KODIPPILIGE SEETHA

v.

SARAVANATHAN AND OTHERS

COURT OF APPEAL.
T. D. G. DE ALWIS, J. AND DHEERARATNE, J.
H. C. A. 43/83.
MARCH 17, 18 AND 19, 1986.

Habeas Corpus–Reference to Magistrate for inquiry–Adversary system–Burden and standard of proof.

The petitioner's application for a writ of habeas corpus to the Court of Appeal was referred to the Magistrate, Colombo for inquiry and report. The main question was whether the corpus (husband of petitioner) had been taken away by the 1st respondent, the O.I.C. of the Police Station, Kotahena. The inquiry at the Magistrate's Court resolved itself into adversarial proceedings where the parties represented by Counsel led evidence. The Magistrate however controlled the proceedings and did his own questioning and even called a witness. By way of burden and standard of proof, the Magistrate proceeded on the basis that the burden of proof was on the petitioner. The standard of proof he applied was the balance of probability.

Held–

(1) At a judicial inquiry where there are competing interests of parties, justice and fairness would demand that the parties be permitted to be represented by counsel and that the parties be permitted to call witnesses to support their respective cases. The adversary system has come to stay in our legal system and in the absence of any other more prudent procedure will continue to hold sway in our legal arena. It is quite natural that a habeas corpus inquiry should resolve itself into an adversarial proceeding with the Magistrate himself actively participating as he did.

(2) The burden of proof must lie fairly and squarely on the party (the petitioner) who makes the assertion which is denied as here, that the corpus was taken into custody by the 1st respondent.

(3) An ordinary citizen making a serious allegation of the corpus being taken into illegal custody which would amount to a crime must prove the allegation beyond reasonable doubt.

Cases referred to:

(1) *Re Dellow's Will Trust – [1964] 1 All E.R. 771.*

(2) *Hornal v. Neuberger Products Ltd. – [1951] 1 Q.B.D. 247, 258.*

(3) *Regina v. Governor of Brixton Prison Ex parte Ashan and Others – [1969] 2 Q.B.D. 222.*

(4) *Samaranayake v. Kariawasan – [1966] 69 N.L.R. 1.*

APPLICATION for a Writ of Habeas Corpus.

Nimal Senanayake, P.C. with *Thilak Balasooriya, Ms. A. B. Dissanayake* and *Mrs. S. Wickramasinghe* for petitioner.

Hector Yapa, D.S.C. with *R. Arsakularatne, S.C.* for the 1st and 3rd respondents.

Cur. adv. vult.

May 14, 1986.

DHEERARATNE, J.

This is an application for a writ of Habeas Corpus filed by the petitioner against the 1st respondent, officer-in-charge of Kotahena Police Station, and the 3rd respondent, the Inspector-General of Police seeking inter alia, for an order on them, to produce the 2nd respondent Ananda Sunil, the husband of the petitioner, before this court.

The petitioner in her pleadings filed on 26.08.1983 alleged that on 27.07.1983 about 10 p.m. at a time when a curfew was in operation, the 1st respondent along with two other police officers entered her house No. A 2/1, Newham's Square Housing Scheme, breaking the front door, and forcibly removed her husband Ananda Sunil. She filed affidavits of E. P. Hemasiri and T. S. Pichchi both living in another flat of the same housing scheme, who claimed to be eye witnesses, and also an affidavit from Hilda Abeyaratne who had accompanied her on 28.07.1983 to the Kotahena Police Station, and thereafter to the Fort Police Station where the applicant had made a complaint. The applicant also alleged that her husband was the chief organiser of the Sri Lanka Freedom Party for Kochchikade, and although no grounds for his arrest were stated by those who took him to custody, he had been so taken on account of his affiliations with that political party.

This court made an interim order on 31.08.1986, directing the 1st and 3rd respondents to produce the corpus. On 05.09.1983, Learned Deputy Solicitor-General appeared for the 1st and 3rd respondents and brought to the notice of court, that 1st and 3rd respondents are unable to comply with the interim order, as the corpus had not been taken into Police custody on 27.07.1983, or any time thereafter. Time was given for those respondents to file their affidavits.

