SELECTED JUDGMENT NO. 45 OF 2017

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IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 23/2015**

HOLDEN AT NDOLA **SCZ/88/318/2014**

(Civil Jurisdiction)

In the matter of: **Order 54, Supreme Court Rules, 1999; and**

In the matter of: **An application for writ of Habeas Corpus ad subjiciendum;**

BETWEEN:

JOAN ANDRIES **APPELLANT**

AND

THE ATTORNEY-GENERAL **RESPONDENT**

Coram: **Phiri, Wood, Malila, Kaoma and Mutuna, JJS.**

On 5th September 2017 and 11th September 2017

For the Appellant : **Not in attendance**

For the Respondent : **Mr. F. Imasiku, Principal State Advocate, Attorney General's chambers**

JUDGMENT

Mutuna, JS.delivered the majority Judgment of the Court.

Cases referred to:

1) **R v Secretary of State for the Home Department, ex-parte Iqbal (1979) 1 ALL ER 675**
2) **Callachand v. State of Mauritius (2008) UKPC 49**

3) **Gomes v. The State (Trinidad and Tobago) (2015) UK PC 8.**
4) **R. V. Gianni de Simon (2000) 2 Cr App R(s) 332 (Crim. Div)**
5) **Nieto v. State (Judgment No.39976) Supreme Court of Nevada**
6) **The People v. DelaCruz (1988) 44 Cal. 3d 1247) (No EO49477)**
7) **Dwight Avon Major v. Warden Craig Apker and Warden Sara and Others (United States Court of appeals for the fourth Circuit No.13-7210)**
8) **R. V. Scalise and Rachel (1985) 7 Cr. App R(s) 395 per Lawton LJ**

Legislation Referred to:

1) **Supreme Court Practice, vol 1, 1999**
2) **Criminal Procedure Code, Cap 88 of the Laws of Zambia**
3) **Transfer of Convicted Persons Act, No. 26 of 1998**

The primary issue that this appeal raises relates to a subject that this and other courts have in the past adjudicated upon of what the powers of a court are where a defendant or respondent fails to appropriately respond to a claim by a plaintiff or applicant. The grounds as crafted by the Appellant suggest that the Appellant is of the view that the court when confronted with such a situation should, like an automaton, grant the order sought by a plaintiff or applicant without having to weigh the merits or demerits thereof.

The appeal also raises the issue of the effect of an order for leave to issue a writ of habeas corpus *ad*

subjiciendum. That is to say, how should a Respondent reply to a writ of habeas corpus.

The last issue that the appeal deals with is the rights of a person who jumps bail and is brought back into the country, having served time in a foreign prison.

The issues arise from the fact that the Appellant was convicted by a magistrate's court in Zambia for the offence of theft of a motor vehicle on 11th March 2009. He was sentenced to five years imprisonment with hard labour effective from 25th May 2008 when he was arrested and detained. While serving the sentence, the Appellant appealed to the High Court against conviction and applied for and was granted bail pending appeal. He was accordingly released on bail on 15th April 2009.

During the period the Appellant was on bail, he left the country and went to Botswana. He effectively jumped bail,prompting the relevant authority to issue a warrant for his arrest which was executed by the authorities in Botswana on 19th January 2010 and he was arrested and

detained in a Botswana prison, pending extradition back to Zambia. He was extradited in November 2013.

Upon his return to Zambia, the Appellant appeared before the High Court presided over by Hamaundu, J (as he then was) in December 2013 and applied to withdraw his appeal. Hamaundu, J accepted the application and ordered the Appellant to serve the sentence of five years imposed by the lower court with effect from 13th December 2013, less any number of days he will have been in custody. It is important to note that this order by Hamaundu, J is not a subject of challenge by the Appellant in this appeal. Neither did he raise the issue in his application for habeas corpus. Therefore, it is unnecessary for us to comment on the appropriateness or otherwise of that order. However, after the foregoing order was granted, the Appellant sought to be released from prison contending that he had served the full term of his prison sentence. The basis upon which he made the said claim was that in computing time spent in custody, regard should be had to the time spent in the Botswana prison pending his extradition back to Zambia. The Respondent refused to release him which prompted

him to institute the application in the court below for habeas corpus*ad subjiciendum.*

The Appellant commenced the action in the court below by way of an *ex-parte* application for leave to issue a writ of habeas corpus *ad subjiciendum.* The *ex-parte* summons was supported by an affidavit sworn by the Appellant and heads of argument. The evidence in the affidavit in support recounted the events from the timethe Appellant was arrested, charged and convicted for the offence of motor vehicle theft and his arrest in Botswana and subsequent extradition to Zambia. It essentially contended that the Appellant had served his five year term of imprisonment and should, therefore, be freed from prison. He relied on the order of Hamaundu J, made in December 2013 which he contended confirmed his allegation that he had served the full term of imprisonment.

