MACHCHAVALLAVAN
vs
OIC, ARMY CAMP, PLANTAIN POINT, TRINCOMALEE AND OTHERS

SUPREME COURT
BANDARANAYAKE, J.
UDALAGAMA, J. AND
FERNANDO, J.
SC. APPEAL No. 90/2003
HC. APPLICATIONS No. 244/90
AND 245/94
22nd SEPTEMBER AND 19th OCTOBER, 2004 AND 16th MARCH, 2005

Writ of Habeas Corpus – Loss of petitioner's sons after removal by Army – Right to life – Articles 13(4) and 126(2) of the Constitution – Duty of Court of Appeal to have referred the entire matter to the Supreme Court – Article 126(3) of the Constitution.

The appellant sought two writs of habeas corpus from the Court of Appeal in respect of his two sons removed after a cordon and search operation by officers of the Army Camp, Plantain Point and who had thereafter disappeared. These applications were referred to a Magistrate who inquired into them and recommended to the Court of Appeal against issuing the writs as the

responsibility for the loss of the corpus could not be proved against the 1st respondent or any other army officer individually. The Court of Appeal issued rule nisi and after inquiry dismissed the applications, particularly due to the unsatisfactory evidence of the appellant after six years that he too was removed by the army. But the appellant's version was supported by the complaints he made to the police station, Trincomalee on 19.12.1992 (P1), Civilian Information Office Colombo, on 21.09.1990 (P2), and to the President on 06.07.1990(P5) regarding the corpora. They were arrested on 06.07.1990. There is also the evidence of one Jesudasan who was arrested with the corpora.

One of the questions on which leave to appeal was granted was whether the Court of Appeal failed to refer the entire matter to the Supreme Court under Article 126(3) of the Constitution as there was *prima facie* evidence of violation of fundamental rights in view of the disappearance of corpora in the light of Article 13(4) (right to life) and recent judgments of the Supreme Court in the matter which gave a broad construction to Articles 11, 13(4), 17 and 126(2) granting the right of petition to the legal representatives of the deceased person, affected by violence at the hands of a public officer.

HELD:

(1) There was prima facie evidence of violation of fundamental rights contrary to Article13(4) of the Constitution.

(2) The Court of Appeal should have referred the entire matter to the Supreme Court under Article 126(3).

(3) The burden was on the Court of Appeal to make such reference and hence the time bar in Article 126(2) had no application particularly as the relief sought by the appellant consisted of relief in habeas corpus applications.

(4) There was sufficient evidence that the cordon and search operation was conducted by the Plantain Point Army Camp even if the identity of the respondents was not established.

(5) As the evidence showed that the corpora had been removed by the army, the State was liable for the acts of the army officers and the State could be ordered to pay compensation and costs to the appellant although in the absence of individual responsibility for the removal exemplary costs may not be ordered against the individual respondents.

Cases referred to

1. *Shanthi Chandrasekeram* v *D. B. Wijetunga and Others* (1992) 2 Sri LR 293
2. *Sebastian M Hongray* v *Union of India (Air)* 1984 SC 1026

3. *Kotabadu Durage Sriyani Silva* v *Chanaka Iddamalgoda* (2003) 1 Sri LR 14 (preliminary objection)
4. *Kotabadu Durage Sriyani Silva* v *Chanaka Iddamalgoda* (2003) 2 Sri LR 63 (merits)
5. *Rani Fernando's* case SC FR 700/2002 S. C. minutes of 26.07.2004
6. *R* v. *Vrixton Prison Governor Ex-Parte* walsh (1985) AC 154
7. *R* v. *Durham Prison Governor Ex-Parte Hardial Singh* (1984) 1 WLR 704

APPLICATION for writs of habeas corpus

Dr. T. Thirunavukarasu for petitioner appellant.

Shyamal A. Collure 1st respondents.

Riaz Hamsa, State Counsel for Attorney-General

Cur.adv.vult

March 31st, 2005

SHIRANI A. BANDARANAYAKE, J.

