JUWANIS
V.
LATHIFF, POLICE INSPECTOR, SPECIAL TASK FORCE, AND OTHERS

SUPREME COURT
SENEVIRATNE J., G. P. S. DE SILVA, J. AND
FERNANDO, J.
S. C. REFERENCE NO. 3/88
C. A. APPLICATION
(H. C. A.) NO. 19/88
JULY 26, 1988.

Writ of habeas corpus — Article 141 of the Constitution — Denial of custody — Inquiry by Court of First Instance.

Petitioner filed this application for a Writ of Habeas Corpus in the Court of Appeal alleging that on or about 12.11.1987 the 1st Respondent (Chief Inspector of Police and Officer Commanding Special Task Force Camp, Morayaya) with some of his officers came in a jeep and removed the 4th respondent (petitioner's brother) on the instructions of the 2nd respondent (I. G. P.) and was holding him in unlawful and illegal detention. The 1st and 2nd respondents filed affidavits denying that the 4th respondent had been taken into custody. When the matter was taken up in the Court of Appeal, Counsel for the petitioner moved that the matter be referred to a Court of First Instance for inquiry. The Additional Solicitor-General objected on the ground that under Article 141 of the Constitution the Court had no jurisdiction to direct an inquiry unless the "Court is satisfied that the corpus is in the custody of or within the control of the respondents". The Court of Appeal being of the view that an interpretation of the Constitution was involved referred the matter to the Supreme Court on two questions for determination.

Held:

(1) It is only if the detention is not proved to be lawful that the writ is issued. The practice of our Courts has been to issue the writ as the final step in the proceedings.

(2) The writ of habeas corpus is a prerogative writ of right which *issues ex debit justitiae* when the applicant has satisfied the Court at the conclusion of the inquiry that the detention is unlawful. But exceptionally it may be issued at an earlier stage if there is a likelihood that delay may defeat justice or where the facts and law are clear.

(3) An (interim) order for the production of the corpus is not an essential step in the procedure prior to the final decision. Article 141 does not make an order for production mandatory either at the stage of the issue of notice or at any

other stage. An order to bring up the corpus is not an essential pre-condition to the exercise of the powers of the Court of Appeal. The Article places no restriction on the discretion of the Court of Appeal.

(4) The fact that the respondents deny having custody or control of custody is admittedly not a bar to inquiry by the Court of Appeal. There is nothing to suggest that such a denial would be a bar to a direction by the Court of Appeal that an inquiry be held by a Court of First Instance.

(5) There is no requirement that the Court of Appeal should first inquire into the question of custody (where it is denied) before proceeding further.

(6) The Court of Appeal can direct a judge of a Court of first instance to inquire into the alleged imprisonment or detention of the corpus and make its report despite respondents' denial of custody or control of the corpus.

(7). It is not necessary for the Court of Appeal to satisfy itself that the corpus is within the custody or control of the respondents before the matter is referred to a judge of a Court of First Instance for inquiry and report.

Cases referred to

1. *Re Bracegirdle 39 NLR 193*
2. *Thamboo v. Superintendent of Prisons 59 NLR 573*
3. *Jobu Nadar v. Grey 58 NLR 85*
4. *Asary v. Vanden Dreesen 54 NLR 66, 69*
5. *Carus Wilson's Case (1845) 72 B 984*
6. *Rasammah v. Perera (1982) 1 Sri LR 30*
7. *John G. Stein & Co. Ltd. v. O'Hanlon (1965) 1 all ER 547, 550*

REFERENCE to the Supreme Court by Court of Appeal under Article 125 of the Constitution.

R. K. W. Goonesekera with *Prins Gunasekera*, *Mrs. Suriya Wickremasinghe* and *K. Abeypala* for petitioner.

Sunil de Silva, Additional Solicitor-General with *N. G. Amaratunga S.S.C.* for the Attorney-General.

Cur. adv. vult.

August 23, 1988
FERNANDO, J.

