

IN THE COURT OF APPEAL OF BOTSWANA

Criminal Appeal No. 31 of 1994
High Court Cr. App. No. (F) 112 of 1993
Serowe Crim. Case No. S 93 of 1991

In the matter of:

MOTHUSI TIMOTHY OLEBILE Appellant

vs

THE STATE Respondent

Appellant in person
L. M. Mothusi for the State

J U D G M E N T

Coram: A. N. E. Amissah, J.P.
P. H. Tebbutt, J.A.
W.L.K. Cowie, J.A.

TEBBUTT, J.A.:

The appellant was convicted in the Serowe Magistrate's Court of theft by servant contrary to Section 271, read with Section 277, of the Penal Code. He stole an amount of P21 784.05 from a store in Serowe called "Pick a Pair", of which he was the manager. The Magistrate sentenced him to five years' imprisonment of which two were suspended for three years on condition "that he pays the sum of P21 784.05 to the complainant within two years."

An appeal by the appellant, who had a previous conviction for forgery in 1984, against his conviction and sentence to the High Court was, in so far as the conviction was concerned, quite rightly summarily dismissed by Cotran, J. as being without any merit. In regard to the sentence, however, the learned Judge felt that the condition imposed by the Magistrate was too vague. He accordingly altered the condition to read "on condition that

the accused be not convicted of an offence involving dishonesty during the period of suspension."

As to the amount of P21 784.05, Cotran, J. stated that it was in his view clear that the complainant had applied for compensation in terms of Section 316 of the Criminal Procedure and Evidence Act (Cap 08:02) (the Act) which is the section dealing with awards for compensation in a case, for example, of theft. The Magistrate had, however, made the award in terms of Section 308 of the Act, which is the section dealing with the suspension of sentences. This was incorrect. I agree.

Where an award is made in a Magistrate's Court in terms of Section 316 of the Act, Section 316 (4) provides that it shall have the effect of a civil judgment of that Court. The purpose of the section is obviously to obviate the necessity of the complainant having to institute a civil action against the thief for the recovery of his money. The complainant in the present case was clearly entitled to recover its money that was stolen by the appellant from it and Cotran, J., again quite rightly, with respect, made an order in terms of Section 316 against the appellant to compensate the complainant in the sum of P21 784.05.

The appellant has now appealed to this Court against his conviction and sentence. At the hearing of the appeal he abandoned his appeal against the conviction. He was wise to do so. The evidence of his guilt is overwhelming. As to the sentence the appellant took two points. He submitted firstly, that he had spent seventeen months in custody awaiting trial which the Magistrate had not taken into account in passing sentence. He has also been in prison for sixteen months since

his conviction. Secondly, he asked that the compensation order against him be deleted.

As to the first point, it has become the practice in Botswana, although it certainly is not a rule of law, for trial Courts to backdate a sentence of imprisonment passed on an accused person to the date he has been remanded in prison custody. A Court does not have to do so, but it should advert its mind to it (see Sethulu v. The State (1986) B.L.R. 272 (C.A); Mothusi Metseyabeng Cr. App. 10/94). It does not appear from the record that the Magistrate did advert his mind to this aspect. I can see no reason why the practice should not be followed in this case. The appellant was arrested and taken into custody on 20th May, 1991. He was admitted to bail on 11th June, 1991 on a suretyship of one Hilda Kuhlman for P20 000.00. On 10th July, 1991 the latter withdrew her suretyship. The appellant's bail was then increased to P50 000.00 which he could not raise and he was kept in custody until his trial and conviction on 17th September, 1993.

It would accordingly, in my view, be appropriate, and in accordance with the recognised practice, to backdate appellant's sentence to 10 July, 1991.

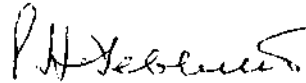
As to the compensation point, the appellant appears to have misunderstood that the suspension of the last two years of his sentence was no longer dependent on the condition that he must pay the P21 784.05 compensation awarded against him within two years. Those two years are suspended on condition that he is not convicted of an offence involving dishonesty committed in the next three years following his release from prison. The

complainant will, however, be entitled to execute on the award of compensation made in its favour. The appellant pleaded that as he has been in prison for almost three years and will probably have difficulty after his release in obtaining employment, he has no money and will in the foreseeable future have none, to pay the compensation. That may be, but this Court cannot see any ground upon which it can set aside the award, which the Court a quo was entitled to make and to which the complainant was, in turn, also entitled. It is accordingly confirmed.

In the result the following order is made:


1. The appeal against the appellant's conviction is dismissed;
2. The sentence is confirmed of five years imprisonment of which two years is suspended for three years on condition that the accused be not convicted of an offence involving dishonesty committed during the period of suspension, save that it is backdated to commence on 10 July, 1991;
3. The award to the complainant in terms of Section 316 of the Criminal Procedure and Evidence Act (Cap 08:02) is confirmed.

GIVEN AT LOBATSE THIS 26th DAY OF JANUARY, 1995.



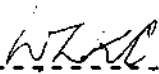
P. H. TEBBUTT
Judge of Appeal

I agree



A. N. E. AMISSAH
Judge President

I agree



LORD W. L. K. COWIE
Judge of Appeal