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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v BRAHAM

Young CJ, Gowans and Harris JJ

31 March 1976 — [1977] VicRp 11; [1977] VR 104

CRIMINAL LAW – ACCUSED FOUND GUILTY OF PARTICIPATION IN A BANK ROBBERY WITH OTHERS – APPLICATION BY THE BANK FOR AN ORDER FOR COMPENSATION – POWERS AND DISCRETION OF THE SENTENCING COURT – NATURE OF COMPENSATION ORDERS – PUNISHMENT AND COMPENSATION ORDER TWO DIFFERENT COMPONENTS OF THE SENTENCE – NO ORDER MADE AGAINST CO-OFFENDER – WHETHER ORDER FOR FULL AMOUNT COULD BE MADE AGAINST ACCUSED: *CRIMES ACT* 1958, s546.

B. let co-offenders into an ANZ Bank where he was employed and left with them on the false basis that he had been under duress to assist them. He was convicted of robbery and sentenced to 8 years' imprisonment with a minimum of 4 years. Order made under s546 on application of bank for payment of $5030 unrecovered. B. appealed against severity of sentence.

It was argued:-
(a) that the compensation order was part of the "sentence";
(b) that Court had a discretion under s546 whereby the defendant's means could be considered;
(c) that a co-offender, Gray, had not been ordered to make compensation (as there was insufficient evidence available to support on application against G.)
(d) that the $5030 represented monies taken by the co-offenders alone, in that B. had agreed only to the robbery of specific monies delivered in rolls by Mayne Nickless, of which the $5030 was not part.

HELD: Order for compensation not annulled.
1. The power to order compensation remains a provision designed to enable summary recovery of compensation and not a provision for additional punishment.

2. The Court was unable to accept the contention that the combined operation of the custodial sentence and the order for compensation rendered the punishment excessive so as to justify the quashing of the sentence constituted by the two components of the custodial sentence and the order for compensation, and the passing of a different sentence. If the punishment is to be regarded as excessive it must be by force of the degree of punishment represented in the custodial sentence.

3. The objective of providing compensation to the victim dominates the provisions of s546 of the Act and that the discretion which governs the making of the order and the fixing of the sum to be paid should not be regarded as permitting an account being taken of the means of the offender, unless and except to the extent that there is a necessary implication to the contrary.
***R v Marion*, VSC, unrep, 20 November 1975, Lush J, not followed.**

4. Whilst there might be occasions in which it would be justifiable to apportion the payment of compensation among offenders without injustice to the victim, the mere fact that an order for compensation has not been made against one of the offenders does not necessarily require that it should not be made against another. The apportionment of the compensation among the offenders is a concession in their favour and it is not a right they are entitled to demand. It would not be an improper exercise of discretion if an order were made notwithstanding that an order for compensation had not been made against the co-offender.

5. In the present case the Judge was told that the co-offender, Gray, had not had an order made against him because there had been "insufficient evidence" before the Judge who dealt with the offender. In the exercise of his discretion the Judge considered that he should not on that account alone relieve a person who was liable to pay the whole of the amount lost. This did not constitute a wrongful exercise of the discretion.

THE FULL COURT (YOUNG CJ, GOWANS and HARRIS JJ: *[The Court made reference to s566 defining sentence as any order of the court; s567-8 – as to powers of Full Court on appeal; and s570 as to quashing of orders relating to restitution of property or money, and continued]* … It is clear that the

exercise of the power contained in s570(2) is confined to dealing with the order for payment of compensation. But in s567(d) and s568(4) the word "sentence" has (having regard to the definition in s566) to be treated as embracing an order for the payment of money by way of compensation: *R v Jones* [1929] 1 KB 211, at pp214-5. Under s568(4), the court may quash the whole of the sentence (including the order for compensation) and substitute another (including another order for compensation), while under s570(2) the court can annul or vary the order for compensation irrespective of its quashing any other part of the sentence.

It does not follow from this, however, that the two components of the "sentence" should be treated as together constituting the punishment for the purpose of determining whether a different sentence should have been passed. Whether the order for compensation should be treated as part of the punishment depends upon the proper character of the provision providing for compensation.

The reference in s546 to "any person suffering loss or destruction of or damage to his property" and the requirement that a person falling within that description has to make application for an order for the payment of money as compensation, point to the character of the provision as designed to benefit that person rather than to punish the person convicted. That is the view that has been taken historically of the predecessor to this section. In the previous form the reference was to "any person aggrieved" and to his making an application for an "award by way of satisfaction or compensation for the loss or damage suffered by the applicant". The view that was taken of the provision when it stood in that form was that it was a convenient procedure in summary form to enable recovery of compensation for the loss or damage suffered. Thus in *R v Lovett* (1870) 11 Cox CC 602 it was said of the corresponding English provision, at p603:

> "This was manifestly designed to be in the nature of a remedy for the wrong done to the individual, and to be in addition to, and not as a substitute for, the punishment due to the crime."

