

THE STATE

Versus

DAVISON NYANDORO

HIGH COURT OF ZIMBABWE  
ZISENGWE J  
MASVINGO 7 SEPTEMBER 2023

**Criminal Review: Sentence**

ZISENGWE J: The accused was convicted, pursuant to his plea of guilty to a charge of escaping from Lawful custody in contravention of Section 185 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (“the Criminal law code”)

The brief facts of the case are that at the material time the accused was an inmate at Bikita Satellite prison of the Zimbabwe Prisons and Correctional Services. He was serving a 10 months’ prison term following a conviction of unlawful entry into premises.

On the day in question, he took advantage of the opportunity afforded to him and other inmates to use the ablution facilities to literally bolt away to freedom. Although the prison officers gave chase they couldn’t catch him for dust.

Both the charge and the State Outline are silent on the circumstances of his arrest, nor do they disclose the duration of his ill-gotten freedom.

In the wake of his conviction, he was sentenced to 36 months’ imprisonment’, 12 of which were suspended on the usual conditions leaving him to serve an effective 24 months prison term.

Startled by the apparent severity of the penalty I directed a query to the learned trial Magistrate in that regard- who has since written back graciously conceding that the sentence was excessive in the circumstances.

Section 185 (1) of the Criminal code provides as follows:

**185 Escaping from lawful custody**

*(1) Any person who, having been lawfully arrested and held in lawful custody and—*

*(a) not having yet been lodged in any prison; or*

*(b) lodged in any prison;*

*escapes or attempts to escape from such custody, shall be guilty of escaping from lawful custody and liable—*

*(i) if the crime was committed in any of the aggravating circumstances described in subsection (4)—*

*A. to a fine not exceeding level eleven or imprisonment for a period not exceeding seven years or both, where the person had not yet been lodged in any prison; or*

*B. to imprisonment for a period not exceeding ten years where the person had been lodged in any prison;*

*or*

*(ii) in any other case—*

*A. to a fine not exceeding level ten or imprisonment for a period not exceeding five years or both, where the person had not yet been lodged in any prison; or*

*B. to imprisonment for a period not exceeding seven years, where the person had been lodged in any prison.*

The meaning of “aggravating circumstances” is defined in subsection 4 of that section which reads:

*(4) It shall be an aggravating circumstance if any weapon or violence was used by a person charged with escaping from lawful custody.*

It is common cause that in this case that no violence or weapon were used in the course of the escaping (i.e., aggravating circumstances are absent) and therefore that the applicable sentencing provision is s185 (1) (b) (ii) B. The court’s discretion in this regard is wide suffice it however to point out that there is no fine for escaping from prison and the maximum permissible sentence is 7 years’ imprisonment.

Broadly speaking the factors to be taken into account when considering the appropriate sentence for escaping from lawful custody include the following:

- a) The length of the prison term (or what remains of it) that the accused was serving prior to his escape. This factor is important because the sentence for escaping should not be inordinately longer than that which he sought to avoid by escaping.
- b) The offence for which he/she was serving prior to his/her escape. This factor is closely linked to (a) above. The more serious the offence for which he was serving the greater would the accused's moral blameworthiness and the severer will be the sentence for escaping.
- c) Whether there was damage to State or other property in the course of escaping. This factor is self-explanatory. Oftentimes the jail-break is facilitated by the literal breaking of prison appurtenances. The cutting of fences, digging of tunnels and drilling of holes into the prison walls being examples. Such conduct being aggravatory.
- d) Whether violence or any weapons were used in the course of escaping. I have included this particular factor solely for completeness being alive to the fact that it is specifically provided for in the penalty provision as an aggravating circumstance.
- e) The duration of the ill-gotten freedom and difficulty associated with re-apprehending the escapee. Where a long period of time elapses before re-arresting the offender the stiffer will generally be the sentence. Conversely, where the escape was short-lived the resultant sentence for escape will be shorter. Similarly where the process of re-apprehending the offender was

Although the offence of escaping from lawful custody is no doubt serious one as it tends to undermine the overall criminal justice system, an effective prison term of 24 months' imprisonment in circumstances such as ones at hand is rather excessive and induces a sense of shock. This is particularly so if regard is had to the fact that the escape was not accompanied with the use of violence and that there was no damage to state infrastructure among other considerations.

A sentence in the region of 12-18months imprisonment with a portion suspended is appropriate. Accordingly, the following order is hereby made.

### **Order**

1. The conviction is hereby confirmed

2. The sentence imposed is hereby set aside and substituted with the following

*“18months’imprisonment of which 6 months imprisonment is suspended for 5 years on condition accused does not within that period commit any offence involving escaping from lawful custody and for which upon conviction accused is sentenced to imprisonment without the option of a fine.*

3. Thea accused to be brought before the count without any undie detail to be informed of the alteration of his sentence on review.

ZISENGWE J.....

MAWADZE J Agrees.....