

**LEELAWATHIE**

**vs.**

**SUNDARALINGAM, HEAD QUARTERS INSPECTOR  
OF POLICE, MIRIHANA AND OTHERS**

COURT OF APPEAL  
BALAPATABENDI, J., AND  
IMAM, J.,  
CA/H. C. A. 65/90

*Writ of Habeas Corpus - Ingredients - Prerogative writ of right - Violation of fundamental rights - Constitution, Articles 126(1), 126(2) and 126(3) - Detention unlawful - Reference to Supreme Court - Instances - Can it be done?*

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The petitioner sought a writ of habeas corpus directing the respondents to produce the 11th respondent her son and a declaration that the arrest and detention are unlawful.

The matter was referred to the Chief Magistrate's Court for inquiry and report.

The finding of the Chief Magistrate was that it had been established by evidence that the corpus was arrested by the Police, shot dead by the Police and the body of the corpus later cremated. This was during a period of nationwide unrest and emergency.

**HELD:**

1. To succeed in a writ of habeas corpus, the petitioner would have to prove that the corpus had been illegally or unlawfully arrested and detained by the respondents; in this case, the arrest is admitted and detention is also within the law as a detention order had been obtained.
2. It is only if the detention is not proved to be lawful that a writ of habeas corpus is issued.
3. The writ of habeas corpus is a prerogative writ of right which issues *ex debit justitae* when the applicant has satisfied the court at the conclusion of the inquiry that the detention is unlawful.

As to the application that this matter be referred to the Supreme Court under Article 126(3) —

**HELD FURTHER:**

1. If a person who alleges that his fundamental rights have been violated fails to comply with Articles 126(1) and (2) he cannot smuggle that question into a writ application in which relief is claimed on different facts and grounds.

2. The evidence does not reveal any violation of the fundamental rights of the petitioner. The arrest and the detention of the corpus had been made in conformity with the law. The petitioner is endeavouring to obtain relief available to her under Article 126(1) in this application after a lapse of more than 14 years which is unreasonable.

**APPLICATION** for a writ of habeas corpus.

**Cases Referred to :**

- (1) *Juwanis v. Lathiff, Police Inspector S. T. F. and others* (1988) 2 Sri LR 185
- (2) *Shanthy Chandrasekeran v. D. B. Wijetunga and others* (1992) 2 Sri LR 299

*R.S. Weerawickrama* for petitioner

*Nalini Kaneshayogan* for 1st petitioner

*Saliya Peiris* for 2nd respondent.

*S. K. Wickramarachchi*, State Counsel for 9th and 10th respondents.

January 20, 2006

**S. I. IMAM, J.**

The Petitioner instituted this action by a Petition dated 01.11.1990 seeking a Mandate in the nature of a Writ of Habeas Corpus directing the 1st to 9th Respondents to produce the 11th Respondent namely Weragodage Jayarathna her son the corpus in this case, and a Declaration that the arrest and detention of the 11th Respondent and/or their subordinates is unlawful. The matter was thereafter referred by this Court to the Chief Magistrate's Court of Colombo for inquiry and report. The aforesaid report is in respect of the 11th Respondent in this application.

Consequent to the Inquiry, the learned Chief Magistrate of Colombo submitted a Report to this Court dated 24.01.2003 after inquiry into the relevant circumstances and available evidence. As the learned Chief Magistrate of Colombo has observed, November 1989 during which period the 11th Respondent is alleged by the Petitioner to have been arrested

and detained by the Sri Lanka Police was during a period of nationwide unrest and emergency. The general public, public institutions, public and private property, state officers and members of the armed forces and police were under grave threat and danger.

The Petitioner in her evidence before the learned Chief Magistrate of Colombo stated that on 02.11.1989 the corpus was taken away by the 2nd to 6th Respondents, and that she visited the corpus on several occasions at the Mirihana Police Station. She thereafter was informed that the corpus had been taken to the Athurugiriya Police Station where she visited the corpus, but since 24.12.1989 she had not seen the corpus. She further stated that she was informed by the Police that the corpus had escaped from the Police. The 1st Respondent Sundaralingam the HQI of Mirihana stated that after the corpus was arrested on 09.11.1989 by several Police Constables namely PCs 18565, 7104, 2606 and 22575 he was kept under detention orders at this Police Station until 01.12.1989, and thereafter for security reasons and on the instructions of the ASP, Mirihana the corpus was transferred to the Athurugiriya Police Station and kept there under Detention Orders.