A similar view was taken by Hood J in the Victorian case of *In Re Clements; Ex parte Ralph Brothers* [1895] VicLawRp 44; (1895) 21 VLR 237. He said, at p239:

> "I think the real object of the Legislature, was, as has been suggested, to avoid the scandal of a second jury reversing the verdict of the first jury ...".

More recently, in *R v Ironfield* [1971] 1 WLR 90; [1971] 1 All ER 202, it was said by Lord Parker, CJ (WLR, at p91; All ER, at p203):

> "If a man takes someone else's property or goods he is liable in law to make restitution or pay compensation even if no compensation order is made by the court before which he is convicted. A victim who wishes to assert his rights need not be put to the additional trouble and expense of independent proceedings..."

Consequently, it was held in that case that it was not wrong in principle to order compensation in the case of a man without means who would, on his release, require what money he could earn to rehabilitate himself. Thereafter, by the English *Criminal Justice Act* 1972 s1(4), it was made necessary for the court to consider the means of the prisoner both in deciding whether to make an order and in fixing the amount of the order and, by s40, power was given to the court to allow time for payment and to direct payment by instalments. Pronouncements on the operation of the provision since then have been coloured by the existence of that requirement but they do not deviate from the view of the character of the provision set out above: *Bradburn's Case* (1973) 57 Cr App R 948, at p951; *R v Oddy* [1974] 2 All ER 666, at p669; [1974] 1 WLR 1212, at p1215; *Inwood's Case* (1974) 60 Cr App R 70.

That view of the operation of the section was adopted by Lush J in *R v Marion* (20 November 1975, unreported) as the accepted view of the section as it appeared before its replacement by the *Crimes (Amendment) Act* 1970. We do not think that the distinctive character of the section was altered in the substituted form. It remains a provision designed to enable summary recovery of compensation and not a provision for additional punishment.

We are therefore unable to accept the initial approach made by Mr Nettlefold based upon the contention that the combined operation of the custodial sentence and the order for compensation rendered the punishment excessive so as to justify the quashing of the sentence constituted by

the two components of the custodial sentence and the order for compensation, and the passing of a different sentence. If the punishment is to be regarded as excessive it must be by force of the degree of punishment represented in the custodial sentence.

That leaves the two components of the sentence to be considered separately in order to see whether either should be altered. It is convenient while the subject of the order for compensation is in hand to consider that matter.

In this connection the changes made in s546 by the *Crimes (Amendment) Act* 1970 call for consideration. Prior to this amendment there were two provisions in the *Crimes Act* 1958 providing for compensation. One operated in a limited field, the other more generally. One was s83(1), the other was s546. The first of these provisions read:—

> "83. (1) Where any person is convicted, whether upon presentment or summarily, of the offence of stealing or illegally using a motor car the judge or chairman of general sessions before whom or the magistrates court before which he is so convicted, if satisfied that the motor car or any property therein or thereon has been damaged or destroyed as a result of the larceny or illegal use, may in addition to any fine or imprisonment imposed order the person convicted to pay to the owner of the damaged or destroyed motor car or property such sum as the judge or magistrates court fixes as compensation in whole or in part for the damage or destruction, and the sum so ordered to be paid may be directed to be paid by instalments and shall, so far as relates to its payment or recovery and to the consequences of failure to pay, be regarded as a fine or penalty imposed by the court upon a conviction in the exercise of its ordinary criminal jurisdiction: Provided that nothing in this section shall be construed as abrogating or affecting any right of action which any person may have to recover damages for or to be indemnified against such damage or destruction so far as the same is not satisfied by payment or recovery of compensation under this section."

The other provision read:—

> "546. Where any court has convicted a person of any felony misdemeanour or summary offence the court may if it thinks fit on the application of any person aggrieved immediately after the conviction award by way of satisfaction or compensation for the loss or damage suffered by the applicant any amount not exceeding the value of the property lost stolen injured or destroyed through or by means of the said felony misdemeanour or summary offence and the amount so awarded shall be deemed to be a judgment debt due to the applicant from the person so convicted and the order for payment of the amount so awarded may be enforced in any manner in which a judgment or order of that court for the payment of a civil debt could be enforced...".

It will be observed that s83(1) contemplated the ordering of compensation in part and payment by instalments, whether application was made for compensation or not, sanctions being provided for payment appropriate for criminal penalties. By way of comparison, s546 provided also for the payment of any amount by way of compensation not exceeding the value of the property lost, the sanction provided for payment being that appropriate for a civil debt. One problem of construction as to whether the compensation was to be for property only was dealt with in *R v Kish* [1970] VicRp 60; [1970] VR 459.

