PARAMASOTHY

v.

DELGODA AND ANOTHER

COURT OF APPEAL
RANASINGHE, J., AND ATUKORALE, J
H. C. A. 138/79
D. C. JAFFNA 55/D
MAY 5 AND 7, 1981.

Writ of habeas corpus – can application for revision be combined with application for a writ of habeas corpus ? Arrest without possession of warrant of arrest – contempt – vacation of order fixing matter for inquiry and dealing with offender before Court rises – s. 388(1) of Code of Criminal Procedure Act – s. 223 of the Penal Code read with s.55(1) of Judicature Act No. 2 of 1978 – s. 800(c) C.P.C. – procedure and sentence.

The petitioner was the plaintiff in a divorce case. On 13. 7. 79 his case was postponed but his arrest and detention were ordered by the District Judge (2nd respondent) as the Police Sergeant represented to the Judge that the Magistrate had issued a warrant to arrest the petitioner. The petitioner then rushed into court and took up a squatting position in front of the Interpreter Mudaliyar's table. The 2nd respondent warned the petitioner that he had interrupted the court proceedings and his conduct would constitute a contempt. The petitioner paid no heed to this. The 2nd respondent ordered the Court Sergeant to *remove the petitioner and remanded him.* Later the same day the 2nd respondent summoned the petitioner and charged him with committing contempt of Court under s. 223 of the Penal Code read with s. 55(1) of the Judicature Act, No. 2 of 1978. The petitioner said he had cause to show and the matter was fixed for inquiry for a future date. Later however on the same day the 2nd respondent before rising for the day caused the petitioner to be produced before him and after explaining that his conduct amounted to wilful interruption of the proceedings of Court asked the petitioner whether he had cause to show. The petitioner said he had cause to show and made a statement but the 2nd respondent proceeded to convict the petitioner in terms of s. 55(1) of the Judicature Act and sentenced him to a term of two years' rigorous imprisonment.

Held:

(1) A substantive term of rigorous imprisonment upon conviction of the offence of contempt of court can be imposed only either under s. 55(1) of the Judicature Act or s. 800(c) of the Civil Procedure Code where the procedure set out therein is followed and the offender has had a reasonable opportunity both of showing cause and defending himself. If recourse is had to section 388(1) of the Code of Criminal Procedure Act to deal with an offender the same day, then the substantive sentence which can be imposed is only a fine.The sentence of imprisonment imposed on the petitioner is untenable and unwarranted in law as the procedure purported to be followed was under s. 388(1) of the Code of Criminal Procedure Act whereunder a substantive punishment of only a fine was permissible. The committal of the petitioner by the 2nd respondent to the custody of the 1st respondent was illegal.

(2) The court will not allow habeas corpus to be used as a device for collaterally impeaching the correctness of a determination by a Court of competent jurisdiction. The writ of habeas corpus will however ordinarily be issued where there is jurisdictional

error. Where a committal is on the face of it, bad, as for instance where the sentence is illegal, a writ of habeas corpus would lie.

(3) Once facts and circumstances, which would justify the exercise of the revisionary powers of the court have been brought to the notice of the Court, the Court should then exercise such powers notwithstanding any technical objection even if such objections were tenable — that an application for revision cannot be combined with an application for a writ of habeas corpus.

Case referred to

(1) Thamboo v. The Superintendent of Prisons (1958) 59 N. L. R. 573.

Application for writ of habeas corpus and revision.

Nimal Senanayake, with Miss S. M. Senaratne, T. Kanagasabai and Tilak Balasuriya, for petitioner

C. Sittambarapillai - S. S. C. for 2nd respondent.

Cur. adv. vult

June 8, 1981.

RANASINGHE, J.

