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WHEREFORE, the writ prayed for is hereby granted and the order of April 2, 1975, issued in Civil Case No. 485-IV of the Court of First Instance of Ilocos Norte, is hereby annulled and set aside. The temporary restraining order heretofore issued is hereby made permanent. With costs against the respondents.

SO ORDERED.

Fernando (Chairman), Barredo, Antonio, Aquino, and *Santos, JJ.*, concur.

SECOND DIVISION

[G.R. No. L-45347. July 13, 1978]

LUSTIANO FLORES, *petitioner, vs.* **HON. MOISES F. DALISAY, SR., in his capacity as Judge of the Court of First Instance of Lanao del Norte, Branch V; PEOPLE OF THE PHILIPPINES, and MERCEDITA VILLAPAÑA,** *respondents.*

SYLLABUS

1. **REMEDIAL LAW; CRIMINAL PROCEDURE; APPEALS; ACCUSED HAS FIFTEEN DAYS FROM THE PROMULGATION OF JUDGMENT WITHIN WHICH TO APPEAL.**— The petition for *mandamus* is meritorious. Respondent Judge erred in dismissing the appeal. Petitioner's appeal was seasonably taken because under section 6, Rule 122 of the Rules of Court he had fifteen days from the promulgation of the judgment within which to take an appeal.

2. **ID.; ID.; ID.; RETURNING TO JAIL AFTER PROMULGATION OF JUDGMENT DOES NOT MEAN THAT THE ACCUSED HAD STARTED THE SERVICE OF HIS SENTENCE OR THAT HE HAS WAIVED HIS RIGHT TO APPEAL.**— The fact that the petitioner is a detention prisoner might have created the erroneous impression that in returning to jail soon after the promulgation of the sentence, without making any manifestation

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that he was going to appeal, he had started the service of his sentence. As a detention prisoner and being without means to post bail (he was allowed to litigate in this Court in *forma pauperis*), he had no alternative but to return to jail after the promulgation of the sentence. The fact that he returned to his cell did not conclusively mean that he started the service of his sentence and that the computation of the penalty imposed upon him should start from the date of the promulgation of his sentence.

APPEARANCES OF COUNSEL

Stephen L. Monsanto for petitioner.

Solicitor General Estelito P. Mendoza, Assistant Solicitor General Jose F. Racela, Jr. and Solicitor Jesus G. Bersamira for respondent People of the Philippines.

Hon. Moises F. Dalisay for and in his own behalf.

D E C I S I O N

AQUINO, *J.*:

Lustiano Flores filed this petition for *mandamus* to compel the Court of First Instance of Lanao del Norte to give due course to his appeal from the decision in Criminal Case No. V-163, convicting him of attempted rape. That decision was promulgated on October 14, 1976. Seven days later, or on October 21, 1976, Flores filed a notice of appeal wherein he indicated that he was appealing to the Court of Appeals.

The fiscal filed a motion to dismiss the appeal on the grounds that it was taken out of time, because one week had already elapsed from the promulgation of the judgment, and that the accused had already started the service of his sentence.

The trial judge granted the motion and dismissed the appeal in his order of November 2, 1976. He denied the motion for the reconsideration of his order of dismissal.

The petition for *mandamus* is meritorious. Respondent Judge erred in dismissing the appeal. Petitioner's appeal was seasonably taken because under Section 6, Rule 122 of the Rules of Court

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he had fifteen days from the promulgation of the judgment within which to take an appeal.

The fiscal was misled by the practice where the accused usually files his notice of appeal immediately after the promulgation of the judgment of conviction. The fact that the petitioner is a detention prisoner might have created the erroneous impression that in returning to jail soon after the promulgation of the sentence, without making any manifestation that he was going to appeal, he had started the service of his sentence.

As a detention prisoner and being without means to post bail (he was allowed to litigate in this Court in *forma pauperis*), he had no alternative but to return to jail after the promulgation of the sentence. The fact that he returned to his cell did not conclusively mean that he started the service of his sentence and that the computation of the penalty imposed upon him should start from the date of the promulgation of his sentence (See Art. 28, *Revised Penal Code and Mabuhay Insurance and Guaranty, Inc. vs. Court of Appeals*, L-28700, March 30, 1970, 32 SCRA 245).

What the trial court should have done was to have categorically asked the counsel *de oficio* of the accused (who was not the counsel *de oficio* who handled the defense of the accused) whether or not he would appeal. Because the accused did not file any notice of appeal immediately after the judgment was promulgated, the trial court jumped to the conclusion that he had no intention of taking an appeal. That assumption was unwarranted because the accused had fifteen days within which to decide whether or not he would elevate his case to a higher court since at the promulgation of the judgment his counsel *de oficio*, who handled his defense and who was the one knowledgeable about the merits of his case, was not present.

There is a dictum that, because the defendant is entitled to appeal, the trial court has the discretion to postpone until the last day of the reglementary period the determination of the question of whether it should or should not order defendant's detention or the execution of the judgment of conviction (*People vs. Valle and Alto Surety & Ins. Co., Inc.*, 117 Phil. 1034, 1037).

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The instant case is different from *People vs. Mamatik*, 105 Phil. 479, where the accused, after the promulgation of the judgment convicting him of *abusos deshonestos*, commenced the service of his sentence and then nine days later he moved for the reopening of the case so that he could prove mitigating circumstances. That motion was denied and this Court sustained the denial order because the judgment became final when the accused commenced the service of his sentence. (See *Wagan vs. Tiangco*, L-37561, August 9, 1976, 72 SCRA 294 and *Hilvano vs. Fernandez*, 96 Phil. 791.)

On the other hand, it should be noted that a judgment of conviction "becomes final after the lapse of the period for perfecting an appeal, or when the sentence has been partially or totally satisfied or served, or the defendant has expressly waived in writing his right to appeal" (Sec. 7, Rule 120, Rules of Court). As the petitioner herein had not filed any written waiver of his right to appeal, it cannot be said that the petitioner had waived that right.

We hold that the petitioner is entitled to the writ of *mandamus* because the trial court failed to perform its ministerial duty of giving due course to petitioner's appeal and excluded him from the exercise and enjoyment of his right to appeal. (*Alama vs. Abbas*, L-19616, November 29, 1966, 18 SCRA 836.)

The disposition of this petition was delayed because it was only in April, 1978 that it was definitely ascertained that the offended party, private respondent Mercedita Villapaña, whose whereabouts are unknown, was not making any comment on the petition.

WHEREFORE, the trial court is directed to give due course *immediately* to the petitioner's appeal. In the interest of justice, the Court of Appeals should give *priority* to the disposition of his appeal since the adjudication of this mandamus petition was already delayed. No costs.

SO ORDERED.

Fernando, Barredo, Antonio, Concepcion Jr., and *Santos, JJ.*, concur.