The Petitioner made an application to the Court of Appeal, under and in terms of Article 141 of the Constitution, for the grant and issue of an order in the nature of a writ of Habeas Corpus, in respect of his brother, the 4th Respondent. He averred that on or about 12.11.87 the 1st Respondent (Chief Inspector of Police and Officer Commanding Special Task Force Camp, Morayaya) and some of his officers came in a jeep to the residence of the 4th Respondent, and on the instructions of the 2nd Respondent (the Inspector-General of Police) took the 4th Respondent into custody at about 4 p.m.; that he is unaware of the present whereabouts of the 4th Respondent; that the 4th Respondent has not been produced in any Court; and that the 4th Respondent's detention in the custody of subordinates of the 2nd Respondent is illegal and unwarranted.

On notice being issued, the 1st and 2nd Respondents filed affidavits, denying that the 4th Respondent had been taken into custody, on 12.11.87 or any other date, by the 1st Respondent or any officer attached to the S. T. F. Camp at Morayaya, and asserting that the 4th Respondent is not in Police custody, at that Camp or elsewhere.

On 19.5.88 when that application was taken up in the Court of Appeal (S. N. Silva, J.), Counsel for the Petitioner moved that the matter be referred for inquiry by a Court of First Instance in terms of the first proviso to Article 141. The Additional Solicitor-General appearing for the Respondents objected "on the basis that (the Court of Appeal) has no jurisdiction to direct an inquiry in terms of the proviso unless the Court is satisfied that the corpus is in the custody of, or within the control of, the Respondents." Being of the view that these submissions raised questions of interpretation of Article 141 of the Constitution, Silva, J., referred the following questions to this Court for a determination in terms of Article 125:

(i) Whether the Court of Appeal has jurisdiction, in terms of the proviso to Article 141 of the Constitution, to direct a Judge of a Court of First Instance to inquire into the

alleged imprisonment or detention of the corpus, and to make report thereon, in a case where the Respondents deny having taken into custody or detained, or having in their control, the corpus?"

(2) Whether in a situation where the Respondents deny having taken into custody or detained, or having in their control, the corpus as aforesaid, it is necessary for the Court of Appeal to satisfy itself in the first instance, after hearing, that the corpus is within the custody of, or detained by, or in the control of, the Respondents, before the matter is referred to a Judge of a Court of First Instance for Inquiry?

Learned Counsel for the Petitioner and the learned Additional Solicitor-General are agreed that such a denial by the Respondents is not conclusive: the application does not have to be dismissed *ipso facto*, and the Court of Appeal has the undoubted jurisdiction to inquire into and determine whether the Respondents have custody or control of the corpus. The only matter in dispute, and for determination by us, is whether the Court of Appeal can exercise its power under the first proviso **only** if it is first "satisfied" that the corpus is in the custody or control of the Respondents. In the course of his submissions, the learned Additional Solicitor-General made two qualifications, or refinements, to this contention: firstly, that it is sufficient if the Court of Appeal is "satisfied **or at least prima facie satisfied**", and secondly, that it is sufficient if the Court of Appeal is "satisfied" that the corpus had been at some stage in the custody or control of the Respondents.

The relevant portions of Article 141 may conveniently be analysed as follows:

"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."

In support of his contention the learned Additional Solicitor-General submitted, firstly, that an order for the production of the corpus is a *sine qua non* for the exercise of the power under the proviso; relying particularly on the phraseology of Article 141 in Sinhala, he contended that the selection of the Court of First Instance depends on the convenience of production of the corpus; since it is "such" court which may be directed to inquire and report, he argued, the power to direct such inquiry is dependent on an order for production of the corpus, as it is only such an order which will enable the identification and selection of the court of inquiry. Secondly, he contended that an order, made under the proviso, for the production of the corpus before the Court of First Instance, is part of the writ of habeas corpus itself; since the writ has to be directed to the person having

custody of the corpus, it is an essential pre-condition to the making of such order that the Court of Appeal should be satisfied that the corpus is in the custody of such person; the Court ought not to stultify itself by making such an order, without being so satisfied, as it would be open to the Respondents to disobey such order with impunity on the ground that the corpus is not in their custody or control. Finally, he submitted that under Article 141 the jurisdiction, power and duty to inquire into an application is cast, primarily, on the Court of Appeal; that the power to delegate, as it were, part of that inquiry is by way of an alternative, or even an exception, and accordingly that power cannot be exercised unless the Court was satisfied that an order for the production of the corpus should be made.

