ROSALIN
vs
SUNDARALINGAM AND OTHERS

COURT OF APPEAL
EKANAYAKE, J AND
SILVA, J
CA 64-65/90
MAY 2, 2005

Re-listing of writ of habeas corpus application - Court of Appeal (Appellate) Procedure Rules 1990, Rules 3 (1)(a), 3(1)(b) and 15 – Constitution, Articles 138 and 140(4) 141 - Available grounds - Lex non cogit ad impossibilia - Locus standi

HELD:

1. The petitioner cannot proceed with the two main cases for mandates in the nature of writs of habeas corpus when there is no corpus in existence (or have ceased to exist) to be brought before court to be dealt with according to law.

2. Re-listing should not be allowed as the application for re-listing has been preferred by a person who had no status to make such application - he has not been properly substituted - no locus *standi*.

3. There is no proper application, as the application has been made by way of a motion and not by way of petition and affidavit.

Per Silva, J.,

"An order granting or refusing an application for re-listing is purely a discretionary matter for the court ; in fact it is not even necessary for this court to give reasons when this court grants or refuses an application for re-listing".

APPLICATION for re-listing.

Case referred to :

1. *Jiandasa and another* vs *Sam Silva and others* (1994) 1 Sri LR 232

R. S. Weerawickrema for appellant.

D. Thotawatte, State Counsel for 8th and 9th respondents

Sapumal Bandara for 2nd respondent.

Cur.adv.vult.

June 01, 2005
W. L. RANJITH SILVA, J.

This is an application for re-listing of C.A.64-65/90 two applications preferred by the petitioner seeking madates in the nature of a Writ of Habeas Corpus under Article 141 of the Constitution which two cases were dismissed by this Court as the petitioner was absent and unrepresented on 04.10.2004, when the case was mentioned in open Court for the written submissions of the parties (The two main applications shall hereinafter be referred to as the "two cases" for convenience).

The original petitioner P. Rosalin preferred two applications that is 64/90 and 65/90 to the Court of Appeal under Article 141 of the Constitution and prayed for mandates in the nature of Writs of Habeas Corpus in respect of two persons namely R. G. Sunil and Weragodage Jayaratne respectively. When this matter was supported in open Court, the Counsel for the petitioner requested that this matter be referred to the Chief Magistrate's Court of Colombo to inquire into and report to Court and the Court having heard the Counsel in support ordered the Chief Magistrate's Court of Colombo to inquire into the matters contained in the petition and affidavit filed in those two applications. The Court of Appeal ordered the Magistrate to inquire into and report to Court the following matters : –

> The circumstances in which the two missing persons mentioned in the two applications were arrested, how they escaped from custody, from where they escaped, the circumstances under which four people including the two persons in respect of whom these applications were filed escaped and to record the evidence of the officer who issued the order for the disposal of the dead bodies in terms of the emergency regulations particularly with regard to the observations made as to injuries on the bodies and the means of identification of the bodies.

On a perusal of the record it is evident that both these cases have been amalgamated and all proceedings have been conducted on that basis apparently with the consent of both parties.

When this matter was referred to the Chief Magistrate to inquire into and report to this Court, the Magistrate having held an inquiry, informed this Court by his report dated 21.01.2003 that it transpired, during the course of the inquiry that the corpus concerned in the two applications along with two others were shot dead by the police in a shoot out that took

place on 1.2.90 at a place called Rukmalgama, between the police and a group of insurgents. The Magistrate in his report has also stated that according to the evidence before him, that no police officers could be held responsible for the death of the two persons concerned. This part of the evidence that was led in the Magistrate's Court had virtually gone unchallenged ; on that evidence it appears to this Court that the petitioner cannot proceed with the two main cases for mandates in the nature of Writs of Habeas Corpus as it would be redundant to proceed with the two cases, when there is no corpus in existence (or have ceased to exist) to be brought before this Court to be dealt with according to law. On that ground alone, it would be redundant to proceed with the two main cases and to allow this application for re-listing, of the two main cases would also be a futile and unnecessary exercise.

