

A 457/09

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION)

Not reportable

DATE: 28/05/09

5/1/09

High Court Ref no : 101

Review case no : MR15/09/BNK

THE HONOURABLE MR JUSTICE RABIE

In the matter between:

THE STATE

And

MARTINUS PHILLIPUS SMITH

REVIEW JUDGMENT

RABIE J:

1

The accused was convicted on 25 June 2008 on a charge of theft of a Nokia cell phone valued at R800.00. He was sentenced to a fine of R3.000.00 or 8 months imprisonment wholly suspended for a period of 3 years on condition that he is not convicted of an offence which involves dishonesty committed during the period of suspension. It was further ordered that the accused pay the amount of R800.00 to the clerk of the court as a compensation fine which will be paid over to the complainant.

2.

The matter came before this court on review and the judge in chambers enquired whether the sentence was not excessive and furthermore whether the compensation order could have been made since it does not appear from the record that the prosecutor acted on the instructions of the complainant.

3.

Both the Magistrate and the State Advocate and the Deputy Director of Public Prosecutions responded to the inquiry and I am indebted to them for their input.

4.

As far as the facts of the matter are concerned the following may briefly be referred to: The accused is a tow truck driver who towed the complainant's vehicle after it had been involved in a collision. The complainant enquired about her cell phone which should have been in the vehicle and at first the accused could not find the cell phone and informed the complainant of that fact. However, at a later stage, he found the cell phone in the motor vehicle but decided to keep the cell phone and not inform the complainant that he had found it.

5.

The accused pleaded guilty and he was properly convicted

6.

The accused is a first offender and he showed remorse for his deed. He testified that he felt very ashamed and he offered to buy a new cell phone for the complainant.

7.

The magistrate was of the view that the aforesaid sentence was not shockingly inappropriate and in this regard particularly referred to the fact that the accused was in a relationship of trust with the complainant and that his breach of this trust is an aggravating factor. In this regard the Deputy Director of Public Prosecutions referred to the matters of S v Kunene 2001(1)SACR119(W) and S v Shilubane 2008(1)SACR and submitted that in the circumstances the sentence does not appear to be excessive. Mention was made of the fact that there is no evidence on record of the accused's income but that it appears that he would be able to pay the fine which was suspended.

8.

In my view the sentence is probably higher than I would have imposed if I had to do so in the first instance. However, I do not regard this sentence as shockingly inappropriate or inappropriate to such a degree that this court should interfere. The victim of a motor vehicle collision usually finds himself in a very vulnerable position and relies on the tow truck driver to take care of his vehicle and his possessions inside the vehicle in a proper manner. The victim is at the mercy of the tow truck driver in this regard and the breach of that relationship of trust is a serious matter. Consequently, I am of the view that this court should not interfere with the sentence imposed upon the accused.

9.

Regarding the compensation order it is clear that such an order can only be made in terms of section 300(1) of Act 51 of 1977 upon application of the injured person or of the prosecutor acting on the instructions of the injured person. In the present matter there is no evidence to indicate that the prosecutor acted on the instructions of the complainant.

10.

An order under section 300 has the effect of a civil order and the court should ask the prosecutor whether he has been authorised by the complainant to make such an application. Such authority is expressly required by the Act for the reason that it affects the complainant's right to claim compensation in a civil court. See *S v Tlame* 1982(4)SA319(P) and *S v Bepela* 1978(2)SA22(BH) at page 23.

11.

In *S v Msiza* 1979(4)SA473(T) at page 474 the compensation order was set aside because the complainant had made no application nor given evidence regarding his damages and also because the *audi alteram partem* principle had not been applied by giving the accused an opportunity to lead evidence or make his presentations regarding the amount of the damages.

12.

In my view there is no evidence that the prosecutor acted on the instructions of the complainant and consequently the magistrate was not entitled to make the compensation order. See further *S v Ntandane* (2006)JOL17681(T) and *S v McKlopper* (2007)JOL19590(E).

13.

In the result the following order is made.

1. The conviction and sentence is confirmed.
2. The compensation order ("compensation fine") is set aside. If the accused had already paid this amount he should be reimbursed by the Clerk of the court *a quo*.