The petitioner who is the plaintiff in Case No. 55/D of the District Court of Jaffna, appeared in the District Court of Jaffna on 13.7.79 which was the date fixed for the trial of the said case; but, as the learned District Judge, who is the 2nd Respondent did not wish to hear the said case, the 2nd Respondent had refixed the trial for 17.8.79 in order to have another judge appointed to hear the said trial. Thereafter, according to the Petitioner, the following incidents took place: that, as the Petitioner was about to leave the Court-house, the 2nd Respondent ordered a police officer on duty in the court-house, to take the Petitioner into custody stating that there is a warrant issued by the Magistrate's Court for the arrest of the Petitioner: that the said warrant was not, at that time, with either the 2nd Respondent or the said Police Officer: that the Petitioner, stating that such arrest was illegal and constituted an abuse of the powers of the 2nd Respondent, sat down in protest: that the Petitioner was then carried bodily into the remand cell in the Court-house by Police Officers on the orders of the 2nd Respondent: that thereafter the same day the Petitioner was brought before the 2nd Respondent at about 4 p.m. and was asked by the 2nd Respondent to show cause why the Petitioner should not be dealt with for contempt of Court: that the Petitioner replied that he has not committed any such offence, and that he should be served with a charge sheet and be given time to retain a lawyer

and show cause: that the 2nd Respondent rejected the Petitioner's application and imposed a sentence of two years' rigorous imprisonment.

The 2nd Respondent's version of the incidents of 13.7.79 is: that, after the said divorce case was postponed, upon an application made by the Court Sergeant that the Petitioner, who had been evading arrest upon the warrant, which had been issued against the Petitioner, be detained in Court until the Court Sergeant obtained the said warrant from the Police Station, the 2nd Respondent ordered that the Petitioner be so detained in Court: that the Petitioner, notwithstanding the said order, walked out on to the verandah of the Court-house: that, after a "discussion" had ensued between the Petitioner and the Court Sergeant, the Petitioner "suddenly rushed into the Court and took up a squatting position in front of the Interpreter Mudaliyar's table": that the 2nd Respondent then warned the Petitioner that his conduct was interrupting the proceedings of Court and constituted an act of contempt: that the Petitioner paid no heed to such warning: that, as the conduct of the Petitioner continued to obstruct the Court proceedings, the 2nd Respondent directed the Court Sergeant to remove the Petitioner from the Court-house and also made order remanding the Petitioner: that later the same day the 2nd Respondent summoned the Petitioner to the open Court and charged the Petitioner with committing the offence of contempt of Court, and called upon the Petitioner to show cause why the Petitioner should not be punished for such offence: that the Petitioner then made a statement which was recorded verbatim by the 2nd Respondent: that the 2nd Respondent following the procedure set out in Section 795 and the other succeeding provisions of the Civil Procedure Code convicted the Petitioner, and passed sentence in terms of the Judicature Act, No. 2 of 1978: that the Petitioner did not make any application for time to retain a lawyer and to make further submissions.

A perusal of the proceedings of 13.7.79, recorded by the 2nd Respondent and a certified copy of which has been marked "A," shows: that, when the Petitioner was first informed that he was being charged with the offence of contempt of Court, the 2nd Respondent had, at that stage, explained to the Petitioner "that he is now committing an offence of contempt of Court declared punishable under Section 223 of the Penal Code read with Section 55(1) of the Judicature Act, No. 2 of 1978: "that, when in answer to the said charge, the Petitioner stated that he wanted time to show cause, the 2nd Respondent then fixed the matter for inquiry on 30.10.79 and made order remanding the Petitioner: that there

is an entry made later on the same day by the 2nd Respondent to the effect that he finds that Section 55 of the Judicature Act, No. 2 of 1978 and Section 388 (1) of the Code of Criminal Procedure Act, No. 15 of 1979 gave him the power to deal with the Petitioner on the same day before the Court rises for the day, and that he (the 2nd Respondent) therefore directs that the Petitioner be produced before him before the Court rises for the day: that thereafter the Petitioner was produced before the 2nd Respondent: that the 2nd Respondent then proceeded to explain to the Petitioner that his conduct earlier in the day (as referred to above) amounted to a wilful interruption of the proceedings of the Court and that the Petitioner has thereby committed the offence of contempt: that, on the Petitioner being asked whether he has any cause to show, the Petitioner had stated that he has cause to show, and had then proceeded to make a statement: that thereafter the 2nd Respondent convicted the Petitioner in terms of Section 55 of the Judicature Act and sentenced him to a term of two years' rigorous imprisonment: that, having done so, the 2nd Respondent proceeded to vacate the order made by him earlier in the day fixing the matter of the self same contempt for inquiry on 30.10.79.

