LEEDA VIOLET AND OTHERS
v.
VIDANAPATHIRANA, OIC, POLICE STATION, DICKWELLA AND OTHERS

COURT OF APPEAL.
S. N. SILVA, J. (PRESIDENT C/A)
H.C.A. 164/89
H.C.A. 171/89
H.C.A. 166/89
NOVEMBER 16, 1994.

Habeas Corpus – Corpus arrested and detained and later disappeared – Exemplary costs – Constitution, Article 141.

Held:

There was no basis for the arrest and keeping in custody of the corpus. The denial of the arrest and custody by the 1st respondent was not acceptable.

As a measure of redress, the respondents were cast in exemplary costs in respect of each of the disappeared corpora.

***Per* S. N. Silva, J.**

Article 141 of the Constitution which invests this Court with jurisdiction to issue writs of habeas corpus is intended to safeguard the liberty of the citizen. The rule

of law, freedom and the safety of the subject would be completely nullified, if any person in authority can cause the disappearance of an individual who has been taken into custody and blandly deny to this Court having jurisdiction to safeguard the liberty of the subject, any knowledge of the whereabouts of such individual. The process of the historic remedy of the writ of habeas corpus, introduced to this country from the law of England, by the Charter of Justice of 1833, cannot be reduced to a cipher by a person in authority, who yet continues to wield authority by falsely denying the arrest and custody of an individual whose freedom the writ is intended to secure".

Some affirmative action is necessary from a Court invested with jurisdiction to issue writs of habeas corpus, when confronted with a case of an obvious disappearance of an individual held in custody and a false denial of such custody by a person in authority. The measure of awarding exemplary costs to a petitioner seems appropriate.

Cases referred to:

1. *Sebastian M. Hongray v. Union of India* 1 AIR 1984 S.C. 1026.
2. *Case of Velasques Rodriguez* : Human Rights Law Journal Vol. 9 1988 p. 212, 237.

APPLICATIONS for writs of habeas corpus.

P. D. Gomes with *E. P. Wickramasekera* for petitioner.

D. S. Wijesinghe, P.C. with *Mrs. Dharmadasa* for 1st respondent.

V. K. Malalgoda, S.C. for 2nd and 3rd respondents.

Cur adv vult.

December 02, 1994.
S. N. SILVA, J.

These applications for writs of habeas corpus have been filed by the 3 Petitioners named above in respect of the 4th Respondent in each application being the corpus. The Petitioners are the mothers, respectively of the 4th Respondent in each case. The Petitioners complained that their sons were arrested by a party of police officers led by the 1st Respondent who was then functioning as the officer-in-charge of the Dickwella Police Station. They were arrested at the same time and place, namely, at about 4.30 p.m. on 7th December 1988 at Neelwella, Dickwella. The applications were supported for notice on 19.4.1989 and Court directed that notice should issue on

the Respondents other than the corpus. In response to this notice the 1st and 2nd Respondents filed affidavits. The 1st Respondent against whom a specific allegation was made of having arrested and detained the corpus of each application, denied such arrest and custody. There was an overall denial of arrest and custody by the 2nd respondent being the Inspector General of Police. Thereafter the matter was referred for an inquiry and report to the Chief Magistrate, Colombo in terms of the proviso to Article 141 of the Constitution. The Chief Magistrate issued notice on the respective parties and held an inquiry in each case separately, in the presence of the 1st Respondent. Evidence was adduced on behalf of the Petitioner in each application. The 1st Respondent and A. R. Mirando, Sub Inspector of Police who was then serving under the 1st Respondent gave evidence denying arrest and custody. Learned Magistrate has in separate reports, examined the evidence and come to specific findings accepting the evidence of the Petitioners as to arrest and detention by the 1st Respondent of the corpus in each application. He has come to a specific finding that the 1st Respondent is personally responsible for the disappearance of the persons who were taken into custody by him. The evidence of the 1st Respondent and of his supporting witness have not been accepted by the learned Magistrate.