The practice of the Court having jurisdiction in respect of habeas corpus applications has generally been to issue, in the first instance, only notice of the application; our attention was draw to the *Bracegirdle* case (1) in which a Rule nisi was issued, in response to which the corpus was produced before the Court. (Also in *Thamboo v. Superintendent of Prison* (2), *Jobu Nadar v. Grey* (3) and in *Asary v. Vanden Dreesen* (4) the notice issued was treated as an order nisi). As in that case, orders have sometimes been made for the production of the corpus pending the final determination of such applications, but there appears to be no precedent in which such an order was made where detention was denied. It is only if the detention is not proved to be lawful that the writ is issued. Thus the practice of our Courts has been to issue the writ as the final step in the proceedings.

Reference to the history of the writ in England shows that it is a prerogative writ, but not a "writ of course", and therefore cannot be had for the asking; proper cause must be shown to the satisfaction of a court; it is, however, not discretionary, in that it is a writ of right which issues *ex debito justitiae* when the applicant has satisfied the court that his detention was unlawful — De Smith: Judicial Review of Administrative Action (1959) pp 253-258. (2) Although it appears that in early times the writ issued, in the first instance, even prior to final adjudication, calling upon the person by whom the prisoner is alleged to be kept in confinement to bring such prisoner before the court — see for

instance the example cited by Dicey: Law of the Constitution 9th Ed. (1956) p. 214 citing **Carus Wilson's Case** (5) — such orders are now made only in exeptional circumstances. Wade: Administrative Law 5th Ed. p. 542 refers thus to the present procedure in England:

> "The procedure is governed by special rules of court . . . . The writ may be applied for *ex parte;* i.e. without notice to the custodian, with the support of an affidavit made by or on behalf of the prisoner; the court will then normally adjourn the case for argument between the parties, with or without requiring the prisoner to be brought before it. 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."**

Our practice appears to correspond to the modern practice in England. The **writ** is only issued at the conclusion of the proceedings if the imprisonment is held to be unlawful; it may, exceptionally, be issued at an earlier stage if there is a likelihood that delay may defeat justice or where the facts and law are clear; an (interim) order for the production of the corpus is not an essential step in the procedure prior to the final decision. It is unfortunate that the determination of this Court in *Rasammah v. Perera* (6) was not cited in the course of the argument before us, for it was there settled that when a *prima facie* case is made out by an applicant for habeas corpus, there is no mandatory requirement that a **writ** should be issued requiring the corpus to be produced prior to inquiry into the legality of the detention; that the customary procedure was the issue of notice upon an *ex parte* application, an order for the production of the corpus on the notice returnable date not being mandatory. Indeed, in a case where the Respondent denies custody, such an (interim) order for production of the corpus would amount to pre-judging the Respondent's case.

Consideration of the submissions of the learned Additional Solicitor-General must thus begin on that basic premise.

Does the language of the proviso make a drastic change in the nature of the inquiry into the facts of a habeas corpus application? Where custody is denied, more complex questions of fact are likely to arise than where custody is admitted; such cases would therefore seem to be more appropriate for inquiry into the facts by a Court of First Instance. Learned Counsel for the Petitioner referred to a significant change in the language of Article 141, namely, the substitution of the phrase "acts of the alleged imprisonment" for the phrase "**cause** of the alleged imprisonment" which occurred in section 45 of the Courts Ordinance and in section 12 of the Administration of Justice Law No. 44 of 1973; had there been any doubt as to the scope of the phrase previously used, the present formulation appears to me clearly to permit an inquiry into the facts where detention is denied.

I must refer to three aspects of the proviso, which lend some support to the learnd Additional Solicitor-General's contention. *Prima facie*, the first two clauses of the proviso are conjunctive; further, the direction "to make provision for interim custody" also appears to be conjunctive; finally, the order of the Court of Appeal is one which the Court of First Instance must "conform to and carry into immediate effect", and this appears to suggest that in every case in which an inquiry is held under the proviso an order for interim custody would have been made in respect of the corpus.

