

In the matter of:

TRACEY SIBANYONI

vs

THE KING

CORAM

F. X. ROONEY

FOR THE CROWN
FOR DEFENCE

A. DONKOH
MATSEBULA

JUDGMENT

29 March 1989

Rooney, J.

On the 23rd August, 1988 the appellant was convicted of the crime of theft. The presiding magistrate (M.S. Jute) sentenced her to four years imprisonment of which term one year was suspended for three years on condition that the appellant is not convicted of a theft committed during the period of suspension. On the application of the prosecutor, acting on behalf of Royal Swaziland National Corporation, the magistrate ordered the appellant to compensate the Corporation to the extent of E18.791 and sixty United States Dolars. This is the total amount which the appellant had stolen from her employers. The order was made under section 5 of the Theft and Kindred Offences Order 1975.

This is an appeal directed against sentence only. Counsel for the appellant attacked the order for compensation as if it were part of the sentence. I am unwilling to treat it as such Section 321 of the Criminal Law and Procedure Act empowers a court to award compensation against a convicted person for loss of property

2

where the offence has occasioned such loss. The amount awarded shall not exceed the civil jurisdiction of such court. Section 5 of the Theft and Kindred Offences by Public Offices Order 19 75 provides the Government and other bodies with an expeditious remedy in the case of a public officer who has been convicted of theft as defined. It in noway increases the liability of the accused, who is always potentially liable, whether in civil or criminal proceedings, to make good the loss she incurred (Ex. Parte. the D.P.P. In re Jeremiah Dlamini 1970-71 S.L.R. 327 per Nathan CJ. at 331).

Mr Matsebula for the appellant submitted that the magistrate was not compelled to make the order for compensation and that he should first have considered the ability of the appellant to repay the amount stolen. The terms of section 5 (1) of the Theft and Kindred Offences by Public Officers Order admit of no such interpretation. The Order requires that "The court trying the case shall upon the application.... forth-with award compensation for such loss....." It is provided in 5 (4) that any award of compensation, made by a court under this section shall have the effect of a civil judgment of that court. A civil court has no discretion to refuse to grant a plaintiff a judgment on account of the deffendan's inability to pay it. There is no substance in Mr Matsebula's argument. Section 5 (7) of the

Order reads -

5. (7) In the event of the court finding that a person convicted has inadequate assets with which forthwith to pay the amount of compensation awarded against him it may order such compensation to be paid in instalments and provide that on the failure to pay any such instalments the accused person shall undergo such further period of imprisonment as it may deem fit".

3

This was not invoked by the magistrate. If it had been it would not have been beneficial to the appellant as it might (notwithstanding the civil nature of the judgment) have rendered her liable to undergo further imprisonment if she defaulted in meeting any instalments ordered.

Mr Matsebula further submitted that the magistrate in passing sentence should have had regard to extenuating circumstances such as the appellant's age, salary and the apparent failure of the Royal Swazi Corporation to discover the appellant's depredations earlier than was the case. He further submitted that having made an order for compensation it was inappropriate for the magistrate to note that the amount stolen had not been recovered.

In giving his reasons for sentence the magistrate remarked -"In deciding on an appropriate sentence the court considered the nature of the crime, the circumstances of accused and the interests of the community.

The court took into account the personal circumstances of the accused as set out by her attorney and that she was a first offender. She however showed no remorse. The court considered the nature of the crime. A large amount of money was stolen over a long period. No money had been recovered.

This type of crime is very prevalent and the court concluded that a sentence with a deterrent effect should be imposed.

Since the court was compelled to make an order for compensation upon application in terms of section 5 of the Theft and Kindred Offences Order 1975 it was not made a condition of the suspended portion of the sentence that accused repays any money.

After consideration of all the above the court imposed the sentence recorded".

4

Although Mr Donkoh for the Crown conceded that the sentence was a severe one and this Court might consider reducing it, I am not persuaded that this would be a proper course.

It is well established practice that an appellate court will not interfere with the sentence passed in a lower court which is within that court's jurisdiction unless the sentence is so obviously inappropriate as to induce a sense of shock or the magistrate has misdirected himself in considering the matter. This is so even where the sentence under review or appeal is not one which the appellate court would have considered appropriate to the circumstances of the case.

It has not been shown that the magistrate misdirected himself in his approach to the sentence passed upon the appellant. While I agree that this was a heavy sentence it was not totally inappropriate and there are therefore no grounds upon which this Court should interfere with the magistrate's discretion in the matter of sentence.

I may add, in regard to the order for compensation, that notwithstanding the proviso to section 321 of

the Criminal Law and Procedure Act referred to above, the court a quo was empowered to make an award in excess of its ordinary civil jurisdiction by virtue of section 5 (2) of the King's Ord'r in Council which stipulates that notwithstanding any other law a magistrate's court shall be entitled to award the full amount of compensation which the complainant has suffered.

F.X. ROONEY

JUDGE

29/3/89