This is an appeal from the judgment of the Court of Appeal dated 01.07.2003. By that judgment, the Court of Appeal refused to grant a Writ of Habeas Corpus as prayed by the petitioner-appellant. On an application by the petitioner-appellant (hereinafter referred to as the appellant), the Supreme Court granted Special Leave to Appeal on two questions which are set out below :

1. At the time the Court of Appeal made the order in respect of which Special Leave to Appeal was sought, there was *prima facie* evidence of infringement of the fundamental rights of the corpus at least under Article 13(4) of the Constitution caused by the 1st respondent, or by another State Officer, for whose act the State was liable. In those circumstances, it is arguable that the Court of Appeal should have referred the entire matter for determination by this Court under Article 126(3) of the Constitution ;

2. Whether the 1st respondent and or the State are liable for the arrest and the subsequent presumed death of the corpora.

The facts of this appeal, *albeit* brief, are as follows :

The appellant, being the father of the corpora, filed two habeas corpus Applications (HCA 244/94 and HCA 245/94) in respect of his two sons,

namely Machchavallavan Arumugam and Machchavallavan Mahendrarajah, who were arrested at a cordon and search operation conducted by Plantain Point Army, Trincomalee. At the time of the arrest which took place on 06.07.1990 they were aged 22 years and 25 years, respectively.

The Court of Appeal on 11.09.1995, referred the two applications to the Chief Magistrate, Colombo to inquire into and report upon the said arrest and alleged imprisonment or detention in terms of the 1st proviso to Article 141 of the Constitution. The learned Chief Magistrate held an inquiry and submitted his findings to the Court of Appeal on 14.03.1997. In his report the learned Chief Magistrate had concluded that there was no evidence to establish that the 1st respondent-respondent (hereinafter referred to as the 1st respondent) either took part in the round-up operation during which the said corpora were alleged to have been taken into custody or was in any manner responsible for the alleged arrest and detention of the said corpora. However, the Court of Appeal, being satisfied that the corpora were detained at the Plantain Point Army Camp after arrest, issued a Rule Nisi on the 1st respondent on 19.07.2000 directing him to bring up the bodies of the said corpora before the Court of Appeal on 17.05.2001.

In response to the aforementioned position, the 1st respondent filed an affidavit dated 15.05.2001 denying the arrest and detention of the corpora by him. He filed another affidavit on 04.10.2001, further clarifying his defence. The Court of Appeal on 01.07.2003, delivered its judgment discharging the Rule Nisi issued on the 1st respondent and dismissed the applications filed by the appellant, holding that the appellant had not succeeded in discharging his burden of proof.

Having set down the factual position in this appeal, I would now turn to examine the two questions on which Special Leave to Appeal was granted.

1. *The Court of Appeal should have referred the entire matter for determination by the Supreme Court under Article 126(3) of the Constitution.*

Article 126 of the Constitution, deals with fundamental rights jurisdiction and its exercise and Article 126(3) specifically refers to the applications received by the Court of Appeal and reads thus :

"Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of habeas corpus, *certiorari, prohibition,*

procedendo, mandamus or quo warranto, it appears to such Court that there is *prima facie* evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court."

It is common ground that the appellant preferred his application to the Court of Appeal seeking a mandate in the nature of a writ of habeas corpus directing the respondents who were responsible, for the alleged arrest and the detention of the corpora referred to in the application to produce them before Court.

The 1st and the 4th respondents however were of the view that there was no basis for the Court of Appeal to have referred the application made by the appellant to the Supreme Court. Their position was that, the petition, or the supporting affidavits did not contain any averment or material against any of the respondents cited in the petition. Further it was submitted that, in paragraph (a) to the prayer to the petition, a writ of *habeas corpus* was prayed for with a direction to the responsible respondents to produce the corpora before the Court of Appeal. In support of this position, learned Counsel for the 1st and 4th respondents relied on the decision in *Shanthi Chandrasekeram* v. *D. B. Wijetunga and others(1)* and submitted that, there was no *prima facie* evidence of an infringement of the fundamental rights of the corpora by a party to the said applications for the Court of Appeal to refer the instant application to the Supreme Court.