Although the word "such" in the second clause of the proviso is undoubtedly used to refer to the "convenient" court specified in the first clause, it does not necessarily follow that an order under the first clause is a condition precedent to a direction under the second. I incline to the view that the proviso confers a discretion on the Court of Appeal, to delegate part of the inquiry into a habeas corpus application — namely, the ascertainment of the relevant facts; in a case in which the Court decides to exercise that discretion, the Court has a further discretion, namely to require the corpus to be produced before the Court of First Instance. Where the Court of Appeal is of the view that production of the corpus is unnecessary or undesirable, it would not exercise the power to require the corpus to be produced

before the Court of Appeal: it must follow (except perhaps in some very extraordinary situation which cannot now be easily visualized) that in such a case if the Court delegates part of the inquiry in terms of the proviso, the Court will, or at least may, refrain from exercising its further discretion to require the production of the corpus before the Court of First Instance.

It is not difficult to conceive of cases where the circumstances of the detention, considerations of security and the safety and health of the corpus, all converge to require production in **any** Court totally unnecessary and undesirable; a full and fair inquiry, convenient to all concerned, may necessarily have to be in a Court of First Instance; an interpretation of the proviso, which prevents delegation in such a situation, unless accompanied by an order for production of the corpus, would be unreasonable, and must be avoided in the absence of compelling language.

The use of the word "and" in the proviso is not conjunctive, so as to require that **both** powers be exercised. Although "and" is normally conjunctive, disjunctive use is by no means unusual: *Stein v. O'Hanlon* (7), in which Lord Reid remarked that the symbol "and/or" is not yet part of the English language. It was held that the word "and" was used to indicate that one or the other of two specified acts, or both, should be done; likewise, "and" occurring in two places in the proviso ("**and** to direct" as well as "**and** to make provision") has been used to indicate that either or both the specified powers may be exercised.

The previous determination (6) of this Court, with which I see no reason to disagree, is that the words "to bring up before (the) Court" in the opening clause of Article 141 do not make an order for production mandatory, either at the stage of the issue of notice or at any other stage. These words do no more than echo the formal parts of the ancient writ — have the body brought up before the Court. The language of the first clause of the proviso — "require the body of such person to be brought up before the . . . . Court" — is in substance the same as the opening words of Article 141, and cannot have a contrary meaning. I am therefore of the view that an order to bring up the corpus before

a Court is not an essential pre-condition to the exercise of the powers of the Court of Appeal either under the first part of Article 141 or under the proviso.

Article 141 places no restriction on the discretion of the Court of Appeal under the proviso; no decision of this Court, or of the Court of Appeal, was cited tending to suggest that there was any such restriction.

The fact that the Respondents deny having custody or control of the corpus is admittedly not a bar to inquiry by the Court of Appeal; there is nothing in Article 141 to suggest that such a denial would be a bar to a direction that an inquiry be held by a Court of First Instance. The proviso cannot be interpreted so as to introduce an exception or qualification, e.g., "except where the Respondent denies that such person is, or has at any time been, in his custody or control".

Where an application is heard and determined by the Court of Appeal, there is no requirement that it should first inquire into the question of custody before proceeding further; exercise of power under the proviso is not made conditional on a prior decision on the question of custody. A restriction that "where it is satisfied (or *prima facie* satisfied) that such person is, or has at any time been, in the custody or control of the Respondent" cannot be introduced into the proviso by interpretation.

Thus the powers conferred on the Court of Appeal are not subject to any such implied condition or restriction. Being a constitutional provision intended to safeguard the liberty of the citizen, the proviso must receive a liberal construction.

I therefore determine the questions for determination as follows:

(1) The Court of Appeal has jurisdiction, in terms of the proviso to Article 141 of the Constitution, to direct a Judge of a Court of First Instance to inquire into the alleged imprisonment or detention of the corpus, and to make report thereon, despite the Respondents denial of having taken the corpus into custody or detention, or of having the corpus in their custody or control.

(2) Where the Respondents deny having taken the corpus into custody or detention, or deny having the corpus in their custody or control, it is not necessary for the Court of Appeal to satisfy itself in the first instance, after hearing, that the corpus is within the custody of, or detained by, or in the control of, the Respondents, before the matter is referred to a Judge of a Court of First Instance for inquiry and report in terms of the proviso to Article 141.

SENEVIRATNE, J. — I agree

G. P. S. DE SILVA, J. — I agree

Case sent back with determination of Supreme Court