IP Vijitha Gunarathna in his evidence said that he was assigned to take away the corpus and three others from Athurugiriya to be detained at the Detention Camp at the race course, and while being taken away at Koskandawala the persons they were taking including the corpus had escaped from their custody.

The 2nd Respondent in his evidence stated that while proceeding towards Athurugiriya he saw a group of persons moving in a suspicious manner who threw an object about 25 meters away which exploded. The 2nd Respondent explained that thereafter they fired, and subsequently found 4 dead bodies of the group. He said that IP Vijitha Gunarathna identified the body of the corpus among the dead persons. Subsequently SP Anura Senanayake giving evidence testified how IP Vijitha Gunarathna identified the body of the corpus and in accordance with the necessary order given under the Emergency Regulations the body of the corpus was cremated.

The finding of the learned Chief Magistrate was that it had been established by the evidence of the Respondents who gave evidence that

the corpus was arrested by the Police, shot dead by the Police, and the body of the corpus later cremated.

For the Petitioner to succeed in a Writ of Habeas Corpus and a Rule Nisi to be issued, the Petitioner would have to prove that the corpus had been illegally or unlawfully arrested and detained by the Respondents. In this case the arrest is admitted, and detention is also within the law as detention orders had been obtained. In the case of *Juwanis vs. Lathiff, Police Inspector Special Task Force and others* <sup>(1)</sup> it was held that it is only if the detention is not proved to be lawful that a Writ is issued. It was further held that the Writ of Habeas Corpus is a prerogative Writ of right which issues "ex debet Justitiae" when the applicant has satisfied the Court at the conclusion of the inquiry that the detention is unlawful.

In accordance with the evidence led before the learned Chief Magistrate the respondents having admitted the arrest of the corpus have also justified the said arrest by tendering the relevant arrest notes and the orders pertaining to the arrest of the corpus. The Petitioner has sought an order in her written submissions from this court referring this application to the Supreme Court to determine any violations of the Petitioner's Fundamental Rights. However in accordance with Article 126(3) of the Constitution an application for Writs of Habeas Corpus can only be referred to the Supreme Court only if it appears to this Court that there is *prima facie* evidence of an infringement or imminent infringement of fundamental rights. In the case of *Shanthi Chandrasekaram vs. D.B. Wijetunga and others* <sup>(2)</sup> it was held by his Lordship Mark Fernando J. that "Article 126(1) confers sole and exclusive jurisdiction in respect of infringement of fundamental rights. Article 126(2) prescribes how that jurisdiction may be invoked. Article 126(3) is not an extension of or exception to those provisions; if a person who alleges that his fundamental rights have been violated fails to comply with them, he cannot smuggle that question into a writ application in which relief is claimed on different facts and grounds, and thereby seek a decision from the Supreme Court. The evidence led before the learned Chief Magistrate of Colombo and the affidavits filed before this court do not reveal any violation of the fundamental rights of the Petitioner. The arrest and the detention of the corpus had been made in conformity with the law. The Petitioner is endeavoring to obtain reliefs available to her under Article 126(1) in this application, after a lapse of more than 14 years which is unreasonable.

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It is my view that the arrest and detention of the corpus have been made in accordance with the law, and is thus lawful. The Petitioner has not satisfied this Court that at present the corpus is in the custody or control of the Respondents, nor has the Petitioner made out a *prima facie* case. The corpus died as a result of confrontation with the Respondents as borne out by the evidence at the inquiry in the Magistrate's Court.

For the aforesaid reasons as the allegations of the Petitioner have no merit, I dismiss the application of the Petitioner without costs.

**BALAPATABENDI, J.** — I agree.

*Application refused.*

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