Learned Counsel for the 1st and 4th respondents, also submitted that, the appellant in his original habeas corpus applications has not raised the question of any violation of fundamental rights and did not do so even in his application for Special Leave to Appeal. Further it was submitted that no allegations based in terms of Articles 11, 13(1), 13(2) or 13(4) were taken up by the appellant at any stage.

Learned Counsel for the 1st and 4th respondents, also took up the position that the appellant had not made the applications within the stipulated time, in terms of Article 126(2) of the Constitution.

Article 126(3) of the Constitution, referred to earlier, does not state that all applications in the nature of obtaining writs from the Court of Appeal be referred to the Supreme Court. Such reference is necessary only if there

is evidence to the effect that there is an infringement or an imminent infringement of fundamental rights. Article 126(3) of the Constitution is quite precise in its position and the said Article states clearly that if it appears to the Court of Appeal, while in the course of hearing an application for orders in the nature of writs of *habeas corpus, certiorari, prohibition, procedendo, mandamus or quo warranto,* that there is ***prima facie evidence of an infringement or an imminent infringement of fundamental rights,*** such matter should forthwith be referred to the Supreme Court for determination. In Shanthi Chandrasekeram's *case (Supra),* in the course of hearing of the habeas corpus applications filed by three petitioners, the Court of Appeal considered that there was *prima facie* evidence of the infringement of Articles 11, 13(1) and 13(2) of the Constitution and made the reference to the Supreme Court. Considering the infringements referred to above, in that case, this Court held that the alleged infringement of Article 11 could not have been the basis of reference under Article 126(3), firstly, because there was only an assertion and no *prima facie* evidence of such infringements, and secondly because there was no averment or evidence that the infringements were by a party to the *habeas corpus* applications. With reference to Articles 13(1) and 13(2), the Supreme Court held that the detainee had been arrested in violation of Article 13(1) and had been detained in violation of Article 13(2).

Accordingly, the notable feature in this provision is that there should be *prima facie* evidence of an infringement or an imminent infringement in the matter before the Court of Appeal. It would also be necessary that there is an averment or evidence that the infringements were by a party to the habeas corpus application. A question arises at this point as to whether it is necessary that the petitioner should bring it to the notice of the Court of Appeal of such an infringement. Article 126(3) does not refer to any such requirement casting the onus on the petitioner to move Court with his application. Instead, what the Article professes is that, if it appears to the Court of Appeal, that there is *prima facie* infringement or an imminent infringement in terms of fundamental rights, then the Court should forthwith refer such matter for determination by the Supreme Court. The burden therefore lies with the Court of Appeal and it would be the duty of the Court to decide, in the course of the hearing of a writ application, as to whether there is an infringement of a fundamental right in relation to the complaint made by the petitioner.

There is one other matter that I wish to state briefly. Learned State Counsel had stated in his written submissions that "if every habeas corpus application, which invariably refers to the arrest and disappearance of a corpus, is to be referred to the Supreme Court in terms of Article 126(3) of the Constitution, it could lead to an abuse of this provision and a mockery of justice".

It is to be borne in mind that, it is not every habeas corpus application that would be referred to the Supreme Court in terms of Article 126(3) of the Constitution. Provision is made in terms of Article 126(3) for the Court of Appeal to refer to the Supreme Court the writ application only when it appears to such Court that there is *prima facie* evidence of an infringement or an imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application. Therefore it would not be correct to say that all habeas corpus applications would invariably be referred to the Supreme Court by the Court of Appeal as such reference should strictly be in terms of Article 126(3) of the Constitution.