Upon the receipt of the record of evidence and the report of the learned Magistrate these applications came up for hearing before me on 12.7.1994. Submissions were made by learned counsel and a rule *nisi* was issued on the 1st Respondent and the Inspector General of Police directing them to produce the corpus before Court on 5.9.1994 or to disclose any material within their control as to the whereabouts of the corpus in each case. In response to the rule *nisi* the 1st Respondent filed an affidavit denying the arrest and custody of the corpus. He has stated in the affidavit that on 7.12.1988, 21 suspects were arrested by the Army and handed over to his custody and that the corpora in these applications were not amongst those persons. Thereafter counsel made submissions as to the orders that could be made by the Court in the face of the findings of the learned Chief Magistrate and the denial repeated by the 1st Respondent.

The facts relating to the arrest and detention of the corpus in each application are as follows:

In HCA 164/89 the Petitioner Leeda Violet being the mother of the corpus, Y. Wimalapala, father of the corpus and T. Lilinona gave evidence in support of the petition. According to their evidence the corpus being eldest son of the Petitioner and her husband Wimalapala was 26 years of age at the time of arrest. He was a fisherman by occupation. On 7.12.1988 he was at Neelwella near a shop which sold fishing gear. This shop was in close proximity to the Co-operative Store and the sea beach. At about 4.30 p.m. a party of police officers came in several vehicles. The 1st Respondent (being a person from the adjoining village) was known to the witnesses and was identified as the officer-in-charge of the Dickwella Police Station. He came in a motor car and got down with the other officers near the Co-operative Store. Thereafter he arrested the persons who were near the shop selling fishing gear. Some persons who were on the beach were also arrested. Witnesses refer to the presence of some army personnel but do not state that any arrest was made by them. Those arrested were asked to kneel on the road. Thereafter the 1st Respondent asked those persons to get into the vehicles and took them to the Dickwella police. It is stated that about 30 persons were arrested. The Petitioners in HCA 164/89 and HCA 171/89 followed the police vehicles and went up to the police station. They inquired from an officer as to the reason for the arrest of the persons who were taken into custody. They were informed that these persons were taken into custody because the then Prime Minister (Hon'ble Premadasa) was coming to Dickwella on the next day and that the persons were brought in to do the preparatory work for the meeting to be addressed by the Prime Minister. Thereafter, the Petitioners visited the police station each day to inquire about the release of the corpora. After the 11th they did not see any of the corpora at the police station. Then they made inquiries at different camps in which persons taken into custody were detained, without receiving any information as to the whereabouts of the corpora. Finally these petitions were filed to secure the release of the corpora from unlawful detention.

The 1st Respondent in his affidavit admitted that he went to Neelwella with a party of police officers on 7.12.1988 in the afternoon. He stated that there were some Army operations at that place. He did not carry out any investigations nor did he arrest any person at that place. Subsequently 21 persons who were arrested by the Army were handed over to his custody in respect of whom he made relevant entries. As noted above he denied the arrest and custody of the corpus in each application. He also stated that during the relevant period there were activities of the Janatha Vimukthi Peramuna in the area. The witnesses for Petitioners denied that there were any activities involving members of the Janatha Vimukthi Peramuna in the area and also denied any participation of the corpora in the activities of the Janatha Vimukthi Peramuna. One witness stated that the police got the people who gathered at the spot to remove posters (presumably of the J.V.P.) that were pasted on the walls.

Learned President's Counsel for the 1st Respondent submitted that he is not seeking to canvass the findings of fact made by the learned Chief Magistrate on the basis of the evidence recorded. But, he submitted that the 1st Respondent does not admit the allegations of arrest and custody.

In the course of the submissions learned counsel were agreed that on the particular facts of these applications this Court may follow the decision of the Supreme Court of India in the case of *Sebastian M. Hongray v. Union of India* [1].

Several hundreds of applications have been filed in this court from about the year 1988 for writs of habeas corpus in respect of persons whose arrest and custody is denied by the named respondents. The respondents are personnel of the Sri Lanka Police or the Armed Forces. In HCA 19/88, being one of the early cases, learned Additional Solicitor-General appearing for the Attorney-General submitted that where arrest and custody is denied by the respondents, this Court should first satisfy itself *prima facie*, as to the alleged arrest and custody before referring the matter for inquiry to a Court of first instance in terms of the proviso to Article 141 of the Constitution. It was the submission of learned Additional Solicitor-General that the Court has jurisdiction to refer the matter for inquiry only where the Court is satisfied that the corpus is in the custody or

within the control of any of the named respondents. At that time I took the view that the objection that was raised related to a question of interpretation of the Constitution and a reference was made to the Supreme Court in terms of Article 125(1) of the Constitution. The Supreme Court by its determination dated 23.8.1988 held 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 of control.
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> (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."

