

MURIN FERNANDO
v.
SERGEANT SUGATHADASA AND SEVEN OTHERS

COURT OF APPEAL.

YAPA, J.,

C. A. 39/90

HABEAS CORPUS

OCTOBER 26, 1995

JANUARY 15, 1997.

Writ of Habeas Corpus – Arrested by Police – Whereabouts not known – Denied arrest and custody – Doubt regarding identity of the respondents – Exemplary costs.

Held:

(1) Having regard to the evidence available it has been clearly established that the 1st and 2nd respondents were responsible for the arrest of the corpus and that the 4th respondent was the officer-in-charge of the Police Station.

Per Yapa J.

“The Rule of Law, the 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 then deny arrest or any knowledge of the person arrested.”

(2) In the circumstances, the arrest and the detention of the corpus falls into the category of cases where a person who has been arrested detained by the authority has disappeared thereafter.

APPLICATION for a writ of Habeas Corpus.

Case referred to:

1. *Sebastian M. Hongray v. Union of India* – 1984 1 AIR SC 1026

A. A. de Silva with Nimal Punchihewa, M. Balalla and Jayalath Hissella for the petitioner.

A. Wengappuli S.C., with P. Kumaratnam S.C., for respondents.

Cur. adv. vult.

February 12, 1997.

YAPA, J.

This is an application for a writ of Habeas Corpus, filed by the petitioner in respect of W. Nandasiri Fonseka. The petitioner is the

mother of the corpus. According to the petitioner the corpus was arrested on 12.09.89 by some officers of the Kalutara North Police station and the Police party included the 1st and the 2nd respondents. After the arrest of the corpus, he was detained at the police station where the 4th respondent was the Officer-in-charge, till 16.09.89 and thereafter, the whereabouts of the corpus was not known.

After this Habeas Corpus application was filed, notice was issued on the respondents on 22.08.90 ordering them to produce the corpus before this Court. Thereafter the 1st, 2nd, 3rd and 4th respondents filed their affidavits dated 21.12.90 denying the arrest and also having the custody of the corpus. In the circumstances on 20.03.91 this application was referred to the Magistrate of Kalutara for inquiry and report, in terms of the proviso to Article 141 of the Constitution. The learned Magistrate of Kalutara who held the inquiry has sent his report which is filed of record. In his report he has stated that there was a doubt in regard to the identity of the respondents who took part in the arrest of the corpus, but however he has held that having regard to the totality of the evidence, it has been established that the corpus had been at the police station from 12.09.89 to 17.09.89.

This Court having considered the material available against the respondents, the findings of the Magistrate, and the submissions made by Counsel on 26.10.95, issued a rule nisi on 29.05.96 against the 1st, 2nd, 4th and 5th respondents directing them to produce the corpus before this Court or that any information regarding his whereabouts be furnished to this Court on 31.07.96. Thereafter, time was obtained on behalf of the said respondents on several dates to file their affidavits and on 02.12.96 an affidavit was filed on behalf of the 4th respondent and on 08.01.97 an affidavit was filed on behalf of the 1st respondent, denying the arrest of the corpus. Thereafter Counsel for the petitioner and for the respondents made submissions, referring to the findings of the learned Magistrate and the denial of arrest repeated in the subsequent affidavits filed by the 1st and 4th respondents. It was also brought to notice of Court that the 2nd respondent in this application was dead.

The facts relating to the arrest and detention of the corpus are as follows:-

In the affidavit filed by the petitioner, she has stated that the 1st, 2nd and 3rd respondents were responsible for the arrest and

detention of the corpus and that the 4th respondent was the officer in charge of the Police station, where the corpus was detained from 12.09.89 to 16.09.89. She has specifically referred to the presence of the 1st respondent at the time of the arrest of the corpus. When she gave evidence before the Magistrate at the inquiry, she has stated that the 1st and the 2nd respondents came to arrest the corpus on 12.09.89 at about 3.00 a.m. and at that time a lamp was burning in her house. She further stated that she visited the Kalutara North Police station in the morning at about 6.00 or 6.30 with her daughter and other members of her family and gave meals to the corpus. She has said on that occasion she saw the corpus seated on a bench at the rear side of the Police station and that the corpus was handcuffed with another. In her evidence, she has referred to the presence of Rani Silva, Gratian and Ajith at the Police station. She has also stated in detail how she went to the Police station carrying food and medicine to the corpus from 12th to the 15th September, 1989, and that on the 16th, the corpus was not there, and they were told that the corpus was taken to Boosa to record a statement. It has been her evidence that the 3rd respondent was not in the police party which came to arrest the corpus. Petitioner's position was that the 3rd respondent was included in her affidavit as a person who came to arrest the corpus, since the mother of another person who was arrested along with her son, had stated to her lawyer that the 3rd respondent was present.