In the instant application, the complaint made by the appellant related to the arrest, detention and the subsequent disappearance of the corpora. The appellant, being the father of the corpora, had made a complaint to Civilian Information Office on 21.09.1990 giving information regarding missing persons (P2). In that, the appellant had stated that on 06.07.1990, the Army Officers at Linga Nagar took two of his sons, referred to in his appeal, into custody along with him and several others and later they were taken to the Plantain Point Army Camp at Trincomalee. According to the appellant, he was released with two others around 5.00 p.m. in the evening. The appellant had stated in the information sheet that his sons were not released at any stage and that on inquiring from the Plantain Point Army Camp he was informed that his sons are not in the said Army Camp. The appellant had also sent a letter to His Excellency the President on 21.09.1990 informing His Excellency the disappearance of his sons. In this communiqué (P5) the appellant had described how they were arrested on 06.07.1990. According to him the corpora and the appellant were at home on 06.07.1990 when there was a cordon and search operation around 6.00 a.m. Thereafter they were taken to Palaiyoothu College until the arrival of the Commander. The appellant had stated that the Grama Niladhari of the area had taken down the details of the persons who were so arrested and a copy of that document was given to the Commander. Thereafter the

Army personnel took all of them to the Plantain Point Army Camp. The appellant and two others were released around 5.00 p.m. on the same day, but not the corpora. The appellant had repeated the aforementioned details in a statement made to the Police Station, Trincomalee on 09.12.1992 (P1).

The appellant had cited the Officer-in-Charge of the Army Camp at Plantain Point Trincomalee as the 1st respondent in his appeal. At the time the Rule Nisi was issued on the 1st respondent, requiring him to bring up the bodies of the corpora before the Court of Appeal on 17.05.2001, he had filed an affidavit before the Court of Appeal on 15.05.2001. In that he had averred that he was not the Commanding Officer of the Plantain Point Army Camp during the time material to this application claimed by the Rule Nisi, but only the Officer-in-Charge of the Military Police Section of the said Camp during the said period. In a further affidavit filed on 04.10.2001, Major Channa Etipola averred that, at the time material to this complaint, he was only a Lieutenant attached to the Plantain Point Army Camp and the late Brigadier C. L. Wijeyaratne functioned as the Commanding Officer. He further averred that Plantain Point Army Camp was the Headquarters of the 22nd Brigade of the Sri Lanka Army and that there were two major units at the said Plantain Point Army Camp, namely, the Operational Staff and the Logistic/Administrative Staff and the Military Police Camps had come under the supervision of the latter. He had further averred that as a Military Police Officer he has no authority whatsoever to arrest civilians under any circumstances and hence he had not arrested the corpora referred to in this appeal.

It is clear on the evidence that the corpora were arrested and detained in or around 06.07.1990 at a cordon and search operation. According to the appellant this was carried out by the Plantain Point Army Camp. The 1st respondent denies any knowledge or involvement in such an arrest but admits that he was attached to the Plantain Point Army Camp situated at Trincomalee. He had further submitted that the said camp consisted of the Headquarters of the 22nd Brigade of the Sri Lanka Army, the Operational Unit and the Logistic/Administration Branch. Therefore on an analysis of the material placed before this Court, although the 1st respondent may not be responsible for the arrest and detention of the corpora and/or that he has no knowledge whatsoever with regard to the arrest and detention, there is a possibility in all probabilities that the corpora would have been arrested and detained by officers in one or both of the other units of the said Camp. This

fact is clearly supported by the information given in the complaint made to the Trincomalee Police (P1), complaint made in Colombo to the Civilian Information Office (P2) and in the letter sent to His Excellency the President in September 1990 (P5). It is inconceivable that civilians would have been permitted to stay in the Plantain Point Army Camp without the permission/ knowledge of the Army authorities, especially at the relevant time where hostilities were high. Therefore it is reasonable to conclude that the corpora were kept in the Army Camp with the knowledge and connivance of the Army officers. Hence Army authorities are responsible to account for the whereabouts of the two sons of the appellant. In such circumstances, would it be correct to say that the appellant had no right to move the Court for grant of writ of habeas corpus? The writ of habeas corpus is a writ of remedial nature and is available as a remedy in all cases of wrongful deprivation of personaly liberty. The basis of the writ of habeas corpus is the illegal detention or imprisonment, which is incapable of legal justification and the appellant's complaint involved the liberty of the corpora.