By the *Crimes (Amendment) Act* 1970, s83(1) was repealed and s546 was repealed and re-enacted in a new form. In subs(2) of the new s546, provision was made for the ordering of payment by instalments as formerly in s83(1). In subs(3) the sanction provided for payment was that appropriate for a civil debt, as formerly in s546. In subs(4) provision was made against any right of action to recover damages or to be indemnified against loss in so far as not satisfied by payment or recovery being abrogated or affected, in the same way as had been done formerly in s546. In subs(1) the operation of the main provision was made to apply to the cases of a bond or probation being granted as to the case of a conviction; the time for the making of the order as distinct from that for the making of the application was required to follow immediately after the conviction or order for a bond or probation; it was made clear that the compensation was to be for loss, destruction or damage to property; and for the words "any amount not exceeding the value of the property lost stolen injured or destroyed" were substituted the words "such sum not exceeding the value of the property lost destroyed or damaged as the court or judge thinks fit." Thus s546 now reads as set out earlier.

Whether under the section as it stood before the change, an order should be made, was a matter for

the court's discretion, as is clearly shown by the words "may if it thinks fit...award". The position is the same in this respect under the new section. The considerations which should govern the exercise of that discretion are left unstated in the section. In accordance with the approach of the courts to the operation of a discretion so stated, it must be accepted as undesirable to endeavour to regulate its exercise by a pre-statement of the conditions which should govern it. But we think that for present purposes it should be stated that it would be a proper exercise of the discretion to refuse to make an order where there was involved a complicated or extensive investigation into the conditions of its exercise or the circumstances to be regarded in exercising it. For example, if there were required to be undertaken a complicated or extensive inquiry in order to ascertain whether there had been a loss or destruction of or damage to property, or in order to ascertain whether it or a part of it had arisen through or by means of the offence, or in order to determine what was the value of the property lost, destroyed or damaged, that would be a consideration proper to be regarded as a ground for refusing to make an order and leaving the matter to other processes. We should not, however, be understood as saying that the mere raising of an issue as to whether part of a loss or destruction or damage had been suffered through or by means of the offence, however tenuous the argument might be, would in itself be sufficient to justify the refusal of an order. We would adopt the view taken of the operation of the related English provision that the machinery of a compensation order is intended for clear and simple cases since the civil rights of the victim remain: *R v Kneeshaw* [1975] QB 57, at p60; [1974] 1 All ER 896. We think it desirable to point out, however, in this connection that the present English provision is substantially different in operation and brings different considerations into play.

Although we would accept, as was stated in *R v Kneeshaw*, *supra*, that a compensation order "can be extremely beneficial as long as it is confined to simple, straightforward cases and generally cases where no great amount is at stake", we would not be disposed to treat the latter part of this statement as meaning that only orders for relatively small sums should be made, and, in any case, we would not regard it as applicable in cases arising under the Victorian legislation, under which no numerical limit of the amount of compensation has ever been imposed. Under it the amount involved alone, without associated complications, is not necessarily a bar.

It appears to us to be clear that under the new s546 the discretion extends beyond the making or withholding of an order to the fixing of the amount of the sum to be paid. The discretion as to the sum to be ordered for payment by a particular offender might properly be exercised in such a way as to allocate to him part of the loss arising through or by means of the offence, if it were thought that injustice would not thereby be done to a victim. Such a case might arise where a number of offenders were all targets of an application for compensation or one of a number of offenders was before the court and there was evidence that they had shared the booty in ascertained proportions. That is not to say that the mere fact that a loss was jointly caused requires such an apportionment. The main objective of the section is, after all, the provision for the victim of compensation for the loss, destruction or damage suffered through or by means of the offence.

A question arises, however, as to what part, if any, is required or should be allowed to be played by the consideration of the means possessed by the offender. S546 does not contain a provision such as was inserted in the English legislation by s1(4) of the *Criminal Justice Act* 1972, making it compulsory for the court to have regard to the means of the person against whom the compensation order is contemplated, so far as those means appear or are known to the court. Apart from the provision for directing payment by instalments contained in s546(2), the terms of the section are, notwithstanding the change of the language in subs1), not substantially different (if the limitation of amount is left out) from the terms of the earlier English provision dealt with in *R v Ironfield*, *supra*, and they were then construed as excluding consideration of the offender's means as a factor relevant to the discretion to fix the sum. The basis for the view there adopted was that compensation for the victim could not be achieved if regard had also to be had to the rehabilitation of the offender. This view of the earlier English provision has been confirmed in later cases. Thus, in *Bradburn's Case*, *supra*, it was said, at p951:

> "Before 1972 when a compensation order was made under the earlier legislation the means of the person making the payments were not regarded..."