After the court received the process filed by the Appellant it ordered that the *ex-parte* summons be heard *inter partes* by endorsing on the *ex-parte* summons. Following from this, the parties first appeared before the

court on 15th August 2014 and the Respondent sought an adjournment because it had not filed documents opposing the application. The court granted the application for an adjournment and ordered that the matter would next come up on 19th August 2014. It also granted leave to the Appellant for the issue of a writ of habeas corpus ordering the officer in charge to bring him before the court and his counsel accordingly caused the writ of habeas corpus to be issued on 15th August 2014 which was served upon the Respondent along with the other documents.

By the return date of19th August 2014 the Respondent had filed an affidavit opposing the application which had not been served on Appellant's counsel. On the request of counsel for the Appellant the Learned High Court Judge adjourned the matter to 21st August 2014 to allow counsel for the Appellant an opportunity to study the affidavit in opposition.

Like the affidavit in support, the affidavit in opposition also recounted the events leading up to the arrest, imprisonment and extradition of the Appellant back to Zambia from Botswana. It emphasised that in accordance

with the order by Hamaundu J, the Appellant is only entitled to be credited with three hundred and twenty four days that he spent in custody in Zambia prior to his release on bail. The Respondent was essentially saying that in computing the number of days the Appellant spent in custody, regard should not be had to the days he was incarcerated in Botswana pending his extradition to Zambia.

When the matter came up for hearing on 21st August 2014 counsel for the Appellant urged the court to grant the order sought by the Appellant for his release because the Respondent failed to show cause why his detention should continue. According to counsel, the Respondent ought to have filed a return to the summons for habeas corpus justifying the Appellant's continued imprisonment. That the affidavit in opposition filed should have been part of the return and should not have been filed alone. In advancing the said arguments counsel relied upon Order 54 rule 7 sub-rule 1 of the ***Supreme Court Practice*** (***White Book***).

In response, the Respondent's counsel argued that the Respondent had met the requirement of Order 54 rule 7

sub-rule 1 of the ***White Book*** by filing the affidavit in opposition because it sufficiently explained the reasons for the continued detention of the Appellant. It was argued further that if indeed the Respondent erred in filing an affidavit in opposition instead of a return, the error is not fatal and can be cured in line with Order 54 of the ***White Book*** which makes provision for amendment of a return.

After hearing the arguments and considering the evidence, the Learned High Court Judge found that the warrant pursuant to which the Appellant was serving his sentence was issued by the magistrate who sentenced him in terms of section 315 of the ***Criminal Procedure Code***. She found further that the said warrant provides for the sentence passed to be served in Zambia and authorises the officer-in-charge of the prison where the Appellant is lodged to carry into effect the sentence prescribed in the warrant. In making the foregoing finding, the Learned High Court Judge relied upon section 307 of the ***Criminal Procedure Code***. She went on to find that there was no evidence before her to suggest that the sentencing Magistrate intended the Appellant to serve the sentence in Zambia and a foreign land. Further that, the incarceration of the

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Appellant in Botswana was merely to facilitate his deportation back to Zambia after he jumped bail. In effect, she was saying that thetime served by the Appellant could not be credited with the time spent in custody in Botswana. Sheappropriately concluded that *"the day[s] for convicted persons to serve sentences in the countries of their choice [had] not yet come."*

The Appellant is aggrieved by the foregoing finding and has launched this appeal on three grounds as follows:

1) **The court erredwhen, after granting leave to issue writ of habeas corpus, which allowed the Appellant to challenge his detention, it did not discharge the Appellant from prison when the Respondent failed to give any legal justification for the continued detention as directed by the court in the writ of habeas corpus and the notice thereof and as required by the Rules of the court.**
2) **The court erred when after granting leave to issue writ of habeas corpus, which allowed the Appellant to challenge his detention, and to which the Respondent failed and or neglected to respond and justify and give a legal reason for the continued detention of the Applicant as it failed to file a return to the writ as ordered by the court and as required by court rules and instead the court assumed the role of a party to the proceedings. To justify the continued detention.**
3) **The court erred in not recognising the fact that the Appellant had made a prima facie case as against his detention, which the**

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4) Respondent did not challenge, and that this error was against the rules of the court.

Prior to the hearing of the appeal, the Appellant filed heads of argument in support of the appeal. He also caused to be filed a notice of non-attendance by which his advocates informed the Court that they would not be present at the hearing of the appeal and would rely on the heads of argument in prosecuting the appeal.

The Respondent also filed heads of argument opposing the appeal which it relied upon after counsel augmented them with *viva voce* arguments.