In the instant application, the complaint made by the petitioner related to the arrest, detention and the subsequent disappearance of the corpora. Whilst Articles 13(1) and 13(2) refer to the arrest and detention of a person according to the applicable procedure laid down by law, Article 13(4) of the Constitution states that no person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The aforementioned Articles are contained in Chapter III which deals with fundamental rights and falls within the category which speaks of freedom from arbitrary arrest, detention and punishment and prohibition of retroactive penal legislation.

It is therefore evident that the appellant was complaining of an infringement of the provisions contained in Chapter III of the Constitution. Moreover, it is to be borne in mind that the complaint was against the officers attached to the Plantain Point Army Camp who had carried out the cordon and search operation. Therefore the allegations were made against the State which involved the liberty of the corpora.

According to the appellant, the corpora and others along with him were taken to the Plantain Point Army Camp. Although the appellant and some others were released later, he had not thereafter heard anything about his sons. In fact he had referred to this position in all his communications

regarding the arrest, detention and disappearance of his sons and therefore it was not factually correct for the Court of Appeal to have stated that nearly 6 years after the alleged incident the appellant had at the inquiry whilst giving evidence had stated for the first time that he too was taken into custody. The Court of Appeal had taken the view that the appellant's evidence must fail on the promptness test.

The Chief Magistrate, Colombo who held the inquiry on the reference made by the Court of Appeal, in his report dated 19.11.1996 (P7) has clearly stated that the appellant had submitted that the corpora were arrested by the Plantain Point Army Camp. A witness by the name Titus Jesudasan, had said that he too was taken to the Plantain Point Army Camp and had also stated that the said operation was conducted by one Colonel Tennakoon and that one Ajith Kumara had questioned them at the time of the arrest. The 1st respondent of course has denied any involvement. Based on the evidence of the 1st respondent the learned Chief Magistrate had come to the finding that 1st to 3rd respondents are not responsible for the disappearance of the corpora.

Considering the evidence of Titus Jesudasan referred to by the learned Chief Magistrate, Colombo in his report, I am of the view that the said witness has corroborated the position taken up by the appellant.

In the light of the above position, it is abundantly clear that the appellant's main ground was that of the disappearance of his sons. Considering the totality of the circumstances of this appeal, the only inference that could be drawn is that both of them must have met an unnatural death. *Prima facie* such deaths would have to be taken as offences of murder and the important fact would be not to cast any aspersions on as to who had committed the crime, but as a first step to come to the conclusion that the corpora are not alive and that they have met unnatural deaths. In fact in *Sebastian M. Hongray* v. *Union of India*[2] where a writ of habeas corpus was issued to produce C. Daniel and C. Paul who were taken to Phungrei Camp by the Jawans of 21st Sikh Regiment, Desai J. referring to the persons who were missing stated that,

> "*Prima facie*, it would be an offence of murder ..... It is not necessary to start casting a doubt on anyone or any particular person. But *prima facie* there is material on record to reach an affirmative conclusion that both Shri C. Daniel and Shri C. Paul are not alive and have met an unnatural death."

In the aforesaid circumstances it is beyond doubt that at the time the Court of Appeal made the order, there was *prima facie* evidence of an infringement of the fundamental rights of the corpora at least in terms of Article 13(4) of the Constitution caused by some State Officers. Article 13(4) of the Constitution does not deal directly with right to life, but states that,

> "No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person pending investigation or trial shall not constitute punishment."

Considering the contents of Article 13(4), this Court has taken the position that no person should be punished with death or imprisonment except by an order of a competent court. Further, it has been decided in *Kotabadu Durage Sriyani Silva* v. *Chanaka Iddamalgoda (3) and 4* and in *Rani Fernando's* case[5] that if there is no order from Court no person should be punished with death and unless and otherwise such an order is made by a competent court, any person has a right to live. Accordingly Article 13(4) of the Constitution has been interpreted to mean that a person has a right to live unless a competent court orders otherwise.

