

**KARUNATHILAKE
VS
LIYANAGE, INSPECTOR OF POLICE (CRIMES), GAMPAHA AND
OTHERS**

COURT OF APPEAL
BALAPATABENDI, J. AND
WIMALACHANDRA, J.
HCA14/2001
FEBRUARY, 28 AND
MARCH 18, 2005

Writ of habeas corpus - Constitution, Articles 11, 13(1) 13(2), 126, 126(1) and 126(3) - Prima facie evidence of infringement of a fundamental right - Duty of Court of Appeal - Reference to Supreme Court - When - How ?

The petitioner had sought a writ of habeas corpus stating that her son, the 8th respondent was arrested by the Police on 30.04.2001, at Katugastota and was taken to the Nittambuwa Police Station. Thereafter he was taken to Weerangula Police Station, where he had been badly assaulted in connection with the murder of a Customs Officer. The plaintiff contended that as there was *prima facie* evidence of an infringement or imminent infringement of a fundamental right the matter should be referred to the Supreme Court to determine that matter.

Held

- (i) Article 126(1) confers sole and exclusive jurisdiction in respect of infringement of fundamental rights by executive or administrative action on the Supreme Court. Article 126(2) provides how the jurisdiction may be invoked. Article 126(3) is not an extension of or exception to those provisions.
- (ii) In the instant habeas corpus application the petitioner sought relief under Article 126(3) after 49 days of the alleged arrest/detention.
- (iii) The Supreme Court is vested with jurisdiction to hear and determine the question of any violation only if the time prescribed in Article 126(2) is complied with.
- (iv) If the petitioner failed to comply with Article 126(2) the petitioner cannot seek relief or redress under Article 126(3) in the writ of habeas corpus application filed in the Court of Appeal.

- (v) Reference could be made in terms of Article 126(3) only if two conditions specified in the Sub - Articles are satisfied viz: (i) There should be a hearing of the application in the Court of Appeal (ii) in the course of such hearing the Court of Appeal should find that there is *prima facie* evidence of an infringement or imminent infringement of a fundamental right by a party to such application.

APPLICATION for a writ of habeas corpus.

Cases referred to :

1. *Shanthi Chandrasekeram vs D.B. Wijetunga* - (1992) 2 Sri LR 293
2. *K.W.C. Perera vs Prof. Daya Edirisinghe* - (1995) 1 Sri LR 148
3. *Kanamani Krishnapillai vs OIC Pettah* - SC (Sp) writ 01/2001

Manohara R. de Silva for petitioner.

S.K. Wickramarachchi, State Counsel, for respondents

Cur. adv. vult.

May 26, 2005

JAGATH BALAPATABENDI, J.

The Petitioner had sought a writ of Habeas Corpus by the petition dated 19th June 2001 stating that, her son the 8th respondent, the corpus (A.D. Priyantha) was arrested by Gampaha Police on 30.04.2001 at Katugastota and was taken to Nittambuwa Police. While he was in the custody of Nittambuwa Police he was taken to Weerangula Police on 26.05.2005, where he was badly assaulted with clubs by 1st to 5th in Respondents in connection with the murder of a customs officer. Later, on 10.06.2001 he was taken to Gampaha Police Station. She states that Nittambuwa Police and Weerangula Police fall within the Gampaha Police Division. Further she states that her son the corpus was not given any medical treatment for his injuries, and was not produced before a Magistrate by the 1st to 5th respondents up to date. Thus, she alleged that her son's arrest and detention was wrongful, illegal and the violent acts of the 1st to 5th respondents were tantamount to a violation of his fundamental right guaranteed under Articles 11, 13(1), 13(2) of the Constitution; hence had prayed for the reliefs mentioned in the prayer to the petition.

The 5th respondent(D.W. Prapathasinghe, Deputy Inspector General of Police) in his affidavits dated 31st August 2002 and 17th February 2003 had admitted that the corpus was arrested on 30.04.2001 at Katugastota only after informing him the reasons for such arrest, and detained him on detention orders issued by the Deputy Inspector General of Police. Subsequently on 04.07.2001 he was produced before the Magistrate of Colombo as a suspect in case No. B./1619/5. Later, he was discharged on the advice of the Attorney-General. Further, he had stated, to prove the validity and legality of the detention of the corpus, the detention orders issued in respect of the corpus under Regulations 19(2) of the emergency regulations had been marked and produced as XI, X2, X3. (supported by an affidavit of the 5th Respondent), covering the period of detention of the corpus from 01.05.2001 to 14.07.2001.