The daughter of the petitioner has given evidence and stated that she identified the 1st respondent as one of the persons who came to arrest the corpus. She has also stated that she could not identify the others in the police party. Her position has been that she knew the 1st respondent before and that there was a light burning in her house at the time of the arrest. She has further stated that she visited the Police station with her mother taking meals to her brother (the corpus) and that she has seen him at the Police station from 12.09.89 to 16.09.89. She has said on 17.09.89 she found that her brother, was not there at the Police station and they were told the corpus was taken away to record a statement.

The third witness, Morin Fernando has given evidence and stated that on the night of 11.09.89 a Police party came in a van to the house where she was staying and at that stage she identified the 1st and the 2nd respondents. Thereafter, she has stated that she was

taken with her aunt to her house and then from there to her sister's house where they were dropped. She has said later when they were returning home at about 5.30 a.m., she came across the said van in which she had seen the corpus, Gratian and Ajith, along with the 1st and the 2nd respondents. This witness has said, when he visited the Police station in the morning of 12.09.89 she has seen Gratian, Ajith, Rani, his brother Saman and the Corpus at the Police station. Her position has been that on 12.09.89 in the afternoon Gratian and Ajith were released. She has also stated that when she visited the Police station on several dates to see her brother, she had seen the corpus at the police station with her brother until 17.09.89, when she found that both of them were not there. Therefore, the evidence of this witness corroborates the evidence given by the petitioner and her daughter Malanee Fonseka with regard to certain matters.

When the evidence of the petitioner, her daughter and Morin Fernando is considered in their totality, it establishes clearly the fact that the 1st and the 2nd respondents were responsible for the arrest of the corpus on 12.09.89, and thereafter, the corpus had been detained at the Police station where the 4th respondent was the officer in charge, from 12.09.89 to 16.09.89. Further, I find that there is no reason to disbelieve the evidence given by these witnesses. On the other hand the respondents did not give evidence and they relied on the affidavit filed by them in the Court of Appeal denying the arrest of the corpus. In addition, they had filed three affidavits from Ajith Dharmatillake, W. Gratian and Rani Silva who stated in their affidavits that when they were at the Kalutara Police station, the corpus and one Saman Fernando were not detained there. It appears that the Magistrate has not acted on these affidavits. Further, in my view, it is not possible to act on these affidavits, as they do not reveal the date on which the said Dharmatillake, Gratian and Rani Silva were at the Police station but merely refer to the month of September 1989.

Therefore, in this case, considering the evidence that is available, it is difficult to understand how the learned Magistrate came to the conclusion that there was some doubt with regard to the identity of the respondents who participated in the incident of arresting the corpus. In my view, having regard to the evidence available, it has been clearly established that the 1st and the 2nd respondents were responsible for the arrest of the corpus and that the 4th respondent

was the officer in charge of the Police station, when the corpus was detained there from 12.09.89 to 16.09.89. It was the 4th respondent's responsibility to see that persons who were arrested and detained at the Police station were safe. The Rule of Law, the 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 then deny arrest or any knowledge of the person arrested.

In the circumstances, the arrest and the detention of the corpus falls into the category of cases where a person who has been arrested and detained by the authorities has disappeared thereafter. In such a situation the question of an appropriate order that should be made was considered by this Court in H.C.A. 164/89, 171/89 and 166/89 decided on 02.12.94. In those applications it was decided by Court that the decision of the Indian Supreme Court in the case of *Sebastian M. Hongray v. Union of India*⁽¹⁾ should be followed and exemplary costs ordered against the respondents who have failed to account for the detention of the corpus. I therefore adopt in this case the reasons stated in the Judgment dated 02.12.94 referred to above and direct the 1st, and the 4th respondents to pay a sum of Rs. 25,000/- each as exemplary costs to the petitioner on or before 02.04.97. Since the 2nd respondent is now dead, I make no order against him. If these amounts are not paid by the 1st and the 4th respondents as directed, further action will be considered in this matter as to 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 a cognizable offence. He will take necessary action 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 judgement to the Hon. Attorney General for appropriate action to be taken by him. The petition is accordingly allowed with costs to be paid as stated above by the 1st and the 4th respondents.

Application allowed.