The gist of the arguments by the Appellant under ground 1 are two-fold: firstly that, the Respondent ought to have credited the time served by the Appellantin custody with the days he spent incarcerated in prison in Botswana and that by failing to do so it went against the decision of Hamaundu J. Secondly, that since the Respondent omitted to file a return to the writ of habeas corpus justifying the continued incarceration of the Appellant, the Learned High Court Judge ought to have released the Appellant from prison. The Appellant also contended that since the wrong

process was filed by the Respondent, the procedure for hearing of the motion could not be followed in line with Order 54 rule 8 of the ***White Book***.

In ground 2, the Appellant argued that the Learned High Court Judge erred at law when she proceeded to hear and hold in favour of the Respondent notwithstanding the fact that the Respondent had omitted to file a return. That the court having notedthe omission by the Respondent to file a return proceeded to hear the application under the misapprehension that the only purpose that a writ of habeas corpus serves is to compel the Respondent to present an applicant before the court to give evidence. It was argued further that the court erred in its interpretation of the order of Hamaundu J, by refusing to credit the time spent in custody by the Appellant with time served in custody in Botswana. Lastly, that to the extent that the Learned High Court Judge attempted to justify the detention of the Appellant, it treated him unfairly.

As regards ground 3, the Appellant essentially restated the arguments advanced under grounds 1 and 2. The only departure was the reference to the decision in the case of ***R***

v Secretary of State for the Home Department, ex-parte Iqbal[1], which it was argued, mandates a court to determine the lawfulness of a person's imprisonment from the return of process and beyond.

In response to ground 1, Mr. F. Imasiku counsel for the Respondent argued that the continued incarceration of the Appellant was pursuant to a judgment of the subordinate court. The said incarceration is, therefore, lawful because it arises from a conviction made in conformity with sections 307 and 315 of the ***Criminal Procedure Code***.

Counsel argued that, as a consequence of the foregoing, the Appellant's application for habeas corpus failed to reveal a case fit for further investigations which rendered ground 3 of the appeal unmeritorious.

In relation to the affidavit in opposition filed by the Respondent reacting to the habeas corpus application, Mr. Imasiku argued that Order 54 rule 7 sub-rule 1 of the ***White Book***, provides that a return on a writ of habeas

corpus can take any form including an affidavit in opposition.

In regard to ground 2, Mr. Imasiku repeated the arguments advanced under grounds 1 and 3 of the appeal.

We have considered the record of appeal, judgment appealed against and the arguments by counsel. What is clear from our consideration is that the Appellant's major grievance stems from the fact that the Learned High Court Judge proceeded to find that the Respondent had shown sufficient cause for the continued incarceration of the Appellant in the absence of a return on the writ of habeas corpus. The position taken by the Appellant is that since the Respondent did not file a return setting out the reasons for the continued detention of the Appellant, the court should automatically have found merit in the Appellant's application and set him free. Further that, a court cannot of its own motion determine whether or not probable cause exists for the continued incarceration of an applicant for habeas corpus.

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The starting point in determining the Appellant's grievance which we have set out in the preceding paragraph is an examination of the Orders of the ***White Book*** that relate to returns. The first such order is Order 54 rule 5 which is intitled *"Directions as to return of writ"* and provides as follows:

> **"Where a writ of habeas corpus ad subjiciendum is ordered to issue, the court or judge by whom the order is made shall give directions as to the court or judge before whom, and the date on which, the writ is returnable."**

By the foregoing order when granting leave to issue a writ of habeas corpus a court or judge is required tostate the return day for the writ once it is issued. The court or judge must also state before which judge such writ is returnable.

A perusal of the notice served along with the writ which is on the record of appeal, reveals that there was compliance with Orders 54 rule 5, because it stipulates the date and time for the return of the writ and also the judge before whom it was returnable.

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The other order which is relevant for our consideration is Order 54 rule 7 which states as follows:

> **"(1) The return to a writ of habeas corpus ad subjiciendum must be indorsed on or annexed to the writ and must state all the causes of the detainer of the person restrained.**
>
> **(2) The return may be amended, or another return substituted therefore, by leave of the court or judge before whom the writ is returnable."**

This order compels a respondent to an application for habeas corpus, such as the Respondent in this action, to among other things, state all the grounds or justification forthe continued incarceration of an applicant on the writ itself or separate document which shouldbe annexed to the writ and filed with the court. The order makes provision for amendment of such return with leave of court, which amendment may take the form of substituting the erroneous return with a correct one.