The first respondent in his affidavit denied that he ever took into custody the corpus. He averred that from 5.30 to 7.00 p.m. on 27.07.1983 he was attending a conference at the Foreshore Police Station convened by Henry Silva, Superintendent of Police, Colombo North, at which conference instructions were given regarding his duties during curfew hours. From the Foreshore Police Station, he accompanied Ronald Gunasinghe, Assistant Superintendent of Police, on his rounds, and returned to the Grandpass Police Station, about 9.00 p.m. From the Grandpass Police Station, he again accompanied Ronald Gunasinghe to Nagalagam Street, in order to inquire into an alleged offence of a triple murder and from there proceeded to the residence of Henry Silva about 11.00 p.m. From Henry Silva's residence, the 1st respondent along with Ronald Gunasinghe, proceeded to the Kotahena Police Station, reaching there about 11.30 p.m. The 3rd respondent the Inspector-General of Police, filed an affidavit to say that he is satisfied that the corpus had not been detained by any officer attached to the Kotahena Police Station. With his affidavit, he produced the affidavit of Detective Superintendent of Police, I. T. Kanagaratnam, who had investigated into the complaint made by the applicant, and the affidavit of Ronald Gunasinghe.

On 07.09.1983, this court made order in terms of article 141 of the Constitution, directing the Chief Magistrate Colombo to inquire into this matter and to forward his report. The primary question the learned Chief Magistrate had to decide at this inquiry was, whether the allegation made by the applicant that the 1st respondent with some other police officers did take the corpus into custody on 27.07.1983, is true or not.

At the inquiry before the learned magistrate, counsel of considerable experience appeared for the applicant, while the 1st and 3rd respondents were represented by experienced State Counsel. On behalf of the applicant, besides the applicant herself, her father-in-law Jayanayaka, Hilda Abeyratne, Hemasiri, Pichchi, two naval officers Chandraratne Perera and Ganegoda, a clerk from the office of the Commissioner, Motor Traffic, Kaviratne and a police officer D. M. Henry, were called as witnesses. On behalf of the 1st and 3rd respondents, the 1st respondent, Henry Silva Superintendent of Police, and two officers of the Magistrate's Court Epa and Wimalaratne were called as witnesses. The Learned Magistrate himself called Detective Superintendent of Police I. T. Kanagaratnam to give evidence.

The two alleged eye witnesses to the incident of taking the corpus into custody, Hemasiri and Pichchi completely retracted from what they had stated in their affidavits, and were treated as hostile witnesses by counsel appearing for the petitioner. Consequently, on the vital question as to whether the corpus was taken into custody by the 1st respondent, the only direct evidence came from the petitioner herself. Having carefully considered the voluminous evidence led at the inquiry, the Learned Magistrate has reported to this court inter alia that:–

(i) the petitioner has given evidence without any sense of responsibility and that her evidence cannot be accepted;

(ii) the 1st respondent has given evidence without any sense of responsibility and his evidence too cannot be accepted.

One of the main complaints of learned counsel for the petitioner in this court, is that the inquiry before the magistrate, took more the form of an adversary proceeding, rather than an exercise directed to finding of facts. At a judicial inquiry where there are competing interests of parties, justice and fairness would demand that the parties be permitted to be represented by counsel, and that they also be permitted to call witnesses to support their respective cases in order to prove or disprove the issues relevant to the inquiry. It is quite natural that such an inquiry should resolve itself to be an ordinary lis between parties. I can conceive of no other orderly method, which could be adopted in any court of justice, to ferret out the truth of any matter in dispute. However, at this inquiry, the Learned Magistrate was no silent spectator, who permitted the lawyers appearing for the parties to steer their respective cases in the directions they wanted. He questioned the witnesses and even called a witness himself. It is common knowledge, that even in proceedings before a Commission of Inquiry, where the conduct of any party is being investigated, legal representation is permitted to such party with the right to call any evidence and the investigation takes the nature of an adversary proceeding. This adversary method, having its origins in the concept of a duel and borrowed from England, has come to stay in our legal system and in the absence of any other more prudent procedure, will no doubt continue to hold its sway in our legal arena. Employment of any other procedure, at a judicial inquiry, to my mind, may perhaps, expose a judge to the criticism that, instead of holding the scales of justice even, he is putting his interests in one of the pans.

