PATRICK MAINZA, GEORGE MUDENDA AND LAMECK KAMANGA v THE PEOPLE (1981) Z.R. 146 (H.C.)

HIGH COURT
SAKALA J
7TH NOVEMBER 1980
(1980/HP/1173)

Flynote
Criminal law and procedure - Habeas corpus - Application for issue of writ - Whether person detained in custody by lawful order of a competent court pending trial on criminal charge can seek for habeas corpus on ground of unreasonable delay in bringing him to trial.

Headnote
This is a joint application for the issue of a writ of habeas corpus ad subjiciendum by the three applicants. The circurmstances leading to this application are that the first and second applicants were arrested on 16th July, 1977, while the third applicant was arrested on the 14th July, 1977. They were charged with aggravated robbery. The three applicants were committed to the High Court for trial.

It was the applicants contention that since their committal to the High Court nothing had been done in connection with their trial. They thus contended that they were unlawfully detained and that their continued detention was punitive, illegal and a violation of their rights of freedom of movement.

According to the State advocate's submissions, the State did not intend to proceed with the charge of aggravated robbery. They proposed to enter a nolle prosequi but had no record in respect of that charge and they did not know the names of the complainants neither was the court record available.

The issue before the court was whether a person in custody by a lawful order of a competent court on committal to the High Court for trial on a criminal charge could seek his release front custody by way of a writ of habeas corpus on account of unreasonable delay in bringing him to trial.

Held:
(i) It is an acceptable practice in most legal systems that in certain circumstances, detention pending trial is justified but that the justification is conditional upon having the prisoner brought to trial as quickly as possible.
(ii) The principle envisages that an accused person will not be held in detention for an unlimited period of time without trial and without remedy.

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(iii) By section 2(c) of the English Law (Extension of application Act) Cap. 4 of the Laws of Zambia, the habeas corpus Act of 1679 is still applicable to Zambia.
(iv) On the principle set out in the Habeas Corpus Act, the applicants are entitled to be tried

quickly failure to which they must be discharged.

Legislation referred to:
Habeas Corpus Act, 1679 s. 6.
English Law (Extension of Application Act), Cap. 4 s. 2(c).
Criminal Procedure Code, Cap. 160 ss. 241, 242, 244 (1), 246 (1) (2) and (3).

Case cited:
(1) Re Corke, [1954] 1 W.L.R. 89.

For the applicants: In person.
For the respondent: A.G. Kinariwala (Esq.) State Advocate.

Judgment

E.L. SAKALA, J.: This is a joint application for the issue of a writ of Habeas Corpus Ad Subjiciendum by the three applicants. The application is dealt with jointly on account that it arises from a joint criminal charge. The applicants appeared in person. The application is supported by a joint affidavit. There was no affidavit in opposition.

The circumstances leading to this application as set out in the applicants' joint affidavit are that the first and second applicants were arrested on the 16th July, 1977, while the third applicant was arrested on the 14th July, 1977. They were all charged with aggravated robbery. The allegation being that they robbed the complainant of K12.00 and four packets of 20 guard cigarettes. On the 8th June, 1978, all the three applicants were committed to the High Court for trial. It is the applicants' contention that since their committal to the High Court nothing has been done in connection with their trial. They thus contend that they are unlawfully detained and that their continued detention is punitive, illegal and a violation of their rights of freedom of movement.

On the 10th October, 1980, I granted the applicants leave to apply for a writ of habeas corpus by way of notice of motion to be served on the Attorney-General together with the applicants' joint affidavit returnable on the 16th October, 1980. When the Court resumed on the 16th October, 1980, Mr Kinariwala for the respondent asked for an adjournment as he had received the papers the day before and had been able to prepare for his case. The matter was adjourned to the 20th October, 1980, at 1430 hours. On that date, although the State had not filed an affidavit in opposition, Mr Kinariwala informed the court that he was opposing the application on the ground that the applicants were lawfully remanded in custody by a competent court pending their trial on a charge of aggravated robbery. He argued that their detention could not be said to be unlawful. He informed the court that the State was intending to enter a nolle prosequi in the criminal matter, but that there were no records concerning the case.

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In the light of the opposition taken by the State at that hearing, I decided to adjourn the case to enable them to take the course suggested. The matter was adjourned to the 31st October, 1980. On that day, again, without finding an affidavit Mr Kinariwala informed the court that his investigations have revealed that the subordinate court record had not yet been received by the High Court. For this reason the case has never been put on the cause list. Thus he was unable to file a

nolle prosqui. He told the court that efforts to trace the police docket had proved fruitless. He stated that he was not aware of the particulars of the charge and the name of the complainant although he had a draft nolle prosequi with him. Mr Kinariwala conceded that while this was not an appropriate court in which to file a nolle prosqui the continued detention of the applicants was not in the interest of justice. But he expressed anxiety of what would happen to the charge of aggravated robbery if this court granted the application to the applicants. At the same time Mr Kinariwala said he had no objection to the application.

