

**IN THE HIGH COURT FOR ZAMBIA**

**2017/HP/1378**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**IN THE MATTER OF: ORDER 54 RULES 1, 2 AND 4 OF THE RULES OF THE SUPREME COURT OF ENGLAND (WHITE BOOK) 1999 EDITION**

**IN THE MATTER OF: PART III OF THE CONSTITUTION OF ZAMBIA CHAPTER 1 OF THE LAWS OF ZAMBIA FOR THE PROTECTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL**

**IN THE MATTER OF: ARTICLES 13, 15 AND 18 OF THE CONSTITUTION OF ZAMBIA CHAPTER 1 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: SECTION 33 OF THE CRIMINAL PROCEDURE CODE ACT CHAPTER 88 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: AN APPLICATION FOR A WRIT OF *HABEAS CORPUS AD SUBJICIENDUM***

**BETWEEN:**

JAFFARY ABDUL

**APPLICANT**

**AND**

THE ATTORNEY GENERAL

**RESPONDENT**

**BEFORE THE HON. MADAM JUSTICE P. K. YANGAILO ON 14<sup>TH</sup>  
AND 18<sup>TH</sup> DAY OF SEPTEMBER, 2017.**

*For the Applicant: Ms. M. Mushipe - Mesdames Mushipe & Associates*

*For Respondent: Mrs. N. S. Nchito - Attorney General's Chambers*

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**JUDGMENT**

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**LEGISLATION AND OTHER WORKS REFERRED TO:**

1. *The Penal Code, Chapter 87 of the Laws of Zambia;*
2. *The Rules of the Supreme Court (White Book) 1999 Edition;*
3. *The Constitution, Chapter 1 of the Laws of Zambia;*
4. *The Criminal Procedure Code, Chapter 88 of the Laws of Zambia; and*
5. *The Preservation of Public Security Act, Statutory Instrument No. 55 of 2017.*

This is an application for Writ of *Habeas Corpus* by the Applicant Jaffary Abdul. The application is supported by an Affidavit sworn by the Applicant Jaffary Abdul. The Applicant was represented at the hearing by his Learned Counsel Ms. Mushipe. The record shows that the Respondent was served with the process on 1<sup>st</sup> September, 2017. There was no Affidavit in Opposition filed herein.

The circumstances leading to this application, as set out in the Applicant's Affidavit, are that the Applicant was a prisoner detained at Lusaka Correctional Prison serving a sentence of seventeen (17) years, having been convicted for an offence and on 31<sup>st</sup> July, 2017, as he was walking out of the Lusaka Correctional Prison after having served the said sentence of 17 years, he was arrested. Upon being arrested, he was taken to Ridgeway Police Post where he was

subsequently charged with the offence of conspiracy to commit a felony contrary to **Section 394** of **The Penal Code**<sup>1</sup>. The said **Section 394** of **The Penal Code**<sup>1</sup> provides that: -

***Conspiracy to commit felony***

***Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Zambia would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to such lesser punishment.***

The Applicant averred in his Affidavit in Support of the application that since his arrest, detention and the purported charge, he has not been presented before a Court of law to answer to the charge levelled against him. He also averred that his plea to apply for Police Bond has proved futile as all the attempts to that effect have been ignored and denied despite having competent sureties. He further averred that his continued detention is unjustified, unlawful as it is unconstitutional in that his fundamental and constitutional guaranteed rights to freedom and liberty are being blatantly violated and unfairly prejudiced.

At the scheduled hearing on 14<sup>th</sup> September, 2017, both parties' Advocates were in attendance. Learned Counsel for the Applicant Ms. Mushipe made the application and relied on the Affidavit in Support together with the skeleton arguments. She referred the

Court to **Order 54 Rule 1, 2 and 4 (1)** of **The Rules of the Supreme Court<sup>2</sup>**, which provide that: -

***Rule 1 - Application for writ of habeas corpus ad subjiciendum***

- (1) ***Subject to rule 11, an application for a writ of habeas corpus ad subjiciendum shall be made to a judge in Court, except that -***
  - (a) ***it shall be made to a Divisional Court of the Queen's Bench Division if the Court so directs;***
  - (b) ***it may be made to a judge otherwise than in court at any time when no judge is sitting in court; and***
  - (c) ***any application on behalf of a minor must be made in the first instance to a judge otherwise than in court.***
- (2) ***An application for such writ may be made ex parte and, subject to paragraph (3) must be supported by an affidavit by the person restrained showing that it is made at his instance and setting out the nature of the restraint.***
- (3) ***Where the person restrained is unable for any reason to make the affidavit required by paragraph (2) the affidavit may be made by some other person on his behalf and that affidavit must state that the person restrained is unable to make the affidavit himself and for what reason.***

***Rule 2 - Power of Court to whom ex parte application made***

- (1) *The Court or judge to whom an application under rule 1 is made ex parte may make an order forthwith for the writ to issue, or may -*
  - (a) *where the application is made to a judge otherwise than in court, direct that an originating summons for the writ be issued, or that an application therefor be made by originating motion to a Divisional Court or to a judge in court;*
  - (b) *where the application is made to a judge in court, adjourn the application so that notice thereof may be given, or direct that an application be made by originating motion to a Divisional Court;*
  - (c) *where the application is made to a Divisional Court, adjourn the application so that notice thereof may be given.*
- (2) *The summons or notice of the motion must be served on the person against whom the issue of the writ is sought and on such other persons as the Court or judge may direct, and, unless the Court or judge otherwise directs, there must be at least 8 clear days between the service of the summons or notice and the date named therein for the hearing of the application.*