A consideration of the proceedings of 13.7.79 shows clearly that, when the 2nd Respondent first decided to deal with the Petitioner for the offence of contempt, he had referred to the provisions of Section 223 of the Penal Code and Section 55(1) of the Judicature Act, No. 2 of 1978, and had, upon the Petitioner asking for time to show cause, taken the view that the Petitioner should be granted such an opportunity, and had then proceeded to grant the Petitioner a period of about 3½ months for that purpose: that the decision made subsequently by the learned District Judge the same day to vacate the aforesaid order fixing the inquiry for 30.10.79 and to deal with the Petitioner the same day, has been influenced, if not wholly, at least to a very great extent, by the provisions of Section 388(1) of the Code of Criminal Procedure Act, No. 15 of 1979.

Of all the relevant provisions of law relating to the offence of contempt found in the Judicature Act, No. 2 of 1978, Civil Procedure Code (Cap. 101), and the Code of Criminal Procedure Act, No. 15 of 1979, Section 388(1) of the said Code of Criminal Procedure Act seems to be the only section which provides for – even in the limited circumstances set out therein – a District Court dealing with an offender, accused of the offence of contempt, at any time before the rising of the Court on the same day. The provisions of this section also make it clear that, if a District Court proceeds under this section, it has power to impose

only a fine not exceeding one thousand five hundred rupees. It has the power to impose a term of imprisonment only as a default term; and that too only for a maximum of "3 months." It has no power to impose a substantive term of imprisonment. A substantive term of two years rigorous imprisonment is permissible only under either Section 55(1) of the Judicature Act, No. 2 of 1978 or Section 800 (c) of the Civil Procedure Code. The term of two years' rigorous imprisonment imposed upon the Petitioner by the 2nd Respondent on 13.7.79 is not, therefore, a sentence sanctioned by the provisions of Section 388(1) of the Criminal Procedure Code. It is clear on a perusal of the proceedings, particularly those under the heading "Eo die later," of 13.7.79, that, in deciding to vacate the order made by him earlier the same day and to deal with the Petitioner the same day, the 2nd Respondent has purported to fall back upon the provisions of Section 388(1) of the Code of Criminal Procedure Act, No. 15 of 1979. The 2nd Respondent seems to have had recourse first to the said Section 388(1) to give him the power to deal with the Petitioner the same day before the Court rises for the day, and then to Section 55(1) of the Judicature Act to impose a sentence of two years' rigorous imprisonment; for, the 2nd Respondent states in his affidavit that he followed the procedure laid down in the Civil Procedure Code and the Code of Criminal Procedure Act, and "passed sentence of conviction in terms of the provisions of the Judicature Act, No. 2 of 78." Such a procedure is not tenable and is wholly unwarranted. If recourse is had to the said Section 388(1) to deal with an offender the same day, then the sentence which can be imposed is only that which is expressly set out in the self same section. It is significant that the substantive sentence which could be imposed where an offender is being dealt with the same day is only a fine. A substantive term of imprisonment could be imposed – either under Section 55(1) of the Judicature Act or Section 800 of the Civil Procedure Code – only where the procedure set out therein is followed and the offender has had a reasonable opportunity both of showing cause and of defending himself. The only sentence imposed by the 2nd Respondent upon the Petitioner is the aforesaid term of rigorous imprisonment. No fine has been imposed at all. Thus the sentence is one wholly in conflict with the provisions of the said Section 388(1). As the procedure purported to have been followed by the 2nd Respondent is said to be under the said Section 388(1) both the conviction and the sentence became untenable in law.