The unfortunate thing in this application is that the respondents have not filed an affidavit in opposition. The only evidence before this court is by way of the applicants' joint affidavit. But according to the learned State advocate's submissions, the State does not intend to proceed with the charge of aggravated robbery. They propose to enter a nolle prosequi but they have no record in respect of that charge and they do not know the name of the complainant neither is the court record available. It would appear from the learned State advocate's submissions that there are no prospects of that record ever appearing again. It is thus clear that the State does not support the applicants' continued detention but handicapped to enter a nolle prosequi in the criminal proceedings in the absence of the record. The remarkable coincidence is that both the court records and the police docket in the criminal proceedings must all disappear at the same time leaving no trace.

The applicants were arrested in July, 1977. They have now been in custody for a period of over three years. The State having for that period failed to bring them for trial they are seeking to be released by way of an issue of a writ of habeas corpus from custody brought about by a lawful court order of committal pending their trial in the High Court. My understanding of the applicants' case is not that the detention is unlawful but that their continued period of waiting for their trial can no longer be justified unless they are now brought to trial quickly. From my brief research this appears to me to be the first application in Zambia in which persons committed for trial on a criminal offence by a competent court have applied for the issue of a writ of habeas corpus. Unfortunately the applicants appeared in person and the learned State advocate was not of much assistance on the point. It is however an acceptable practice in most legal systems that in certain circumstances, detention pending trial is justified but that the justification is conditional upon having the prisoner brought to trial as quickly as possible. This principle envisages that an accused person will not be held in detention for an unlimited period of time without trial and without remedy.

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The question for consideration is this-can a person detained in custody by a lawful order of a competent court on committal to the High Court for trial on a criminal charge seek his release from custody by way of a writ of habeas corpus on account of unreasonable delay in bringing him to trial? As already observed, I have not been assisted with any Zambian authority and in my brief research I have found none. The English position is that a person convicted by a competent court of summary jurisdiction cannot apply for a writ of habeas corpus (in Re Corke (1)). But by section (6) of the Habeas Corpus Act of 1679, it is specifically provided that a person detained pending his trial had to be tried within a specific period failure of which be discharged. The section which is written in rather archaic language reads as follows:

> "Provided always . . . that if any person or persons shall be committed for high treason or

> felony, plainly and specifically expressed in the warrant of committal upon his prayer or petition in open court the first week of the term or first day of the sessions of oyer and terminer or generalle goale delivery to be brought to his trial shall not be indicated sometime in the next terme sessions of oyer and terminer or generalle goale delivery after such commitment it shall and may be lawful to and for the judges of the Court of Kings Bench and justices of oyer and terminer or generalle goale delivery and they are hereby required upon motion to them made in open court the last day of the terme sessions or goale delivery either by the prisoner or any one in his behalf to set at liberty the prisoner upon bail unless it appears to the judges and justices upon oath made that the witnesses for the King could not be produced the same terme sessions or generalle goale-delivery. And if any person or perons committed for aforesaid upon his prayer or petition in open court the first week of the terme or first day of the sessions of oyer and terminer or generalle goale delivery to be brought to his trial shall not be indicated and tried the second terme sessions of oyer and terminer or generalle goale delivery after his commitment or upon his trial shall be acquitted he shall be discharged from his imprisonment."

By the Courts Act of 1971, the Habeas Corpus Act of 1679 has been repealed in England. Commenting on that section, the author of the book The Laws of Habeas Corpus has this to say at pages 133 to 134:

> "From the seventeenth century to the present, judges have considered this section to be the very hub of the design of the Habeas Corpus Act 1679. Lord Holt's words in 1694; ' . . . the design of the Act was to prevent a man's lying under an accusation of treason, and c. above two terms', were echoed by Abbott,C.J, in 1825: 'The object of the Habeas Corpus Act . . . was to provide against delays in bringing persons to trial, who were committed for criminal matters' and by Parker,C.J, in 1959: 'The Act of 1679 was a procedural Act . . . and was directed specifically to the abuse of detaining persons in prison without bail and without bringing them to trial.' As Dicey pointed out, the section gave habeas

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> corpus an important dual purpose. As a result, an accused person was able to test the validity of the warrant and charges upon which he was held as soon as he was incarcerated, but if these preliminary grounds for his detention were found to be sufficient, he was then able to demand to be either brought quickly to trial or bailed or released. In view of the importance of the principles at stake, it is surprising to find so little discussion of the section in the modern cases and it is disappointing to find that the section has recently been repealed by the Courts Act 1971. It had undoubtedly become difficult to apply s.6 because of its archaic language but the principle it established, namely, the guarantee of a remedy to ensure speedy trial should have been continued."

