



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
MISC. CRIMINAL CASE NO.43 OF 2016**

BETWEEN:

**DANIEL HARRYAPPLICANT
AND
THE STATE.....RESPONDENT**

Coram: Hon. Justice M L Kamwambe

- Chapuwala of counsel for the State
- Goba Chipeta of counsel for the Applicant
- H. AmosOfficial Interpreter

JUDGMENT

Kamwambe J

The Applicant seeks release from unlawful custody in prison under section 16 (6) (a) (ii) of the Statute Law (Miscellaneous Provisions) Act. He was convicted of the offence of breaking into a building and committing a felony therein contrary to section 311 (1) of the Penal Code and sentenced to 100 months imprisonment on 8th September, 2010 under Criminal Case No. 368 of 2010 by the Thyolo First Grade Magistrate Court. The sentence was supposed to expire on 7th January 2019 if served without remission.



On 28th December, 2010 he escaped from lawful custody of prison officers while working in a prison farm at Mikuyu Young Offenders Rehabilitation Centre. He was re-arrested by police at Thyolo market on 10th May, 2011 after spending 5 months and 23 days at large. On 20th June, 2011 he was again convicted of house breaking and theft contrary to sections 309 (a) and 278 of the Penal Code respectively under Criminal Case No. 364 of 2011 and was sentenced to 48 months and 20 months respectively. Consequently, according to section 35 of the Penal Code he would now be released on the 18th December, 2021 after considering remission on the second conviction.

The State argues that according to section 91 of the Prison Act the Applicant was not entitled to one third remission because of demonstrating bad conduct by escaping from lawful custody. The Applicant is of the view that he is supposed to only lose 60 days at most due to bad conduct according to the Prison Act. He argues that he does not lose the right to remission but only 60 days thereof. He only loses part of remission period, not all. This means that he was due for release on the 30th August, 2016.

The State did not provide the court with skeleton arguments. I allowed it to argue its case all the same. The first part of call is section 107 (1) of the Prisons Act which states as follows:

"A convicted prisoner under sentence of imprisonment for a period of more than one month, other than a prisoner sentenced to imprisonment for life, may earn by satisfactory industry and good conduct remission of one- third of his sentence:

Provided that in no case shall sentence be reduced by reason of remission to less than one month. "

Then section 107 (5) of the Prisons Act provides as follows:

"For the purpose of giving effect to subsections (1) (2) (3) and (4) every prisoner referred to in those subsections shall-

- a) In the case of a prisoner referred to in subsection (1) on his admission to prison; be credited with the full amount of remission he can earn from which shall be deducted any loss of remission awarded to him for a prison of fence in terms of section 9 1 or 92.*

What I read in section 107 (5) is that any such prisoner referred to in subsection (1) to which group the Applicant belongs, is as of right entitled to one-third remission which represents the full amount of remission period. It must always be considered subject only to section 9 1 (a).

Section 91 of the Prisons Act referred to above reads:

"In the case of a prisoner referred to in section 90 (1) (a) may be awarded-

- a) (ii) loss, for a period not exceeding sixty days, of a remission of sentence earned in terms of section 107;"*

Here, a prisoner who has shown bad conduct, forfeits not more than sixty days of the remission period. This means that on the due date to be released after remission, those forfeited days will be added onto custody period. In this regard, the Applicant was due for release on the first count, according to exhibit "MM 3" from the State, on the 27th March, 2016. To this date, sixty days lost remission period if added brings us to about 27th May, 2016. Then add custody period of 32 months imprisonment for the second conviction, one third remission having been considered, it comes to about 27th

November, 2018. Of course the one month presidential pardon shall be deducted.

However, according to the Applicant, when one-third remission is factored in, release date is 30th June, 2016. Add to this date 60 days lost remission days it comes to 30th August, 2016. Then sentence of 48 months for the second conviction starts running which takes us to about January 2019 as his earliest release date. Whichever is the proper tabulation, the Applicant is in lawful custody to date the 17th December, 2016. I have noted that the Applicant did not disclose the material fact in his application that he had a second sentence to serve alternately, hence the State through Dr Priminta of State Advocate Chambers supported his release. The situation was made clear by counsel from the prison service.

The Applicant does not deserve a remedy of immediate release from custody. This application fails.

Pronounced in Chambers this 4th day January, 2017 at Chichiri, Blantyre.

M L Kamwambe
JUDGE