Mark Fernando, J. with whose judgment the other Judges agreed made the following observation with regard to Article 141(1) of the Constitution which invests this Court the jurisdiction to issue writs of habeas corpus, "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."

Following the aforesaid determination of the Supreme Court, this Court has referred a large number of habeas corpus applications for inquiry and report to the Chief Magistrate, Colombo. The question that now arises relates to further orders to be made by this Court in applications where the learned Chief Magistrate has come to findings that there is evidence of arrest and custody of persons who have subsequently disappeared.

The evidence of the Petitioners and of their supporting witnesses establish as a fact, that the corpora in these applications, being the sons of the respective Petitioners, in their early twenties and

fishermen by occupation were taken into custody by the 1st Respondent on 7.12.1988 at Neelwella. They have not been engaged in any unlawful activity. There is no evidence forthcoming nor is there any suggestion made that they were members of the Janatha Vimukthi Peramuna or any other organisation engaged in unlawful activity. In other words, there is no basis whatever for their arrest and custody. The 1st Respondent who admits having visited the place of arrest at the alleged time denies the act of arrest as alleged by the Petitioners. His denial has been disbelieved by the learned Magistrate. Learned Magistrate has correctly observed that if the 1st Respondent visited the place for any official act in connection with any investigation or peace keeping operation, he could have produced the relevant entries from the books maintained at the Police Station. The suggestion of the 1st Respondent appears to be that whatever operation that was carried out by the authorities at the time in question, at Neelwella, was the responsibility of the Army and not of the Police. The shifting of responsibility from the Police to the Army and *vice versa*, is of little solace or comfort to the Petitioners. Their evidence discloses a harrowing tale where they have seen their sons taken to the Police Station and kept there for several days. For all intents and purposes their sons have disappeared from the face of the earth after 4 days. The denial of arrest and custody, by the 1st Respondent, who is well identified by the witnesses, as a person known to them, has not commended itself to the learned Chief Magistrate. Certainly, that denial does not commend itself, as being worthy of any credit, to this Court. It was in these circumstances that a rule *nisi* was issued on the 1st Respondent and the Inspector General of Police to disclose any material in their control as to the whereabouts of the corpora. The rule has been answered only by a repetition of the denial which has already been rejected by the learned Chief Magistrate.

As observed by Mark Fernando, J. in the decision referred above, Article 141 of the Constitution which invests this Court with jurisdiction to issue writs of habeas corpus is "intended to safeguard the liberty of the citizen". The Rule of Law, freedom and the safety of the subject would be completely nullified, if any person in authority can cause the disappearance of an individual who has been taken into custody and blandly deny to this Court having jurisdiction to safeguard the liberty of the subject, any knowledge of the

whereabouts of such individual. The process of the historic remedy of the writ of habeas corpus, introduced to this country from the Law of England, by the Charter of Justice of 1833, cannot be reduced to a cipher by a person in authority, who yet continues to wield authority, by falsely denying the arrest and custody of an individual whose freedom the writ is intended to secure. In the *Hongray* case referred above the Supreme Court of India expressed the view that false denial in similar circumstances amounts to civil contempt. However, that Court did not deal with the Respondent for contempt by the imposition of a term of imprisonment or fine but directed further proceedings on the basis that a cognisable offence has been committed. As a measure of redress the Respondents were directed to pay "exemplary costs" amounting to Rs. 100,000/- to each Petitioner before a specified date. Desai, J. made the following observation as to the further course of action to be taken.