The next complaint of learned counsel for the petitioner concerns the burden of proof. The Learned Magistrate took the view that the burden of proving the allegations lay on the petitioner; and the standard of proof necessary, was the balance of probabilities. Learned counsel for the petitioner contends that both these propositions are erroneous, because, to borrow his own words, the writ of Habeas Corpus was developed out of the policy of the courts to safeguard the subject, and in such proceedings the question of burden of proof does not assume the same significance that it would in adversary proceedings. I think, I have already adverted to the matrix of his argument, but, I wish to make my own observations on the twin aspects of burden of proof, on whom it lies and the standard of proof necessary.

The basis for the application for this writ, is the petitioner's assertion, which is denied by the 1st and 3rd respondents, that the corpus was taken into custody. The burden of proof, therefore, must lie fairly and squarely on the party who makes this assertion. However, the burden of proof in every Habeas Corpus application, will not lie with the petitioner, for, this may shift according to circumstances. For instance, had the 1st and 3rd respondents admitted that the corpus was in fact taken into their custody, then, the burden of proving that such act was lawful, would without doubt, rest with these respondents.

The question of the standard of proof, in the absence of any decided authority, undoubtedly, troubled the Learned Magistrate, and he took the yardstick most favourable to the petitioner, in that she must prove her case on a balance of probabilities. Perhaps, it may not be irrelevant here, to quote the words of Dr. C. G. Weeramantry from his book "The Law in Crisis" (1975). At page 102 he says:

> "Nor do the laws which specify how a matter may be proved, afford us any conclusive guide. Lawyers cannot possibly quantify the degree of proof they require of an evidentiary matter and have hence no alternative but to resort to vague verbal formulas such as proof 'by a preponderance of probability' in civil cases and proof 'beyond reasonable doubt' in criminal case – and indeed a third type – 'proof by clear, strong and cogent evidence' favoured by the Americans and appearing to lie mid-way between the two. Recent developments in the Law of Evidence have shown how blurred the boundaries between these two formulas can become and that the degree of proof to carry conviction to the judicial mind cannot be a matter of mere verbal formulation."

Learned Deputy Solicitor-General does not contend that the petitioner should prove her case beyond reasonable doubt, but, he submits that in circumstances of the serious allegation made, a higher degree of proof than mere balance probabilities should be required. He submitted two authorities on this matter. In the first, *Re Dellow's Will Trust* (1) it was held that–

> "The standard of proof in a civil case did not reach the very high standard required by the criminal law, but more serious the allegation, the more cogent was the evidence required to overcome the unlikelihood of what is alleged and thus to prove it ...."

In the second case, *Hornal v. Neuberger Products Ltd.* (2) Denning, L. J. said:

> "The more serious the allegation the higher the degree of probability that is required; but it need not, in a civil case, reach a very high standard required by the criminal law."

Both these authorities are unrelated to writs of Habeas Corpus. However, my own investigation in this direction of the required standard of proof in Habeas Corpus matters, has led me to the case of *Regina v. Governor of Brixton Prison Ex parte Ashan and Others* (3). This is a case where burden of proof fell on the executive to prove the validity of certain detention orders. The head-note reads:

> "Held granting the applications (Ashworth, J. dissenting) that, since the court was inquiring into a claim by the executive to detain in custody a British subject and the applicants had alleged that a condition precedent to the validity of the notice of refusal had not been performed, the onus was on the executive to negative the challenge and prove beyond reasonable doubt, that the condition precedent has been performed. Accordingly, since the executive had not dischargd the onus, the applicants should be released."