To the extent that the facts of this case reveal that the Respondent did not endorse the grounds or justification for the continued incarceration of the Appellant on the writ or separate document annexed thereto, the arguments by the

Appellant that the Respondent did not appropriately respond to the writ has merit. The Order as we have explained requires such grounds or justification to be set out or endorsed on the writ or annexure thereto and not in an affidavit in opposition as the Respondent did in this case. There was, therefore, an error on the part of the Respondent in filing an affidavit in opposition.

This brings us to a consideration of whether or not the Learned High Court Judge should have gone ahead to find that the Respondent had failed to showcause for the continued incarceration of the Appellant and accordingly freed him?

We are of the firm view that there was no misdirection on the part of the Learned High Court Judge when she considered the reasons set out in the affidavit in opposition filed by the Respondent as a way of justifying the continued incarceration of the Appellant. This is because, although there was an omission on the part of the Respondent, the said omission was not fatal but curable in terms of Order 2 rule 1 of the ***White Book*** which states as follows:

"Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings or any document, judgment or order therein."

As a result of the foregoing Order the proceedings and judgment of the court below cannot be annulled merely because the Respondent failed to comply with Order 54 rule 7 by endorsing a return on the writ of habeas corpus.

Further, whilst we acknowledge that what was at stake in the matter in the court below involved the liberty of the Appellant and hence the need for the parties involved to follow the law to the letter, we are of the view that it would have been a grave misdirection on the part of the Learned High Court Judge to ignore the justification for the incarceration as presented by the Respondent merely because it was improperly presented. This would have been tantamount to the Learned High Court Judge turning a blind eye to the evidence before her, however inappropriately presented. Consequently, we do not accept the argument by counsel for the Appellant that the

Appellant was exposed to an unfair hearing especially that it is highly likely that the justification set out in the affidavit in opposition would have been the same one relied upon in a return.

We have also considered the argument by the Appellant that he should have been credited with time served in custody in Botswana. We do not find any merit in the said argument because, as rightly held by the Learned High Court Judge, the Appellant was obliged to serve his sentence in accordance with the warrant issued pursuant to section 307 of the ***Criminal Procedure Code*** in a prison in Zambia and not Botswana because the jurisdiction of our courts is limited to Zambia. The section states as follows:

> **"A warrant under the hand of the Judge or Magistrate by whom any person shall be sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Zambia, shall be issued by the sentencing Judge or magistrate, and shall be full authority to the officer in charge of such prison and to all other persons for carrying into effect the sentence described in such warrant, not being a sentence of death."**[Underling is ours for emphasis only].

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The wording of the said section reveals that there can be no departure from the warrant in terms of the country in which a jail term will be served and we accordingly endorse the finding by the court below that the time for a Prisoner to choose which country to serve his sentence in has not yet come.

We have also had occasion to consider what happens in jurisdictions where there is the practice of prisoner exchange between countries consequent upon which time spent in a foreign prison is credited to ones local sentence. Our consideration reveals that in such jurisdictions there is domestic legislation in the form of ***Transfer of Prisoners Act*** and there is a Convention in existence to facilitate such transfers. In this respect in Trinidad and Tobago, there is a ***Transfer of Prisoners Act*** No.12 of 1993. The preamble to the said Act stipulates as follows:

> **"An Act to provide for the transfer between the Republic of Trinidad and Tobago and other countries of persons convicted of criminal offences and for the enforcement of sentences passed upon them, and for purposes incidental thereto and in connection therewith."**

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Under section 2 which is the interpretation section, the Act defines *"the Convention"* as meaning the Convention on the Transfer of Sentenced Persons adopted in Strasbourg, France on 22nd March 1983 by the Committee of Ministers of the Council of Europe. It is this Convention pursuant to which the domestic legislation was enacted to facilitate prisoner exchange. Zambia is not a signatory to this Convention and neither has it acceded to it.We do, however, have***The Transfer of Convicted Persons Act***No. 26 of 1998 which provides for transfer of convicts between Zambia and other specified or designated countries. In order for a transfer to be done pursuant to this Act, Zambia and the foreign country, from which a convict is coming or going to, must have an existing agreement to that effect or enter into one. Further, the foreign countrymust have enacted similar legislation for the transfer. This is pursuant to section 3 of the Act which also empowers the Minister in consultation with the Attorney-General to specify Commonwealth countries or other territories to which the Act will apply.

In terms of section 4 of the Act, in order for a convict to benefit from the provisions of the Act, he or she must apply to the appropriate authority for a transfer. Such application may also be made by the Attorney General, a relative of a convict or any other interested person or body.