> "A query was posed to the learned Attorney-General about the further step to be taken. It was made clear that further adjourning the matter to enable the respondents to trace or locate the two missing persons is to shut the eyes to the reality and to pursue a mirage. As we are inclined to direct registration of an offence and an investigation, we express no opinion as to what fate has befallen to Shri C. Daniel and Shri C. Paul, the missing two persons in respect of whom the writ of habeas corpus was issued save and except saying that they have not met their tragic end in an encounter as is usually claimed and the only possible inference that can be drawn from circumstances already discussed is that both of them must have met an unnatural death. *Prima facie* it would be an offence of murder. Who is individually or collectively the perpetrator of the crime or is responsible for their disappearance will have to be determined by a proper, thorough and responsible police investigation. It is not necessary to start casting a doubt on any one or any particular person. But *prima facie* there is material on record to reach an affirmative conclusion that both Shri C. Daniel and Shri C. Paul are not alive and have met an unnatural death. And the Union of India cannot disown the responsibility in this behalf. If the inference is permissible which we consider reasonable in the facts and circumstances of the case, we direct that the Registrar (Judicial) shall forward all the papers of

> the case accompanied by a writ of mandamus to the Superintendent of Police, Ukhrul, Manipur State to be treated as information of a cognizable offence and to commence investigation as prescribed by the relevant provisions of the Code of Criminal Procedure."

The subject of disappearance of prisoners in detention has received considerable attention in international human rights fora. Nigel Rodley in his book titled "The Treatment of Prisoners under International Law" (a publication under the auspices of UNESCO), devotes an entire chapter to the subject of "Disappeared Prisoners: Unacknowledged Detention". The learned author traces the modern genesis of the phenomenon of disappearances to the NACHT UND NEBEL DECREE of Nazi forces in occupied Europe. According to this decree, suspected resistance movement members could be arrested and secretly transferred to Germany "under cover of night". This measure was to have "a deterrent effect because the prisoners will vanish without leaving a trace, no information may be given as to their whereabouts or fate".

The Inter-American Court of Human Rights considered the matter of a disappearance in the *Velasques Rodriguez case* [2] The Court observed as follows, (at p237).

> "Disappearances are not new in the history of human rights violations. However, their systematic and repeated nature and their use, not only in causing certain individuals to disappear, either briefly or permanently, but also as a means of creating a general state of anguish, insecurity and fear, is a recent phenomenon ... The phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion."

The United Nations Commission on Human Rights by resolution 20 (XXXVI) of 29th February, 1980 established a working group to inquire into enforced or involuntary disappearances. Sri Lanka has the dubious distinction of having being the subject of study by that working group.

In two cases against the Government of Uruguay considered by the Human Rights Committee that Government was directed to take effective steps:

(a) to establish what had happened to the victims;

(b) to bring to justice those found to be responsible for the death or disappearance as the case may be;

(c) to pay compensation for the wrong suffered;

(d) to ensure that similar violations do not occur in the future.

The decision of the Indian Supreme Court and the material from international human rights fora referred above, clearly demonstrate that some affirmative action is necessary from a Court invested with jurisdiction to issue writs of habeas corpus, when confronted with a case of an obvious disappearance of an individual held in custody and a false denial of such custody by a person in authority. The measure of awarding exemplary costs to a Petitioner, as taken by the Indian Supreme Court, appears to be appropriate. Learned President's Counsel appearing for the 1st Respondent submitted that in quantifying exemplary costs, the Court should have regard to the fact that the 1st Respondent alone is not responsible for what has happened in the light of references to the presence of Army personnel.

The Petitioners filed these applications in April 1989. There were initial hearings before this Court and protracted inquiries before the Magistrate's Court. Thereafter the cases were adjourned for further hearing before this Court. It is obvious that the Petitioners have incurred heavy expenditure in these proceedings. They have boldly pursued these applications, which is commendable conduct considering that the 1st Respondent continues to hold office. They have done so with the firm belief that truth and justice will finally prevail. Several applications with regard to other disappearances reported from the same place have been dismissed for non-prosecution. In these circumstances as a measure of exemplary costs, I direct the 1st Respondent to pay each Petitioner in the above applications a sum of Rs. 100,000/- as exemplary costs. These

amounts should be paid to the respective Petitioners on or before 28.02.1995. If these amounts are not paid in full, further action will be considered in the matter of contempt of court. I also direct the Registrar of this Court to forward copies of the proceedings recorded in the Magistrate's Court to the Inspector General of Police who is hereby directed to consider the evidence recorded as information of the commission of cognizable offences. He will take necessary steps to conduct proper investigations and to take steps according to law. The Registrar is also directed to forward a copy of the proceedings with this judgment to the Hon'ble Attorney-General for appropriate action to be taken by him. The petitions of the respective petitioners are allowed with costs to be paid by the 1st Respondent in each application as directed above.

Petition allowed with costs.