As already indicated, the 2nd Respondent himself had earlier considered it fit and proper to grant the Petitioner some time to get ready to show cause and defend himself. There was no justifiable ground, in my opinion, for the 2nd Respondent to have

vacated his earlier order and to deal with the Petitioner the same day. Section 388(1) of the Code of Criminal Procedure Act, No. 15 of 1979 cannot, as already stated, be called in aid to support what the 2nd Respondent has thereafter done later the same day. The steps taken by the 2nd Respondent subsequent to his having fixed the matter for inquiry on 30.10.1979 would, in the circumstances of this case, undoubtedly have caused the Petitioner considerable degree of prejudice.

In this view of the matter, I am of opinion that the conviction of and the sentence imposed upon the Petitioner by the 2nd Respondent on 13.7.79 are both untenable and unwarranted in law, and that the committal of the Petitioner by the 2nd Respondent to the custody of the 1st Respondent is illegal.

The question, which now arises for consideration, is the objection raised by learned State Counsel appearing for the 2nd Respondent that the Petitioner is not entitled to a Writ of Habeas Corpus as prayed for by him. The contention put forward in support of the said objection is: that the Petitioner has been tried and convicted by a Court competent to do so: that the warrant of committal issued by the 2nd Respondent to the 1st Respondent, consequent upon the conviction, is a sufficient return to the writ of habeas corpus: that, a writ of habeas corpus will not issue where it is being sought to be used as a means of appeal: that a writ of habeas corpus cannot be availed of to test the validity of a committal, or to review a judgment which could have been tested by way of an appeal, or to question the validity of an order made by an inferior Court on a matter within its jurisdiction: that an application for a writ of habeas corpus cannot be combined with an application for revision.

Learned Counsel for the Petitioner submitted that he is in this application canvassing the jurisdiction of the learned District Judge to have proceeded to deal with the Petitioner in the way he has done, and on the grounds set out by the learned District Judge: that where such jurisdiction is being challenged the proper procedure is to come before this Court in the way the Petitioner has done — by way of an application for a writ of Habeas Corpus and/or Revision: that, in such a situation an appeal is not the appropriate remedy.

De Smith: Judicial Review of Administrative Action (4th Edn.) at page 600, whilst discussing the scope of judicial review in habeas corpus proceedings, notes the following points: that the Courts will not allow habeas corpus to be used as a device for collaterally impeaching the correctness of a determination by a

Court of competent jurisdiction: that, in general, where imprisonment has been ordered by a Court or other judicial tribunal, habeas corpus will issue if the decision is void for want of jurisdiction but not merely voidable for error: that, although this distinction has been broadly adhered to in respect of superior Courts, it has often been disregarded in respect of minor tribunals, and habeas corpus has been awarded where a conviction or order has been made without evidence although the defect was not necessarily jurisdictional: that habeas corpus has issued where instruments of committal are ex facie bad, although the defect would not ordinarily be regarded as jurisdictional.

Sinnetamby, J. in the case of *Thamboo v. The Superintendent of Prisons*[10] held that a write of habeas cotpus is not available against an order of committal which is based on a judgment of the Supreme Court or against a committal after trial by an inferior Court acting within its jurisdiction. At page 574, Sinnetamby, J. stated, after a discussion of the relevant English rule:

> "It will thus appear that ordinarily a writ will not be granted if there is a warrant of committal duly signed by a judge of the Court. The only cases where writs have issued or would issue are cases in which the sentence itself is clearly illegal – for instance, where an offence is punishable only by a fine but the Court has imposed a term of imprisonment or where the term of imprisonment imposed exceeds the maximum provided for the offence. But where otherwise the matter is within the jurisdiction of the Court the writ would not lie in England."

In regard to the connotation of the word "jurisdiction" in this connection, Sinnetamby, J. went on to state:

> "The English cases make it clear that the word 'jurisdiction' relates to the question of whether the Court is empowered by law to try cases of the type in which the offender was tried and convicted."