After an application for transfer has been granted and the convict brought to Zambia, he or she shall be credited with any remission of a sentence of imprisonment to which the convicted person has become entitled at the date of his or her transfer. This is by virtue of section 8 of the Act.These are the only circumstances under which a convict transferred from a foreign country back to Zambia may be credited with time served in a foreign prison. The Act does not provide for relief or indeed apply to a convict such as the Appellant who deliberately jumped bail in order to avoid serving the punishment meted upon him.Further, the wording of the Zambian Act and spirit of the Trinidadand Tobago Act and Convention is that it is meant for a foreign convict serving time in a foreign prison after being convicted by the foreign country seeking to return to Zambiaor his or her country of origin. It does not relate to a

situation where the convict commits the crime locally and flees to a foreign country.

We have also considered the argument advanced by the Appellant in relation to the case of ***ex-parte Iqbal***[1]. Our view is that the argument made by the Appellant in reference to this case is misguided because it refers to the minority and dissenting decision of the court in that case.

In the final analysis, our findings reveal no merit whatsoever in all the three grounds of appeal and we uphold the decision of the court below and accordingly dismiss the appeal. We make no order as to costs.

Malila, JS delivered the following dissenting judgment.

I have had the benefit of reading carefully and digesting the majority judgment of the court, and I am profoundly grateful to my learned colleagues for their courage in eloquently pronouncing themselves so decisively on the difficult questions that confront us in this appeal. I, of course, feel a great sense of restraint to prefer my opinion

against the majority judgment. Given, however, the tremendous and impactful consequences, from a legal and human rights standpoint, which flow from the majority judgment, and the likely implications on the personal liberty of individuals who may find themselves in the same position as the appellant (whom I shall refer to in this opinion as 'the prisoner'), I have been impelled to subject the relevant aspect of the judgment of the lower court as well as the majority judgment which upholds it, to an acid test.

In my considered view, there is in this case a wider principle in play, than merely the safety in terms of the correctness of the sentence that was imposed by the Magistrate's court and upheld by the High Court. Put shortly, there comes a point when, however obviously guilty an accused person may appear to be, and no matter how blatantly he may attempt to flee from justice, an appeal court reviewing or otherwise considering his sentence, cannot gloss over any allegation that the length of his sentence was not properly considered.

Having critically considered the ratiocination running through both the lower court's judgment, I most respectfully dissent from the majority judgment. My dissent is inspired by the somewhat firm and seemingly conclusive judicial position taken in the majority judgment by my learned brothers and sister on the question whether pre-sentence custody of a prisoner in a foreign country can or cannot be credited to the prisoner's ultimate sentence pronounced by the court upon his conviction.

In specific terms, the fundamental question towhich my dissent is addressed is solely whether the prisoner is entitled to have the days that he spent in incarceration in Botswana following his arrest on a warrant issued by Zambian authorities, taken into account in reckoning the length of the sentence imposed on him. While the majority judgment holds that the prisoner was not entitled to such credit, my considered view is that he was for reasons which I shall articulate anon.

It is inappropriate, and in any event unnecessary to rehearse the factual background narrative of this case in

detail. This has been summarized with admirable clarity in the majority judgment. To put a context to my dissent, however, the following summary of the facts will suffice.

The prisoner was a Namibian citizen. He was in Zambia in May 2008, when he was arrested for the offence of theft of motor vehicle. He was arraigned before the Subordinate Court of the First Class which subsequently convicted him of the offence. The court sentenced him to five years imprisonment with hard labour with effect from 25th May 2008. He appealed the conviction and sentence to the High Court and, pending such appeal, applied for and was granted bail in April, 2009. The prisoner then did what was clearly a foolish thing to do; he secretly left the country - a clear design to flee from justice. A warrant for his arrest was consequently issued by the Subordinate Court on 18th May 2010. With the intervention of International Police (INTERPOL) the appellant was arrested in Botswana and was remanded in custody on 19th January 2010.

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An extradition request was made by Zambian authorities on February 2010. Pending the conclusion of extradition formalities, the prisoner remained in custody in that country until November 2013, when he was eventually extradited to Zambia. He was finally brought before the High Court for the hearing of his appeal in December 2013.

By that time, his appetite to continue with his appeal had evidently waned. He withdrew the appeal.