***Rule 4 - Power to order release of person restrained***

- (1) *Without prejudice to rule 2 (1), the Court or judge hearing an application for a writ of habeas corpus ad subjiciendum may in its or his discretion order that the*

*person restrained be released, and such order shall be a sufficient warrant to any governor of a prison, constable or other person for the release of the person under restraint.*

Ms. Mushipe also referred this Court to **Article 13 (3)** of **The Constitution**<sup>3</sup>, which provides that: -

***Protection of right to personal liberty***

***(3) Any person who is arrested or detained-***

***(a) for the purpose of bringing him before a court in execution of an order of a court; or***

***(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia;***

***and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained under paragraph (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.***

I was further referred to **Section 33** of **The Criminal Procedure Code**<sup>4</sup>, which provides that: -

***Detention of persons arrested without warrant***

***(1) When any person has been taken into custody without a warrant for an offence other than an offence punishable with***

*death, the officer in charge of the police station to which such person shall be brought may, in any case, and shall, if it does not appear practicable to bring such person before an appropriate competent court within twenty-four hours after he was so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person, on his executing a bond, with or without sureties, for a reasonable amount, to appear before a competent court at a time and place to be named in the bond: but, where any person is retained in custody, he shall be brought before a competent court as soon as practicable. Notwithstanding anything contained in this section, an officer in charge of a police station may release a person arrested on suspicion on a charge of committing any offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge.*

- (2) *In this section, "competent court" means any court having jurisdiction to try or hold a preliminary inquiry into the offence for which the person has been taken into custody.*

Ms. Mushipe submitted that the Applicant has spent a total of 45 days in the said Police Post without being brought before a Court of law and thus she contends that the detention is unlawful, unjustified and unconstitutional. She further contends that the continued detention is unjustified in that the Applicant has not been formally charged or warned and cautioned for any purported offence, although the Occurrence Book (OB) shows that an entry for the offence of conspiracy to commit a felony was entered against the Applicant, which offence is bailable. She also submitted that it is

surprising that a person who has been incarcerated for a period of 17 years would commit an offence such as the one entered in the OB, before walking out of prison. Based on the authorities cited above and her submissions, Ms. Mushipe beseeched the Court to grant an Order releasing the Applicant forthwith.

In response, Learned Counsel for the Respondent, Mrs. Nchito submitted that in the pursuit of getting instructions from its client, the Respondent discovered that the Applicant is a foreign national from Tanzania who was convicted of the offence of aggravated robbery and sentenced to twenty (20) years imprisonment, which sentence he has since served. That being a foreigner, he is supposed to be removed from Zambia upon serving the sentence and when he was arrested, he was actually supposed to be deported. She further submitted that the Respondent has not been availed with any instructions in relation to Applicant's continued detention and in light of that, she urged the Court to proceed with the Applicant's application for *Habeas Corpus* on its merits.

In reply, Ms. Mushipe submitted that on 31<sup>st</sup> July, 2017 immigration officers had gone to pick up the Applicant from the prison and that the Applicant actually intended to leave the country of his own accord. She further submitted that the Respondent had conceded to this application for *Habeas Corpus* and as such, it was her humble plea that the Applicant be released forthwith, unconditionally with costs.

I have considered the application for Writ of *Habeas Corpus*, the Affidavit evidence of the Applicant herein, the authorities and the submissions by Learned Counsel for both parties, for which I am grateful.

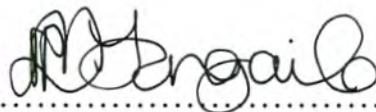
The Respondent has not filed any Affidavit in Opposition. The only evidence before this Court is the Applicant's Affidavit. The Learned State Advocate Mrs. Nchito has submitted that the Respondent has not been availed with any instructions as to how to proceed and in light of this, Mrs. Nchito urged the Court to proceed with the Applicant's application for *Habeas Corpus* on its merits. It thus appears that the State has no objection to the application.

The Applicant was arrested on 31<sup>st</sup> July, 2017, upon being released from Lusaka Correctional Prison where he had served a sentence of 17 years. According to Ms. Mushipe, the Applicant has not been charged or warned and cautioned, although the OB shows that he was charged with the offence of conspiracy to commit a felony contrary to **Section 394** of **The Penal Code**<sup>1</sup>. Further, he has not been brought before the Courts of law to answer to the purported charges levelled against him. Accordingly, he has now been in custody for a period of forty-five (45) days. The State having for that period failed to bring him for trial, he is seeking a Writ of *Habeas Corpus* and to be released from custody forthwith. My understanding of the Applicant's case is that the continued detention is not only unlawful but is unjustifiable and that it is only

fair and just that an order for a Writ of *Habeas Corpus* be issued forthwith unconditionally.

From the authorities that I have been referred to, it is quite clear that a person detained must be brought before Court within a specific period. There being no opposition raised by the Respondent and no evidence to the contrary, I accept the Applicant's Affidavit that he has not been brought before the Court for trial on the charge levelled against him and that his continued detention is unlawful, unjustified and unconstitutional. In the circumstances, I hereby grant to the Applicant an order of a Writ of *Habeas Corpus* directed to the Respondent to release the Applicant forthwith. I further order that the costs are for the Applicant, to be taxed in default of agreement.

**Delivered the 18<sup>th</sup> day of September, 2017.**



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**P. K. YANGAILO**  
**HIGH COURT JUDGE**