At page 230 Lord Parker, C. J. said:

> "The real question, as I see it, is as to the proper approach of this court. Do I ask myself the question, have the applicants satisfied me that they had, on February 10, been here for more than 24 hours? If that is the proper question, my answer is: No, their evidence is so unsatisfactory that I could not find affirmatively that they were here for more than 24 hours. In other words I, like the immigration officer, am not satisfied they have been here for more than 24 hours. Or is the proper question: has the respondent, through the

immigration officers and the police, satisfied me that the applicants had not been here for more than 24 hours? If so, I for my part could not find beyond doubt, because this would, I think, be the standard of proof, that they had been here for less than 24 hours. True, they had told somewhat differing stories, and two are said to have confessed, but with the language difficulties involved and the known natural propensity of men such as these to say whatsoever they think will suit their case, I could not be sure that they had been here for less than 24 hours. Lies do not prove the converse, and the only positive evidence in this case was as to the state of their clothing. There was, however, no forensic evidence as to the nature of the wet, whether it was sea water or what, and some were said to have been smartly dressed."

In the same case, at page 241 Blain, J. observed:

"I say at once that if the burden of proof is upon the Crown, it is not discharged to my satisfaction so that, as a notional juryman, I could feel sure that at the time of examination these applicants had not been more than 24 hours ashore."

Could it be argued that the case which I have just referred to, is an exceptional case, where, when the liberty of a subject is involved, a heavier burden of proof is cast on the executive? I think not. I would expect an ordinary citizen making a serious allegation, which if true would amount to a crime, to prove that allegation too beyond reasonable doubt.

In assessing the evidence of the applicant, the learned magistrate, quite correctly, made an adequate allowance due to a lady who had undergone a traumatic experience of her husband disappearing under the most mysterious circumstances. Yet, for the ample reasons given by the learned Magistrate, he found her evidence unreliable and given without any sense of responsibility. Learned counsel for the petitioner, most helpfully, led us through the reasons adduced by the learned Magistrate with reference to the voluminous evidence given in the case, which I think, need not be recounted here. However, excepting for a solitary instance of wrong inference drawn by the learned Magistrate with regard to the contents of a contradiction marked 1R1, we find that the conclusions reached and inferences drawn by him are correct. We find no reason to interfere with the finding of the learned Magistrate that the petitioner's evidence is unreliable.

However, the matter does not rest there, for, learned counsel for the petitioner contends that the learned Magistrate's conclusion that he is unable to give credence to the story that the 1st respondent was at the relevant time of the alleged abduction of the corpus, carrying on investigations with Ronald Gunasinghe on a triple murder at Nagalagam Street, coupled with the fact that Ronald Gunasinghe was not called to give evidence, should have led the learned Magistrate to draw an inference that the evidence of the applicant is probably true. Learned counsel for the petitioner, drew our attention to the case of *Samaranayake v. Kariawasan* (4) to support this proposition. In that case, the issue was whether one Soma Withanachchi as an agent of a successful candidate at an election, did make false statements about the conduct of an unsuccessful candidate, regarding the acceptance of a bribe by the unsuccessful candidate. The fact that such statements were made, was admitted. The question then was whether such statements were true. The evidence of the unsuccessful candidate was disbelieved on several matters. Soma Withanachchi gave evidence to say that the unsuccessful candidate accepted a bribe from her, which evidence was disbelieved. It was therefore held that the corrupt practice of making a false statement regarding the conduct of the unsuccessful candidate had been proved beyond reasonable doubt. I do not think that the principle applied, according to the circumstances of that case, has any application here. I would echo the words of Lord Parker, C.J. in *Regina v. Governor Brixton Prison Ex parte Ashan and Others (supra)*, that "lies do not prove the converse".

Another matter to which learned counsel for the applicant drew our attention, was the assessment by the learned Magistrate of the evidence of Pichchi and Hemasiri, who completely went back on their affidavits. A police officer dressed in plain clothes, who admitted that he was from the Kotahena Police Station, and who was unable to give a truthful account of his presence in the precincts of the court, was seen speaking to those two witnesses. The conduct of this police officer, to say the least, is reprehensible. It is reasonable to conclude, from the conduct of this police officer and the conduct of the two witnesses, that those witnesses had been subjected to some influence by the interested party. However, it appears to me that on the nature of the evidence given by the two witnesses, which was

found to be utterly unreliable, no one assessing their evidence judicially, can come to the conclusion, that what they had deposed to in their affidavits is the truthful version.

For these reasons I would dismiss the application of the petitioner without costs.

T. D. G. DE ALWIS, J. – I agree.

Application dismissed.