

IN THE HIGH COURT OF SWAZILAND

In the matter of

Case No. 328/81

REX

vs

Benjamini Sifo Mamba

Review Order No. 15/81

District of Hhohho (Pigg's Peak)

Mbabane 11.12.1981

Review Case No.288/81

JUDGMENT ON REVIEW

NATHAN C.J.

The Accused, who was a Land Ranger in the employ of the Swaziland Government, was convicted of the theft from the Government of the sum of E30. He was sentenced to a fine of E100 or six months imprisonment and was further ordered to pay the Swaziland Government the sum of E30 on or before the 31st December, 1981.

The matter came before me on Review. As it prima facie appeared to me that this might well be a case calling for the minimum sentence of six month's imprisonment under Kings-Order-in-Counsel No. 22 of 1975 as amended by Act 5/1981 I directed that it should be set down for argument with a view to increase in sentence; that pro deo counsel should be assigned to the Accused; and that the Magistrate should furnish reasons for his sentence. This has been done. Mr. Matse has argued the matter on behalf of the Accused and the Court is grateful to him for his assistance. The argument took place in the absence of the Accused, who has apparently disappeared. But as he was represented the Court ruled that the hearing should continue, subject to a suitable order being made in the event of the sentence being altered.

Section 4 of Kings - Order - in - Counsel No. 22/1975, as substituted by Section 4 of Act 5 of 1981 provides:

2

"Penalty for theft by public officer.

4. A person convicted of theft under this Order shall be liable to a minimum sentence of six months imprisonment in the case of a first conviction or a minimum sentence of twelve months in the case of a second or subsequent conviction, without the option of a fine, and no such sentence or part thereof shall be suspended:

Provided that the Court may impose a lesser penalty of imprisonment or a fine -

(a) if the person so convicted establishes the existence of any extenuating circumstances in connection with the commission by him of such offence; or

(b) if, having regard to the age of the person convicted or the value of the public property in respect of which the offence was committed, the Court is of the opinion that in the interest of justice such lesser penalty is more appropriate."

The Magistrate in his reasons for sentence approached the matter solely from the point of view of the value of the property stolen, and drew a comparison between his sentence in the present case and that

imposed in such cases as R v V.S. Dlamini, Criminal Appeal, 10/1981, 25th September, 1981. He did not deal with the important question that arises, namely the circumstances of the theft. The evidence discloses that the theft in the present case was perpetrated by a complicated fraud in which the duplicate or triplicate of a receipt for E34 were altered to E4 and there was a further falsification of the cash book kept by the Accused. This was very serious misconduct on the part of a public servant who receives payments that have to be made to the Government.

In the light of these factors it prima facie appeared to me that this was a case calling for the imposition of the minimum sentence of six month's imprisonment without the option of a fine.

Mr. Matse has, however, submitted that where in terms of the section the Magistrate is empowered to exercise his discretion to impose a lesser sentence than imprisonment without the option of a fine, and has done this, the High Court should not interfere with the exercise of that discretion.

3

On consideration I have come to the conclusion that Mr. Matse's submission is correct. The proviso to Section 4 empowers a Court to impose a lesser sentence than that laid down in the first portion of the section,

(a) if there are extenuating circumstances;

(b) if considerations of the age of the Accused or the value of the public property involved render the lesser penalty more appropriate.

If the Magistrate has exercised his discretion in the light of the value of the public property involved - E30 in the present case, which is minimal in comparison with some of the thefts of public money which do take place - I do not consider that such exercise of discretion should be rendered nugatory by reference to the circumstances in which the offence was committed. It might have been proper for the Magistrate, in the first place, to have decided not to exercise his discretion to impose a lesser sentence by reason of the circumstances in which the offence took place. But, he not having done that, and having decided to impose the lesser sentence, I do not consider that this Court should interfere.

It follows that the conviction and sentence should be confirmed.

There is one further matter I should deal with. The Magistrate ordered that the Accused should pay E30 to the Swaziland Government on or before 31st December 1981. In my opinion this order was irregular. A Court may order that payment of compensation be deferred or made in stated instalments where this is desirable as a condition of suspension of sentence. But I do not consider that the Court has any such power in general. Even in those cases where I have ordered that payment of compensation be deferred in conjunction with the imposition of a suspended sentence I have always stated that this order shall be without prejudice to the legal rights of the complainant to take such action to recover the compensation as it may be advised. My brother and I are, however, of the

4

opinion that although the order made was irregular, no amending order should be made in the present instance. The reason is that the period of deferment has almost expired, and it would not be proper to make a new order in the absence of the Accused.

The conviction and sentence are confirmed.

C. J. M. NATHAN

CHIEF JUSTICE.

WILL, A.J. :

I agree.