In such circumstances it was apparent that there was an alleged violation of Article 13(4) of the Constitution.

Therefore, for the reasons aforementioned, I hold that the Court of Appeal should have referred the entire matter for determination by the Supreme Court in terms of Article 126(3) of the Constitution.

2. *Whether the 1st respondent and/or the State are liable for the arrest and the subsequent presumed death of the corpus*

The appellant stated that his sons were taken into custody on 06.07.1990 by the Plantain Point Army in the course of a cordon and search operation. According to the appellant after the arrest, his sons were detained in the Plantain Point Army Camp and since then he has not received any information of his sons.

Learned Counsel for the 1st respondent made several submissions to indicate that the 1st respondent is not responsible for the alleged disappearance of the corpora and that the appeal should be dismissed.

In support of his submissions, learned Counsel for the 1st respondent has relied upon the following positions :

(a) The appellant in his original application for the writ of habeas corpus did not take up the question of violation of his fundamental rights in terms of Article 13(4) of the Constitution ; and

(b) The appellant has not made the complaint within the stipulated time limit of one month from the disappearance of his children. ;

(a) *The appellant in his original application for the writ of habeas corpus did not take up the question of violation of his fundamental rights in terms of Article 13(4) of the Constitution ;*

The appellant, it is to be borne in mind, preferred an application for a writ of habeas corpus to the Court of Appeal, on the basis of the arrest, detention and the subsequent disappearance of his two children. The appellant therefore did not come before the Court of Appeal and later to the Supreme Court on the basis of an infringement of Article 13(4) of the Constitution. Whilst the appellant's chief and only contention was on his application for a writ of habeas corpus, it was this Court which had granted leave on the question of an infringement in terms of Article 13(4) of the Constitution. The Supreme Court has the jurisdiction to look into such a question in terms of Article 126(3) of the Constitution. In terms of Article 126(3), it is obvious that the purpose of that Article was to prevent persons from filing different applications in the Supreme Court and the Court of Appeal on the same transaction. Referring to the purpose of the provisions in Article 126, Justice Mark Fernando, in *Shanthi Chandrasekeram* v. *D. B. Wijetunga and others (Supra)* stated that,

"Since those provisions do not permit the joinder of such claims, the aggrieved party would have to institute two different proceedings, in two different courts, in respect of virtually identical 'causes of action' arising from the same transaction unless there is express provision permitting joinder. The prevention in such circumstances, of a multiplicity of suits (with their known concomitant) is the object of Article 126(3)."

It would therefore not be correct for the 1st respondent to take up the position that, as the appellant has not taken up the infringement of Article 13(4) at the initial stage, that now he cannot urge such violation before the Supreme Court. In fact, it is also to be borne in mind that, the appellant could not have combined a violation of Article 13(4) with an application for a writ of habeas corpus in the Court of Appeal and in the event he had proposed for an application in terms of Article 13(4) of the Constitution, he should have made the application to the Supreme Court and not to the Court of Appeal and in any event, the sole purpose of Article 126(3) of the Constitution is to avoid such multiplicity of actions and therefore the 1st respondent cannot now take up the position that the appellant has failed to urge the infringement in terms of Article 13(4) of the Constitution. On a careful consideration of the provisions of Article 126(3), I hold that, it is the duty of the Court of Appeal to decide whether there is *prima facie* evidence of an infringement or an imminent infringement of the provisions of the Articles contained in the Chapter on fundamental rights of the Constitution and if so to refer such matter for determination by the Supreme Court. In such circumstances, there is no requirement or a need for the appellant to take up the question of an infringement of Article 13(4) of the Constitution in his application for a writ of habeas corpus in the Court of Appeal.

(b) *The appellant has not made the complaint within the stipulated time limit of one month from the disappearance of his children.*

Learned Counsel for the 1st respondent submitted that, there was no basis on which the Court of Appeal could have referred the appellant's application in terms of Article 126(3) of the Constitution as he has not complained within one month since the alleged incident as stipulated in Article 126(2) of the Constitution. His position is that the appellant's children were alleged to have been removed from their residence and were taken to Plantain Point Army Camp in June or July 1990, whereas his application praying for mandates in the nature of writs of habeas corpus were filed only in June 1994.

