

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

(Civil Jurisdiction)



2017/HP/1378

**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 30TH
DAY OF AUGUST, 2017.**

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

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

RULING

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 leave to issue a Writ of *Habeas Corpus Ad Subjiciendum* by the Applicant Jaffary Abdul. The application is supported by an Affidavit sworn by the Applicant Jaffary Abdul. The application was made *Ex Parte* on 16th August, 2017 and I directed that it be heard *Inter Parte* on 30th August, 2017. The record shows that the Respondent was served with the process on 21st August, 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 31st 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**¹. The said **Section 394 of The Penal Code**¹ 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.

It is the Applicant's contention 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. It is also his contention that his plea to apply for Police Bond has also proved futile as all the attempts to that effect have been ignored and denied despite having competent sureties. He thus contends 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 30th August, 2017, both parties' Advocates were in attendance. Learned Counsel for the Applicant

Ms. Mushipe made the application and relied on the Affidavit in Support. She submitted that she would rely on the skeleton arguments but the record shows that no skeleton arguments were filed herein. She referred the Court to **Order 54 Rule 1** and **2** of **The Rules of the Supreme Court**², 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.***

Ms. Mushipe also referred this Court to **Article 13 (3) of The Constitution³**, 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 **Order 54 Rule 4 (1)** of **The Rules of the Supreme Court**², which provides that: -

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.*

This Court was also referred to **Section 33** of **The Criminal Procedure Code**⁴, 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 further referred this Court to **Regulation 33 (7) of The Preservation of Public Security Act⁵**, which provides that: -

- (7) *A police officer of or above the rank of Superintendant may, without warrant, arrest a person in respect of whom that officer has reason to believe that there are grounds which would justify that person's detention under this regulation, and may order that the person be detained for a period not exceeding seven days pending a decision whether a detention*

order should be made against that person, and the provision of sub-regulation (5) shall apply in respect of that person's detention during that period.

Based on the authorities cited above, Ms. Mushipe beseeched the Court to grant leave to issue *Habeas Corpus Ad Subjiciendum* to allow the Respondent to bring the body of the Applicant before this Court.

In response, Learned Counsel for the Respondent, Mrs. Nchito submitted that the Respondent has not been able to file a response to the application because they have not received any instructions from their client. She further submitted that if the Court could give the Respondent a bit of time, maybe their client would then give them instructions to respond to the application.

In reply, Ms. Mushipe objected to the Respondent being given further time on the ground that the Applicant has been in custody since 31st July, 2017 and that the Court process was served on the Respondent on 21st August 2017, as such, they have had ample time within which to seek instructions from their client taking into account the urgency and seriousness of the matter.

The application by the Respondent to give them a bit of time to obtain instructions was not granted. In the view of this Court the use of the words "...maybe our client will give us instructions..." by the Respondent shows that the Respondent is not treating this matter with the urgency that it deserves and is not certain whether they will obtain instructions from their client.

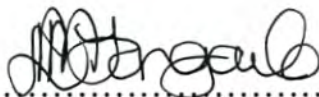
I have considered the application for leave to issue Writ of *Habeas Corpus Ad Subjiciendum*, the Affidavit evidence of the Applicant herein, the authorities and the submissions by Learned Counsel for the parties, for which I am grateful.

The Applicant was arrested on 31st July, 2017, upon being released from Lusaka Correctional Prison where he had served a sentence of 17 years. He was subsequently charged with the offence of conspiracy to commit a felony contrary to **Section 394** of **The Penal Code**¹, but 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 thirty-one (31) days. The State having for that period failed to bring him for trial he is seeking leave to issue a Writ of *Habeas Corpus Ad Subjiciendum* and to be released from custody pending the hearing of the Originating Notice of Motion for Writ of *Habeas Corpus*. 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 a Writ of *Habeas Corpus Ad Subjiciendum* be issued forthwith to secure his protection of the law. The learned State Advocate Mrs. Nchito was not of much assistance on the point raised by the Applicant as she had not yet obtained instructions and was not certain if she would obtain instructions. 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. In the circumstances, I hereby grant leave to the Applicant to issue a Writ of *Habeas Corpus Ad Subjiciendum*. However, I will not grant an order for the release of the Applicant as that will be dealt with at the main hearing of the matter.

Leave to issue a Writ of *Habeas Corpus Ad Subjiciendum* is granted.

Delivered the 31st day of August, 2017.



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P. K. YANGAILO
HIGH COURT JUDGE