THE USE OF WRIT OF HABEAS CORPUS UNDER THE MALAYSIAN CONSTITUTION

BY

NOR ADIBAH BT. ABD. RAHIM

Submitted In Partial Fulfilment
of the requirements for the
Diploma In Law
at the School of Law
MARA Institute of Technology
Shah Alam
SELANGOR

May, 1986

PREFACE

The aim of this Project Paper is to determine the general trend of the courts in Malaysia in issuing the writ of habeas corpus. This includes the study of the principles used by the courts in determining when a detained person is entitle to the writ of habeas corpus.

This paper also includes a study of approaches used by the courts in Malaysia compared to that used by courts in United Kingdom and India.

This Project Paper is based on the Article 5(1)and 5(2) of the Federal Constitution for the discussion of substantive right and Criminal Procedure Code (F.M.S. Chap. 6) for the procedural law in the issue of the writ of habeas corpus. The principles used by the courts in deciding on whether the writ of habeas corpus should be issued was based on decided cases.

The law here is as it stands on 31 st. May 1986.

Nor Adibah Abd. Rahim

May, 1986

B. THE SUBSTANTIVE RIGHT UNDER ARTICLE 5(1) AND ARTICLE 5(2) OF THE FEDERAL CONSTITUTION.

In Malaysia, the writ of habeas corpus is a right given by the Constitution under Article 5(1) which states that :

> " No person shall be deprived of his life or personal liberty save in accordance with the law."

Article 5(2) further provides a situation where a person may be ' deprived of his life and personal liberty '; that is when he is unlawfully detained. Article 5(2) also imposes a duty on the court to inquire and determine relevant issue where a complaint was made alleging unlawful detention.

Since it is a right given by the Constitution, any person who is illegally detained is entitled to the writ as was stated in the Yeap Hock Seng's case[1] that :

> " Habeas Corpus is a high prerogative writ of summary character for the enforcement of this cherished civil right of personal liberty and entitles the subject of detention to a judicial determination that the administrative order adduced as warrant for the detention is legally valid... "

Therefore, as long as the detainee in unlawfully detained, court have no discretion in granting the writ. The duty imposed on the court is mandatory in nature. Article 5(2) of the Constitution states that the court ' shall ' investigate into the matter if a complaint is made to the court that a person is illegally detained.

C. THE PROCEDURAL LAW AS TO WRIT OF HABEAS CORPUS.

Powers to grant writ of habeas corpus is conferred on the High Court by Section 365 of the Criminal Procedure Code (F.M.S. Chap. 6). Therefore any application for writ of habeas corpus should be forwarded to the High Court under Section 365 of the Criminal Procedure Code. (C.P.C.)

The power conferred on the High Court to free a person in detention is subject to certain conditions; that is when the applicant is detained in any prison within the limits of the Federation on a warrant of extradition or the applicant is alleged to be illegally or improperly detained within the limits of the Federation. These two conditions were mentioned in Section 365(i) of the C.P.C.

Another situation in which writ of habeas corpus may be issued is where the defendant is in custody under a writ of attachment. This is mentioned in Section 365(ii) of the C.P.C., and applies to case which is not purely criminal.

The procedure to issue writ of habeas corpus under Section 365 (ii) of the C.P.C. is laid down in Section 369 and Section 370 of the C.P.C. Section 369 of the C.P.C. requires the officer in charge of a defendant in custody shall bring the defendant to court as soon as possible after the arrest. This is to enable the court to determine the validity of the arrest. If such a requirement is not complied with, then the court is required to order the defendant be brought before it by was of a warrant addressed to the detaining

authority. The warrant is to be made and signed by the Registrar and sealed with the seal of the court.

In the case of a person alleged to be illegally detained or a person detained on a warrant of extradition, Section 366 of the C.P.C. requires the application to be supported by affidavit. Three factors need to be shown by the applicant in the affidavit:

1- The place where he is detained,

2- By whom is he detained and

3- The facts relating to such detention.

However, the third requirement is not absolute since Section 366 of the C.P.C. states that the facts to be mentioned is only ' as far as they are known ' to the applicant. It may be inferred that the ' facts ' refers to facts which are relevant to the detention which might be able to support the applicant's contention that he is illegally or improperly detained. Therefore from such facts the applicant should be able to show the court that there is probable ground to suppose that he is illegally detained.

The affidavit supportung the application is required by Section 367 of the C.P.C. to be made by the person detained himself. However, there is an exception to the general rule which says that " some other person " shall make the affidavit on behalf of the detainee if he is unable to make the affidavit himself.