procedure, however, allowed the Court to try the matter without a formal return and without the expense

of having the prisoner brought physically before the Court - *Sharpe p. 212.*

The modern practice was adopted in 1938 and is contained in Order 54 of the Rules of the Supreme Court (1965). The application is made ex parte to a Divisional Bench of the Q.B.D. or to a single Judge. If the court grants leave the application is adjourned for notice to be served on such person as the Court directs; and upon the adjourned hearing if the application succeeds the writ is ordered to issue. It is possible, however, for the Court or Judge under Rule 2 (1) to order that writ issue forthwith on ex parte application: "Although there is power by this Rule to make an order forthwith for the issue of the writ on the ex parte application, it is only exercised where there is a likelihood that delay may defeat justice or where the facts and law are clear. In other cases the Court or Judge makes one of the other orders mentioned in the rule, in which event the person detained must not be released meanwhile." *The Supreme Court Practice (1979) Vol. 1, p.838.* According to *Wade-Administrative Law (4th Ed) p.521* the modern practice is not to require the production of the prisoner unless there are special circumstances, but to order his release if the imprisonment is found to be unlawful whereupon the writ of habeas corpus is issued. The instances when the writ ought ex parte to issue are best summarised in *Halsbury's Laws of England (4th Ed) Vol II para 1482.* In cases relating to the custody of minors, where there is a possibility of a minor being removed out of the jurisdiction or of his custody being changed or parted with, the issue of the writ ex parte may be the expedient and proper course.

Although the Supreme Court of India has, by Order 32 Rule 3 of the S.C. Rules, adopted the classical English practices of requiring that the person who had the custody should himself bring the return and the body of the prisoner before the court on the day and the hour prescribed *A.T. Markose* seems to think that strictly the Courts have a discretion either to order the jailor to bring the body along with the return or only to make a return without bringing the prisoner to the Court at the first instance. He gives three reasons for this, one of which is that the allegations made in the petition are not conclusive: *Judicial Control of Administrative Action in India (1956) p. 165.*

In Sri Lanka, when the power to issue the writ of habeas corpus was conferred on the Supreme Court by the Courts Ordinance No.1 of 1889, the procedure adopted appears to have been the rule nisi procedure which prevailed in England. In certain cases a direction was included to produce the body of the person alleged to be wrongfully detained on the date of return to the rule nisi. *Bracegirdle's case* (39 NLR 193) was one such case. Bracegirdle was about to be deported out of the country and that appears to be the reason for having him produced forthwith. But one cannot say that there has been an inveterate practice to have the body produced forthwith either under the rule nisi procedure or the later procedure of issuing notice. For example, in H.C. Application No. 411/71 it was alleged that the arrest of one P.C. Gunasekera on 5.12.71 and subsequent custody under emergency regulation 19 was wrongful. A Divisional Bench of the Supreme Court directed that the corpus be produced to be dealt with according to law (that is, to release him) only on the date after the conclusion of the submissions of Counsel, and not on the notice returnable date. The subsequent arrest and custody of Gunasekara was challenged in H.C. Application No. 43/72 and the judgment of the Supreme Court in that case, which is reported in *76 NLR 316* at 321 supports the statement that Gunasekara had been produced only after the conclusion of the submissions of Counsel at the first inquiry.

After the repeal of the Courts Ordinance, the power to issue the writ of habeas corpus was conferred on the former Supreme Court by section 12(2) of the Administration of Justice Law, No.44 of 1973. On the repeal of that law, the power is now conferred by Article 141 of the Constitution on the Court of Appeal. The power conferred is the identical power conferred by the Court's Ordinance. The procedure, however, is now governed by Rules of Court made by the Judges of the Supreme Court by virtue of powers vested under Article 136 empowering the Court to make rules as to the proceedings in the Supreme Court and the Court of Appeal in the exercise of the several jurisdictions conferred on them. The relevant rules are contained in Part IV of the "Supreme Court Rules, 1978" entitled "Writs and Examination of Records".

Briefly, the rules provide for the issue of notice on an ex parte application supported by affidavtit and exhibits. The respondent is required, on service of notice, to file objections, if any, within a

certain period. Although the rules are in respect of all applications for writs, a distinction between habeas corpus and other writs is drawn in rule 47; so that it cannot be said that the Judges in making these rules have not specifically considered the special procedure applicable to habeas corpus. It is significant that there is no reference in the rules for the production of the corpus on the notice returnable date. There appears to be a sound reason for this, and that is that the power to issue the writ has been conferred on the Court of Appeal, which is designated a Superior Court. Now, one characteristic of Superior Courts is that they have inherent powers to do certain things. The stage at which the corpus should be produced before the Court of Appeal or before a Court of First Instance is decided by the Court of Appeal by virtue of its inherent powers and not by virtue of any requirement in the Supreme Court Rules. The Court of Appeal in determining this question will exercise its discretion according to well known principles and practices and on a consideration of the circusmtances of each case. When, for example, it is alleged by a petitioner that the whereabouts of a person taken ito custody are unknown, or that the custody of a minor is about to be parted with or the minor is about be removed out of the country, a direction for the production of the corpus before the Court forthwith may be the proper and expedient course. The discretion remains unfettered by the rules of Court. But to hold that the respondent is under a duty in every case to produce the body on the date of the return to notice or on any date prior to the issue of the writ after inquiry would be to unduly fetter the discretion of the Court of Appeal. I would therefore determine the questions referred to us as follows:–

(1) When a prima facie case is made out by the petitioner in an application made under Article 141 of the Constitution there is no mandatory requirement that the body of the person alleged to be wrongfully detained should in every case be brought up before the Court of Appeal (or the most convenient Court of First Instance) before proceeding to inquire into the legality of the detention; the Court of Appeal has a wide discretion to determine the stage at which the body should be produced. When the Court of Appeal directs a judge of a Court of First Instance to inquire and report in terms of the first proviso to Article 141, it is lawful for the Court of Appeal to require the body of the person alleged to be illegally or improperly

detained to be brought up before such Court of First Instance at the earliest opportunity.

(2) Even when the Court of Appeal is not satisfied that a prima facie case has been made out, the Court is entitled to order the issue of notice on the respondents in terms of rule 49 of the "Supreme Court Rules, 1978".

(3) It is not mandatory under the terms of Article 141 for the Court of Appeal to require the respondents to produce the Corpus before the Court on the date of the return to the notice issued under rule 49

RATWATTE J: — I agree.

VICTOR PERERA J: — I agree

Case referred to Court of Appeal with determination