I whole-heartedly agree with the author's observations and sentiments. Although the section had become difficult to apply because of the archaic language the principle it established namely the guarantee of a remedy to ensure a speedy trial should have been continued rather that repeal the Act. In my view however, I do not think that the repeal of that Act lay the Courts Act of 1971 in England affects its application in Zambia. It is an act which was in force in England on the 17th

August, 1911. By section 2(c) of the English Law (Extension of application Act) Cap. 4 of the Laws of Zambia I hold that the Habeas Corpus Act 1679 is still applicable to Zambia. On the principle set out in that Act I would hold that the three applicants are entitled to be tried quickly failure to which to be discharged. From the learned State advocate's submissions it appears most unlikely that there would ever be a trial. In the circumstances, I hold the view that the applicants are entitled to the benefit of the povisions of section 6 of the Habeas Corpus Act of 1679.

In the event I am wrong in holding that the Habeas Corpus Act of 30 1679 is applicable to Zambia I propose, in the alternative to deal with the application under the provisions of the Criminal Procedure Code, 160.
Section 241 of the Criminal Procedure Code reads as follows:

> "241. In the event of a committal for trial, the written charge, the depositions, the statement of the accused person, the recognizances of the complainant and of the witnesses, the recognizances of bail (if any) and all documents or things be transmitted without delay by the committing court to the Registrar, and an authenticated copy of the depositions and statement aforesaid shall be also transmitted to the Director of Public Prosecutions."

There being no evidence to the contrary I accept the applicants' joint affidavit that they were committed to the High Court for trial on a charge of aggravated robbery on the 8th June, 1978. In the circumstances I will assume in their favour that the written charge the depositions, the recognizances of the complainant and all the witnesses and all documents or things which were tendered or put in evidence at their committal were transmitted to the Registrar and an authenticated copy of the depositions and the statement was also transmitted to the Director of Public Prosecutions. Section 242 of the Criminal Procedure Code reads as follows:

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> "242. If after receipt of the authenticated copy of the depositions and statement provided for by the last preceding section, and before the trial before the High Court, the Director of Public Prosecutions shall be of the opinion that further investigation is required before such trial, it shall be lawful for the Director of Public Prosecutions to direct that the original depositions be remitted to the court which committed the accused person for trial, and such court may, thereupon, reopen the case and deal with it, in all respects, as if such person had not been committed for trial as aforesaid; and, if the case be one which may suitably be dealt with under the powers possessed by such court, it may, if thought expedient by the court, or if the Director of Public Prosecutions so directs, be so tried and determined accordingly."

Again in the absence of any evidence I will assume in favour of the applicants that the Director of Public Prosecutions did not exercise his powers under this section to direct further investigations in the case. Section 244 (1) reads as follows:

> "244 (1). If, before the trial before the High Court, the Director of Public Prosecutions is of opinion, upon the record of the committal proceedings received by him, that the case is one which may suitably be tried by a subordinate court, he may cause the depositions to be returned to the court which committed the accused, and thereupon the case shall be tried and

determined in the same manner as if such person had not been committed for trial."

On the evidence before me, the Director of Public Prosecutions did not cause the depositions to be returned to the court which committed the accused persons for summary trial. Section 246(1) reads as follows:

> "246 (1). The period within which the Director of Public Prosecutions may file an information under the provisions of this Code shall be one month from the date of receipt by him of the authenticated copy of the depositions and other documents referred to in section two hundred and forty-one."

On the only evidence before me I will further assume in favour of the applicants that one month after receipt of the authenticated copy of the depositions and the other documents the Director of Public Prosecutions did not file an information. In addition, as per s. 246(2) I will assume that the Director of Public Prosecutions did not inform the High Court and the accused persons of the date he received an authenticated copy. Section 246(3) of the Criminal Procedure Code reads as follows:

> "246 (3). If the Director of Public Prosecutions has not within the period of one month aforesaid exercised his powers under section two hundred and forty-two or two hundred and forty-four filed an information, the High Court may of its own motion, and shall upon the application of the person committed, discharge such person unless the High Court sees fit to extend the time for filing an information.".

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I have already assumed in favour of the applicants that the Director of Public Prosecutions in terms of section 242 and 244 did not direct further investigations and did not direct the return of the depositions and that in terms of section 246 (1) he did not file an information. That being the case by virtue of section 246 (3) there are two things that can now be done on the facts of this case. Firstly, this court of its own motion can discharge the applicants unless this court sees fit to extend the time for filing an information. Secondly, there already being an application by the applicants this court has no alternative but to act on the application although intended for a different remedy. Acting on that application leads either to extending time within which the Director of Public Prosecutions must file the information or that the applicants be discharged. On the facts of this case it is unnecessary to consider extending the time for filing an information since the record is no longer there. The only appropriate order in my view is to discharge the applicants.

At the end of the day therefore the applicants' application succeeds either under the provisions of section 6 of the Habeas Corpus Act of 1679 which I hold is applicable to Zambia or in the alternative, if I am wrong in my holding, the applicants' application still succeeds by the provisions of section 246 of the Criminal Procedure Code Cap. 160. Accordingly I discharge all the three applicants on the charge of aggravated robbery and order that they be released forthwith. This discharge however is not a bar to say any further proceedings should the State so wish.

Applicants discharged