When the above mentioned matters were brought to light the counsel for the Petitioner informed Court that he confines the reliefs asked only to the paragraph (d) of the prayer to the petition *viz* :- " to refer this matter to the Supreme Court under Article 126(3) of the Constitution. Probably for the reason that the Petitioner was unable to proceed with the Habeas Corpus application in the circumstances mentioned above.

Before dealing with the Article 126(3) of the Constitution, I would like to refer to the Articles 126(1) and 126(2) of the Constitution. Article 126(1) states as follows :- The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.

Article 126(2) states as follows :- Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, **within one month thereof**, in accordance with such rules of Court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges.

Article 126(3) states as follows :- 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.

In support of his contention the Counsel for the Petitioner has cited the decision of the Supreme Court in *Shanthi Chandrasekeram vs D.B. Wijetunga*⁽¹⁾ :- In this case it was held that "Article 126(1) confers sole and exclusive jurisdiction in respect of infringement of fundamental rights and 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. On the other hand, there could be transaction or situations in which, on virtually the same facts and grounds, a person appears entitled to claim relief from the Court of Appeal through a writ application under Articles 140 or 141 and, from this Court by a fundamental rights application under Article 126. 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), and also the decision of the Supreme Court in *K.W.C. Perera Vs. Prof. Daya Edirisinghe*⁽²⁾ held that :- The fact that by entrenching the fundamental rights in the Constitution the scope of the writs has become enlarged is implicit in Article 126(3), which recognizes that a claim for relief by way of writ may also involve an allegation of the infringement of a fundamental right. While learned Senior State Counsel is correct in suggesting that the appellant may have sought redress under Article 126(2), she was also entitled to apply to the Court of Appeal for certiorari and mandamus, and when it appeared that there was, *prima facie*, an infringement of a fundamental right, the whole matter could have been referred to this Court under Article 126(3).

It is pertinent to note that, Article 126(1) confers sole and exclusive jurisdiction in respect of infringement of fundamental rights and Article 126(2) prescribes how that jurisdiction may be invoked. Article 126(3) is not an extension of or exception to those provisions (vide *Shanthi Chandrasekaram Vs D.B. Wijetunga*, (*supra*)).

In the instant habeas corpus application the Petitioner sought relief under Article of 126(3) of the Constitution **after 49 days of alleged arrest** and detention. Under Articles 126(1) and 126(2) of the Constitution the Supreme Court is vested with the jurisdiction to hear and determine the question of infringement of fundamental rights of the Petitioner only if the time prescribed in Article 126(2) is complied with.

If the Petitioner failed to comply with the required time limit of one month as stipulated in Article 126(2) of the Constitution, it is my opinion that the Petitioner cannot seek relief or redress under Article 126(3) of the Constitution, in the writ of habeas corpus application filed in this Court.

The other point to be considered is in the instant case **there was no hearing of the writ of habeas corpus application of the Petitioner by this Court**, as the Petitioner did not proceed with the habeas corpus application. Further the allegation of assaulting the corpus with clubs by the 1st to 5th respondents have not been supported by a report of a medical officer or by any other means as to the injuries.

The only Medico-Legal report (R3) dated 04.07.2001 in respect of the corpus filed by the Respondents does not indicate any injuries on the corpus.

In the case of *Kunamani Krishnapillai Vs. O.I.C. Pettah*⁽³⁾ S.N. Silva, C.J. observed as follows :- " We note that a reference could be made in terms of Article 126(3) of the Constitution only if two conditions specified in the sub articles are satisfied, they are :-

- 1) There should be a hearing of the application in the Court of Appeal
- 2) In the course of such hearing, the Court of Appeal should find that there is *prima facie* evidence of an infringement or imminent infringement of a fundamental right" by a party to such application."

Thus we are of the opinion that the petitioner had failed to establish with prima facie evidence that the assault of the corpus with clubs by the 1st to 5th respondents, and there had been an infringement of his rights under Articles 11, 13(1) and 13(2) of the Constitution.

For the reasons mentioned above, we refuse the application of the petitioner to refer this matter to the Supreme Court under Article 126(3) of the Constitution.

WIMALACHANDRA, J. — I agree.

Application dismissed.