The learned High Court judge nonetheless ordered that the prisoner serves his sentence of five years imprisonment with hard labour imposed by the Subordinate Court with effect from 13th December 2013, less any number of days he had been in custody. Consequent upon this ruling by the High Court, the prisoner filed an application (*Ex-parte*) for leave to issue a writof *habeas corpus ad subjiciendum* under Order 54 rule 1 of the Rules of the Supreme Court (White Book) 1999 edition. The point he made in his application was that there was no legal justification for prison authorities to continue keeping him in custody, as he had served his sentence over the period that he spent

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time in custody both in Zambia and in Botswana. He did his arithmetic and concluded that the total number of days in five years is 1,825 and that even without taking into account remission, which he suggests he was entitled to, he had, as at the time of the application, been over incarcerated by more than 120 days. He projected his computation of his time spent in custody in the following terms:

- **25/05/2008 : I was arrested and put in custody in Zambia.**
- **11/03/2009 : I was convicted and sentenced to 5 years IHL, backdated to 25/05/2008 by then I had spent 294 days in custody.**
- **15/04/2009 : I applied for and was granted bail pending appeal to the High Court – at this point I had spent 324 days in custody.**
- **19/01/2010: I was arrested in Botswana on warrantissued by Zambian authorities and put in custody where I remained until my extradition in November, 2013. I have been in custody since my arrest for more than 1,968 days.**

The High Court granted the prisoner leave to issue a writ of *habeas corpus ad subjiciendum* on 15th August 2014. The application for *habeas corpus* was opposed. On behalf

of the respondent, the opposing affidavit was sworn by Francis Kasanga, Officer-in-Charge at Lusaka Central Prison. In that affidavit, the reasons set out for opposing the application were chiefly that the prisoner's sentence was to be served in Zambia and does not include the number of days that he was in custody in Botswana. In this regard the number of days the prisoner is entitled to be credited with is 324, being the days he spent in custody prior to his release on bail pending appeal.

The learned High Court judge dismissed the prisoner's grievance quite plainly. According to her, the warrant for the execution of the prisoner's sentence was issued by a Magistrate in Zambia who gave full authority to the Officer-in-Charge of a Zambian prison to carry the sentence into effect. The sentence of five years imposed on the prisoner was, therefore, to be served in Zambia and nowhere else. There was, according to the learned judge, no evidence before her to suggest that the sentencing Magistrate intended that the prisoner serves his sentence in Zambia and in a foreign land. She concluded that:

> **[t]he applicant was held in Botswana in order to facilitate his return to Zambia after he jumped bail. The day for convicted persons to**

serve sentences in the countries of their choice has not yet come. The appellant is therefore lawfully detained.

She ordered that the prisoner be credited only with the 324 days he served in the Zambian prison and should complete his five years sentence in Zambia.

The prisoner appealed against the High Court judgment on three grounds as articulated in the majority judgment.

I have already stated that the only issue which I address in this dissent relates to whether or not the prisoner was entitled to be credited with the days for which he was incarcerated in Botswana. In this respect, I do not dwell on the other technical points and arguments as to the form of the *habeas corpus* application which have been addressed in the majority judgment. I think that the issue of crediting his pre-extradition incarceration is the profound question deserving a profound answer.

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The majority judgment agreed with the learned lower court judge that as the warrant by which the sentencing court committed him to prison was issued by a Magistrate in Zambia, exercising jurisdiction only within the boarders of Zambia, the prisoner could only serve his sentence in Zambia. They quote in this regard section 307 of the Criminal Procedure Code, chapter 88 of the laws of Zambia, and concluded that time spent in custody elsewhere could not be credited towards the length of the sentence the prisoner was to serve. I fully appreciate the burden of that argument, more so from a common sense point of view. I am however, not convinced it is the correct argument to make.

The first issue perhaps that points to the inappropriate consideration of the sentence of the lower court relates to the manner in which the High Court judge before whom the appeal from the Subordinate Court had come, dealt with the matter. Upon his extradition from Botswana, the prisoner was brought for the hearing of his appeal before Hamaundu J as he then was. The prisoner withdrew his appeal. This means that the appeal technically stood

dismissed. There was no longer any appeal to be heard by Hamaundu J and there was, therefore, nothing new that Hamaundu J could lawfully say in terms of sentence orders affecting the prisoner. The *status quo ante*, that is to say, the position as it prevailed before the appeal, was therefore retained. That position was that the prisoner was sentenced to serve five years' imprisonment with hard labour effective 25th May 2008. That sentence and the effective date stood, and the judge had no jurisdiction to tamper with it given that the appeal was withdrawn. The principle of inviolability of sentence not appealed against should have been dutifully observed. Yet, the learned judge proceeded to make a statement which was quoted and subsequently relied upon in later proceedings. It reads as follows:

> **Now therefore the court has ordered that JOAN ANDRIES serves his sentence of 5 years with hard labour imposed by the lower court to be with effect from 13th December 2013, less any number of days he was in custody.**

Clearly, the appeal High Court judge varied the effective date of the sentence from 25th May 2008 to 13th December 2013. This finds no support in statute, case law

and just as little in reason. I am convinced that as there was no legal basis to do so, the judge misdirected himself. Such misdirection impacted on the whole sentence that the prisoner was bound to serve. As is evident from the High Court judge from whose decision emanates the present appeal, she was influenced, I must add, unduly by that adjustment in the effective date which she endorsed.