This Court is also mindful of the maxim '*lex non cogit ad impossibilia*' that is, the law does not expect a person to do what is impossible. This applies with equal force to the courts of law as well. On the same reasoning Court will not issue an order which cannot be implemented or would be redundant. When it had been proved to the satisfaction of the Magistrate on the material available in the Magistrate's Court, that the two persons were dead, it would be futile to inquire into the matter any further. The purpose of issuing a Writ of Habeas Corpus is to compel the body of a person who is held in unlawful custody or detention to be brought before Court to be dealt with according to law. When the person who was illegally confined becomes non existent or ceases to exist then the matter ends there and it would be utterly futile to issue a Writ of Habeas Corpus to compel a party to produce the corpus in Court.

The 2nd reason why re-listing of the said two cases should not be allowed is because the application for re-listing has been preferred by a person who had no status to make such application. The person who made this application is not a person who has been properly substituted in the room of the petitioner ; in fact there was no such application for substitution ever made to this Court. Therefore the person who made this application had no "*locus-standi*" to make this application as he was not a person substituted in the room of the original petitioner.

The 2nd respondent in his petition of objections referred to the affidavit marked X4 filed by one R. G. Chandrasakera, which is found bound in the record, who in his affidavit urged this Court to proceed with the two main cases. He has mentioned in his affidavit (Vide para 4) that his mother, the original petitioner, expired on 06.02.1999, that is long before the two main cases were dismissed for the first time on 12.11.2003, therefore it could be seen that an application for re-listing could not have been made by the petitioner on 05.03.2004 when the case was dismissed for the first time on 12.11.2003, since the petitioner was already dead, it is obvious that the petitioner could not have made that application for re-listing on 05.03.2004 and who ever who made that application was not the petitioner ; therefore the initial application for re-listing was made by a person who was not even properly substituted in the room of the deceased petitioner. Even at that stage, no application for substitution was made and therefore this Court could not have entertained an application for re-listing made by a person who was not properly substituted in the room of the petitioner. When the two main applications were dismissed for the 2nd time on 04.10.2004, the original petitioner was already dead and the petitioner could not have made the present applications for re-listing of the two main cases which were dismissed on 04.10.2004 and up to date no application has been made to this Court seeking substitution in the room of the deceased petitioner. Therefore the situation is still worse with regard to the application for re-listing after the 2nd dismissal of the two main applications after the death of the petitioner. The interested parties have failed or neglected to get themselves or himself substituted in the room of the petitioner and to prosecute their case diligently. They have neglected for a considerable period of time to make an application for substitution. The law will not help those who sleep over their rights. At this stage it must be recorded that even the counsel for the applicant Mr. R. S. Weerawickrama has stated to Court that the petitioner was dead and that he did not know for whom he appeared (as per journal entry dated 02.05.2005).

The third reason is that there is no proper application for re-listing before this Court as the application has been made by way of a motion and not by way of petition and affidavit as required by the Supreme Court Rules.

The present petitioner has failed to comply with the imperative provisions of the Supreme Court Rules.

The relevant Supreme Court Rules are the Court of Appeal (Appellate) Procedure Rules 1990. According to Rule 3 sub section 1(a) and Rule 3 sub section 1(b), any application under Article 140 and 141 of the Constitution and Article 138 of the Constitution should be made by way of petition and affidavit. Although applications for re-listing do not come under 3(1)(a) and 3(1)(b) such an application has to be made in accordance with Rule 15. Rule 15 reads thus "this rule also shall apply "*mutatis mutandis*" to applications made to Court under any provisions of law other than Articles 138, 140, and 141 of the Constitution, subject to any directions as may be given by the Court in any particular case.

Therefore it is seen that an application for re-listing should have been presented by way of petition and affidavit which is not the case with regard to the present application for re-listing before us. Further the Court has not given any direction authorising a deviation from the normal practice at any stage of the proceedings.

An order granting or refusing an application for re-listing is purely a discretionary matter for the Court. In fact it is not even necessary for this Court to give reasons when this Court grants or refuses an application for re-listing, although I have thought it fit to give my reasons, on this occasion. (Vide *Jinadasa and others* vs. *Sam Silva and others*[1] judgment by A. R. B. Amarasinghe, J.) For the aforesaid reasons this application for re-listing of H. C. A. 64-65/90 is refused and the same is dismissed without costs.

EKANAYAKE, J. — I agree.

Application dismissed.