Learned Counsel for the 1st respondent considered that, in a long line of cases, the Supreme Court has consistently held that the time limit of one month stipulated in Article 126(2) of the Constitution is mandatory. He took up the view that the intention of the legislature with regard to the mandatory time limit specified in Article 126(2) of the Constitution is re-emphasized in section 13(1) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996 which states that,

"When a complaint is made by an aggrieved party in terms of section 14 to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the Commission shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution."

Learned Counsel for the 1st respondent also drew our attention to the decision in *Shanthi Chandrasekeram* v. *D. B. Wijetunga and others (Supra)* where he submitted that, the detainees were arrested on or about 03.07.1991 and that the applications praying for the writs of habeas corpus were filed in August 1991.

Admittedly, the corpora were taken into custody in July 1990 and the appellant had come before the Court of Appeal only in June 1994. The appellant had stated in his petition that he had made inquiries and had searched for his sons with government and non governmental organizations (P1-P5).

Habeas corpus, unlike other prerogative orders still remains as a writ. It is not discretionary and therefore it cannot be denied because there may be some alternative remedy. As pointed out by Wade *(Administrative Law,* 9th Edition, 2004, pg. 594).

"The writ may be applied for by any prisoner, or by anyone acting on his behalf, without regard to nationality, since 'every person within the jurisdiction enjoys the equal protection of our laws'. It may be directed against the gaoler, often the appropriate prison governor, or against the authority ordering the detention, e.g. the Home Secretary. It is not discretionary, and it cannot therefore be denied because there may be some alternative remedy. **There is no time limit.** The defence will not always be statutory."

It is also to be borne in mind that the writ of habeas corpus potentially has a very wide scope as it is directly linked to the liberty of citizens. Blackstone referring to the writ of habeas corpus, had stated that, *(Commentaries,* BK III, 12th Edition, 1794, pg. 131):

"the king is **at all times entitled to have an account,** why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted."

Although the learned Counsel for the 1st respondent had referred to the provision in Article 126(2) of the Constitution, the appellant had not moved the Court in terms of that provision. It is this Court which had granted Special Leave to Appeal to consider the question of any violation in respect of Article 13(4) of the Constitution. Therefore it would not be correct to say that the appellant had to strictly adhere to the mandatory time limit stipulated in Article 126(2). The application made by the appellant was on the basis of obtaining a writ of habeas corpus and was not in terms of the fundamental rights jurisdiction of the Supreme Court. Although I am in complete agreement that a long line of cases of this Court had decided that an application on the basis of obtaining relief in terms of any infringement or imminent infringement of his fundamental rights will have to be filed within 30 days of the alleged infringement, subject to a few exceptions, it is my view that this condition does not apply to the appellant in this case as he had moved the Court of Appeal on an entirely a different premise. In such circumstances it would not be relevant to consider the application of Article 126 in relation to the time bar with regard to this appeal.

The next question that has to be gone into is whether the 1st respondent and or the State are liable for the arrest and the subsequent presumed death of the corpora.

The appellant's position was that in or around 06.07.1990, two of his sons were taken into custody by the Army Officers attached to the Plantain Point Army Camp. The appellant had made a complaint to the Trincomalee Police on 09.12.1992 about the said arrest. In the said complaint and in the subsequent complaints made by the appellant with regard to the arrest of his sons he had mentioned that his sons were arrested by the officers attached to Plantain Point Army Camp. However, the appellant had made no direct allegation against the 1st respondent to the effect that he and he alone is responsible for the arrest of his sons. The appellant's contention was that the corpora were arrested by the officials of the Plantain Point Army Camp and they were last seen at the said Camp. This position was substantiated by witness Jesudasan who was also arrested at the time the corpora were arrested, but released after a few days of the arrest.