The tragedy,as I see it,which resonates in both the lower court's judgment, as well as the majority judgment of this court, is that there is no direct Zambian case authority, on the point. In the circumstances, resort to persuasive foreign judgments including those from America and the United Kingdom is inevitable. Neither the lower court judge nor the majority here appeared minded to seek persuasive guidance from decisions of foreign courts.

There appears to be no dispute that the sentencing policy that the courts in this country are obliged to employ, like their counter parts in England, is that credit should be given for the days a prisoner spends in pre-sentence custody. On this general principle, my colleagues in the majority appear to be in agreement. In **Callachand**

v. State of Mauritius[2] which was referred to in the case of **Gomes v. The State**[3]it was stated among other things as follows:

> **...In principle it seems to be clear that where a person suspected of having committed an offence, is taken into custody and is subsequently convicted, the sentence imposed should be the sentence which is appropriate for the offence. It seems to be clear too that any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing...**

Where an accused person flees from justice and is apprehended in a foreign country following extradition, credit for days spent in custody is not lost.In **R. v. Gianni de Simone**[4]the English Court of Appeal was emphatic in its observation that fairness requires that a period spent in custody awaiting extradition should be taken into account in a sentence to be served on return to the United Kingdom. This is invariably the practice, not only in the United Kingdom, but also in the United States, Canada and other jurisdictions.

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In the United States where a federal system of government obtains, the different States have distinct criminal jurisdiction and are treated, for purposes of criminal law, as if they are separate countries. The practice in those States is that time spent in one State while a person awaits extradition to another State, shall be credited to the period of incarceration in the sentence that is ultimately imposed. Thus, in **Nieto v. State**[(5)]the Supreme Court of Nevada, had occasion to consider the issue of credit for time spent in jail before a person's formal sentence. The appellant, Joshua Nieto, pleaded guilty to one count of attempted murder and was convicted. A district court sentenced him to 60-180 months imprisonment, and was ordered to pay restitution and extradition fees. He was given credit for 146 days time served.

The appellant had, prior to his conviction fled from Nevada to California where he was arrested on a fugitive warrant in April 2011, and was extradited to Nevada in June 2011. He argued that as the charges in Nevada were the sole reason for his incarceration in California, he was

entitled to additional credit for time served for his period of pre-trial confinement in California while awaiting extradition to Nevada. The New Hampshire Court made a distinction between 'awaiting trial' and 'awaiting extradition' for purposes of determining when an accused person is in the custody of the State. It concluded that credit for time served in pre-trial confinement is inapplicable where the accused person is not awaiting trial but is instead awaiting extradition. The Supreme Court of Nevada, however,disagreed and held that credit should be granted for pre-sentence confinement while awaiting extradition when the sole reason for incarceration was the offence for which the accused person was ultimately convicted and sentenced.

Equally in **The People v. DelaCruz**[6]the Court of Appeal of Califonia, Fourth District, Division Two, held that pre-sentence custody while the appellant awaited extradition should be credited to the convicted prisoner. There, the accused person pleaded guilty in 1996 to attempted murder with an armed enhancement, and conspiracy to commit murder. He fled the jurisdiction

before sentencing. He thereby forfeited his bail, and a warrant of arrest was subsequently issued. Two years later, in 1998, he was discovered in custody in the Philippines. In the ensuing 11 years he resisted extradition. He was finally returned to California for sentencing in 2009. The accused person claimed that the trial court had improperly failed to award him pre-sentence custody credit for the time he was in custody in pre-sentence the Philippines resisting extradition. The Court of Appeal of California agreed that he was entitled to credit for his pre-extradition custody.

In **Dwight Avon Major v. Warden Craig Apker and Warden Sara and Others**[7], the appellant appealed from the district court's order, in which his petition seeking credit towards his federal sentence, for time spent in a Bahamian prison prior to his conviction. He had been sentenced in the Commonwealth of the Bahamas to several years imprisonment on multiple charges of drug possession, making threats and obstructing justice and conspiracy to import cocaine. Sentence on the last of his convictions was only imposed in November 2007 retroactive

to October 2003. He appealed that conviction and sentence, the effect of which was that the execution of the decision was suspended. Meanwhile, in June 2003, a grand jury of the Southern District of Florida indicted the appellant on a drug charge. The Bahamian police then executed a warrant from the United States for the appellant's arrest. The United States also initiated extradition proceedings which the appellant resisted vigorously for several years. An extradition warrant was only issued in July 2004. The appellant was extradited in April 2008, to the United States where he pleaded guilty to a drug conspiracy charge. He was sentenced to 108 months in prison with 'credit for time served in Bahamas while awaiting extradition.' It was held that the appellant was entitled to have his sentence credited for the time he spent in custody in the Bahamas awaiting extradition.