In that case the learned Magistrate had in charging the accused followed the procedure which was accepted at that time to be the correct procedure but which was later held to be not legal by a Divisional Court. The accused, when he appealed against his conviction to the Supreme Court, did not however urge the said infirmity as a ground on which his conviction was challenged. After the appeal was dismissed, the Petitioner made an application for a writ of habeas corpus, and Sinnetamby, J. at page 576 characterised it as "precisely what the English cases condemn as

being tantamount to attempt to obtain a review of the case, having failed in the first appeal or not having appealed at all."

A consideration of the above principles seems to show that, although ordinarily grounds for the award of a writ of habeas corpus are limited to jurisdictional errors and the writ cannot be used as a device for collaterally impeaching the correctness of an order made by a Court of competent jurisdiction, yet, where a committal is, on the face of it, had, as for instance where the sentence is illegal, a writ of habeas corpus would lie.

In this case the 2nd Respondent in his capacity as the District Judge undoubtedly had the power to deal with the Petitioner for the offence of contempt; and he also had the power, under the provisions of the Judicature Act and the Civil Procedure Code referred to earlier, to impose a sentence of 2 years rigorous imprisonment, even though under the provisions of Sec. 388(1) of the Code of Criminal Procedure Act he could impose only a fine. Be that as it may, I do not propose to consider further the question whether the Petitioner is or is not entitled, in the circumstances in this case, to a writ of habeas corpus for the reason that the Petitioner should, in any event, be given relief by way of revision.

The powers of revision vested in this Court are set out in Article 138 of the Constitution. Once facts and circumstances, which would justify the exercise of such revisionary powers vested in this Court, have been brought to the notice of this Court, it appears to me that this Court should then exercise such powers, notwithstanding any technical objections – even if such objections were tenable – that an application for revision cannot be combined with an application for a writ of habeas corpus.

As I have indicated earlier, considerable prejudice would certainly have been caused to the Petitioner by the learned District Judge's vacation of his earlier order giving the Petitioner time to show cause. The ground, which seems to have been relied on by the learned District Judge does not, as already stated, bear close investigation. Furthermore, certain observations made by the learned District Judge in the course of his order made on 13.9.79 refusing the petitioner's application for bail, though made at a point of time after the petitioner was dealt with as set out above on 13. 7. 79 would justifiably raise the question whether what he expressly stated on that subsequent occasion could also have in some way influenced him in making the order he made around 4 p.m. on 13. 7. 79 to vacate the order he had made earlier that day fixing the inquiry for a later date. The 2nd Respondent had not stated as to when such confidential information was disclosed

to him "under oath of secrecy". It need hardly be said that a Judge should act only upon evidence placed before him according to law and that material such as this should not be allowed to influence a judge in making a judicial order, and must not be allowed to influence him in any way to making an order adverse to the person against whom such information is disclosed. In a situation such as this the Petitioner is entitled to complain to this court that he has been seriously prejudiced.

A consideration of the recorded proceedings of 13. 7. 79 shows that the conduct alleged against the Petitioner if in fact is established, the Petitioner has certainly laid himself open to contempt proceedings being held against him.

For these reasons, I made order, in the exercise of the revisionary powers vested in this Court, setting aside not only the conviction of and the sentence imposed on the Petitioner by the 2nd Respondent on 13. 7. 79, but also all the proceedings taken against the Petitioner on 13. 7. 79 after the order, made earlier on 13. 7. 79, by the 2nd Respondent fixing the charge of contempt for inquiry on 30.10.79. I direct the Distirct Judge of Jaffna to re-fix, in the presence of the Petitioner, the matter of the charge of contempt framed against the Petitioner (and which had, on 13. 7. 79, been fixed for 30.10.79) for inquiry, and proceed according to the relevant provisions of law. The Petitioner will be entitled to take whatever objections that are open to him in law at such inquiry. In view of what has transpired the said inquiry should be held before a District Judge other than the 2nd Respondent, competent in law to hold such inquiry.

Atukorale, J. I agree.

In revision conviction and sentence and proceedings against petitioner set aside. Case remitted for inquiry into charge of contempt.