Habeas corpus could be applied for and granted in many occasions such as when there is an excessive delay in bringing a prisoner up for trial (*R* v *Brixton Prison Governor, ex-parte Walsh*[6]) or in executing an order for his deportation (*R* v *Durham Prison Governor, ex-parte Hardial Singh*[7]). However, it is to borne in mind that the writ has served and has a remarkable reputation as a bulwark of personal liberty although it has failed to measure upto the standards of the European Convention on Human Rights (Wade, *Administrative Law,* 9th Edition pg. 596).

In such circumstances the question arises as to the burden of proof in habeas corpus cases. Considering this question Wade *(Supra)* is of the view that it is the responsibility of the detaining authority to give positive evidence of the circumstances. As pointed out by Wade *(Supra at* pgs. 294–295):

> "In cases of habeas corpus there is a principle which 'is one of the pillars of liberty', that in English Law every imprisonment is *prima facie* unlawful and that it is for a person directing imprisonment to justify his act.
>
> Accordingly the detaining authority must be able to give positive evidence that it has fulfilled every legal condition expressly required by statement, even in the absence of contrary evidence from the prisoner ..... This rule is indeed an example of the principle stated at the outset, since unjustified detention is trespass to the person. It is particularly important that the principle should be preserved where personal liberty is at stake".

The existence of the Plantain Point Army Camp is not disputed by the 1st and 4th respondents and the appellant as well as witness Jesudasan refers to the cordon and search operation conducted by the said Army Camp.

Although the 1st respondent denies his involvement with such an operation, he himself has stated that Plantain Point Army Camp was the Headquarters of the 22nd Brigade of the Sri Lanka Army and moreover that there were two major units at the said camp which consisted of the branches dealing with the operations and administration of the area. The Military Police Camps had come under the supervision of the latter. He has also admitted that he had no authority to arrest civilians under any circumstances and that there were other high ranking officers in charge of

the Army Camp. All the documents filed by the appellant give a clear indication that he had been referring to the Plantain Point Army Camp as the place from which the cordon and search operation was conducted, the arrests made and was the place where the corpora as well as the appellant (for a short period) were detained. As has been pointed out earlier, it is reasonable to conclude that corpora were kept in the Army Camp with the knowledge and the connivance of the Army officers. In such circumstances, it was the duty of the Commanding Officer who had the authority to arrest and detain, to discharge the burden as to what took place on or about 03.07.1991. As pointed out by Wade, one cannot ignore the cardinal principle laid down in English Law with regard to habeas corpus applications that every imprisonment is *prima facie* unlawful and that it is for a person directing imprisonment to justify his act. Since there is no evidence against the 1st respondent I cast no liability on him, but I hold that the State is responsible for the disappearance of the corpora while they were in detention at the Army Camp and the subsequent presumed death.

For the aforementioned reasons, I answer both questions raised by this Court at the time Special Leave to Appeal was granted in the affirmative. The appeal is allowed and the judgment of the Court of Appeal dated 01.07.2003 is set aside.

On a consideration of the circumstances referred to above, this Court must consider the kind of relief that should be granted to the appellant. In a similar situation, Desai J. in *Sebastian M. Hongray* v *Union of India (Supra)* had held that exemplary costs from the respondents are permissible in such cases. As we have held that the 1st respondent is not personally responsible, there cannot be any exemplary costs payable to the appellant. However, as has been referred to earlier, the Commanding Officer has the authority to arrest and to detain and was in overall charge of such operations. In the circumstances, the State is responsible for the infringement of the fundamental rights of the corpora governed in terms of Article 13(4) of the Constitution, which rights have accrued to and/or devolved upon the appellant. It is to be borne in mind that respect for the rights of individuals is the true bastion of democracy and State has to take steps to redress the infringement caused by its officers to the corpora. I therefore direct the State to pay a sum of Rs. 150,000 each for the two sons of the appellant, who had disappeared in detention as compensation and costs.

Thus Rs. 300,000, being the total amount to be paid to the appellant within 3 months from today.

UDALAGAMA, J. — I agree.

FERNANDO, J. — I agree.

Relief granted.