I find these cases to be significantly persuasive and in the absence of any direct local authority on the issue, they should be instructive in providing judicial guidance in the determination of the crisp issue before us.

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The question raised before us in the present appeal closely mirrors that which fell to be decided by the Privy Council in the case of **Gomes v. The State**[3].In that case, the appellant was on 15th May 1998, charged with a drug related offence and remanded in custody. He had also been charged with unlawful possession of firearms. The latter charge was tried separately at the end of which the trial judge upheld a submission of no case to answer. The State intimated its desire to appeal. The appellant was granted bail, and two days later, in breach of bail, and knowing of the State's intended appeal, he fled the country. The State's appeal was heard in the absence of the appellant. A retrial was ordered. An arrest warrant against the appellant was issued. The appellant was arrested at Heathrow Airport, London in May 2006. An extradition request to the United Kingdom authorities by Trinidad and Tobago was stoutly resisted.

After protracted proceedings, the appellant was returned to Trinidad where he was remanded in custody for trial. The trial, on both drug and firearm charges commenced in June2010 and lasted over two months. At

its conclusion, following a guilty verdict, the trial court was called upon to consider three periods which the appellant had spent on remand in custody namely, (a) 19 months between the arrest of the appellant and the conclusion of the first trial when he was granted bail: (b) 45 months between his arrest at Heathrow and his return to Trinidad following the extradition process; and (c) six months while he was in custody in Trinidad following his return and prior to his conviction.

The learned counsel for the appellant argued that the judge should discount the appropriate sentence by deducting all three periods that the appellant had spent in remand either in Trinidad or in the United Kingdom. Counsel for the State acknowledged that credit should be given for the first period of 19 months, but contended that as the appellant had fled jurisdiction, in breach of bail in relation to the firearms offence and when fully aware of the appeal against the drug charges, no discount should be given in respect of the period spent opposing extradition. In that context, reference was made to the conduct of the

appellant causing the State to deploy resources, both to locate him and secure his return.The Privy Council held that he was entitled to full credit for the time he spent in custody. It stated as follows:

> **The Board sees no reason in these circumstances to differentiate between the period of 19 months on remand in custody before the decision of Volney J and the period in custody prior to conviction following his return to Trinidad. Given the very substantial period which has not been allowed while the appellant was in custody in the United Kingdom, the Board has concluded that this period should have been deducted from the overall term that the appellant served.**

I think that this case is almost on all fours with the case before us.

I am, of course, also alive to the genre of cases which make it clear that while time spent in custody overseas pending extradition should normally be taken into account when sentencing, where the defendant has deliberately resisted extradition to the fullest extent and prolonged the period of custody abroad while awaiting extradition, it is not necessary for the sentence to be reduced to take that into account. (See **R. v. Scalise and Rachel**[8].) I think

however, that these cases are in the exceptional category of the equation which has no room here.

I have elsewhere stated that the prisoner should never have jumped bail. There are distinct sanctions available for accused persons who fail to abide by bail conditions. Those sanctions could be meted out separately without having to conflate them with the sentence that was pronounced by the Subordinate Court following the trial.

It is for all the foregoing reasons that I am inclined to hold that the prisoner was entitled to full credit for the days he spent in custody in Botswana following his arrest on the strength of an arrest warrant issued by a Magistrate in Zambia.

The majority have in their judgment referred to the transfer of prisoners between States. With respect, I think that argument is misplaced. The transfer of prisoners' legislation has no application here where the issue was purely one of extradition.

I am of the considered view that the lower court was wrong in principle in rejecting the application before it. By upholding the lower court, the majority of this court in my

view have equally fallen into error. I would allow the prisoner's appeal.

Wood. JS - I agree with the view expressed by Malila JS in his dissenting judgment. The record shows that the appellant was arrested and incarcerated in Botswana at the behest of the Zambian Government. No reasonable explanation has been given by the learned Attorney General why no steps were taken to facilitate the extradition of the fugitive to Zambia for a period of three years. The appellant should in the circumstances be given credit for the time he was incarcerated in Botswana.

I accept that costs are in the discretion of the court.I also accept that costs normally follow the event. I am however of the view that awarding costs against the appellant who is a prisoner and given the unique issues raised which are of public interest is wrong in principle. I would allow his appeal.

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G.S. PHIRI
SUPREME COURT JUDGE

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A.M. WOOD
SUPREME COURT JUDGE

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Dr. M. MALILA, SC
SUPREME COURT JUDGE

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R.M.C. KAOMA
SUPREME COURT JUDGE

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N.K. MUTUNA
SUPREME COURT JUDGE