And in *R v Oddy*, *supra*, it was said:

> "It is necessary, however, for the purposes of considering the problem which arises in this case to go back to the *Forfeiture Act* 1870, which is the foundation of the modern law relating to compensation orders. Shortly after that Act was passed, in *Reg v Lovett* (1870) 11 Cox CC 602, it was submitted to the court that a compensation order under the *Forfeiture Act* 1870 might be considered as an alternative to a sentence. The judge, Serjeant Cox, firmly rejected that submission. He referred to the Act and said, at p603:
>
> > "This' – that is, s4 – 'was manifestly designed to be in the nature of a remedy for the wrong done to the individual, and to be in addition to, and not as a substitute for, the punishment due to the crime.'
>
> That was the approach of the courts from 1870 up to 1972, and as recently as 1971 in *Reg v Ironfield* [1971] 1 WLR 90 this court laid down the principles which were applicable for the making of compensation orders under the *Forfeiture Act* 1870."

We have come to the conclusion that the objective of providing compensation to the victim dominates the provisions of s546 and that the discretion which governs the making of the order and the fixing of the sum to be paid should not be regarded as permitting of account being taken of the means of the offender, unless and except to the extent that there is a necessary implication to the contrary. It is true that there is such an implication to be found in s546(2) authorizing a direction to pay by instalments, but we do not think that there appears either from the history of the legislation or its content any intendment that such an operation should apply with respect to s546(1). We do not find in the mere fact that subs(1) in terms of permits of the ordering of a lesser sum than that which represents the loss a sufficient indication that the means of the offender must be taken into account, and we do not see how such a requirement could very well be fulfilled if there were no material before the court from which the means of the offender could be ascertained, nor are we clear as to whose responsibility it would be to place before the court any such material.

We are conscious of the fact that this construction is different from that adopted by Lush J in *R v Marion*, *supra*, but with due respect, we do not find sufficient in the provision, notwithstanding the difference in language from that of its predecessor, to justify the conclusion he reached in this regard.

It is now appropriate to turn to the circumstances of the making of the order for compensation in the present case. The learned Judge found the loss of $5030 to be sufficiently proved. He found also that the facts proved compelled the conclusion that Braham concurred in the theft of any money which could be expeditiously and safely removed from the bank. This finding was made the subject of dispute in this appeal on the basis that the only evidence was to the effect that the applicant had not been party to a scheme extending beyond the taking of the sum prepared in rolls of notes for removal by Mayne Nickless. But the real issue was whether within the language of s546(1), the bank had suffered the loss it claimed to have suffered "through or by means of the offence". Whatever the limits of the scheme in which the applicant had joined, he was properly convicted of engaging in the robbery and the consequence of his offence was that the sum which had not been recovered was lost. The facts found by the Learned Judge were sufficient to establish this. We do not think that this contention of the applicant had such substance in it that the mere fact of its being raised required or could have justified the refusal of the order.

It was also contended that the fact that no order had been made against the applicant's co-offender, Gray, should have resulted in the refusal of an order since it would involve the whole of the burden of the loss being borne by the applicant. We have indicated that there might be occasions in which it would be justifiable to apportion the payment of compensation among offenders without injustice to the victim. But the mere fact that an order for compensation has not been made against one of the offenders does not necessarily require that it should not be made against another. The apportionment of the compensation among the offenders is a concession in their favour and it is not a right they are entitled to demand. It would not be an improper exercise of discretion if an order were made notwithstanding that an order for compensation had not been made against the co-offender. In the present case the learned Judge was told that the co-offender, Gray, had not had an order made against him because there had been "insufficient evidence" before the Judge who dealt with the offender. In the exercise of his discretion the learned Judge considered that he should not on that account alone relieve a person who was liable to pay the whole of the amount lost. We are unable to say that this constituted a wrongful exercise of the discretion.

Then it was put that it was wrong to make an order against the applicant because he could then have no right of contribution against Gray. We are far from satisfied that s24 of the *Wrongs Act* 1958 is not available to the applicant to enforce contribution against Gray. But we need not determine that point. For if s24 were not available that would not be a consequence of the making of the order against the applicant but the result of other considerations. In other words, it would not be the making of an order that would affect the applicant's position. The learned Judge assumed without deciding it that the contrary was the case. But he observed:

> "A concern to preserve for Braham what s24 of the *Wrongs Act* may have been supposed to have intended he should have, ought not in my opinion to outweigh the considerations which favour the exercise of the discretion conferred by s546 to grant the bank's application. Those considerations are that by conduct that was both gravely criminal and a tort against his employer, the bank, Braham has made himself civilly liable for its loss to the extent of $5030."

We would hesitate to say that, if the effect of making an order under the section were to deprive the applicant of rights he would have if the victim were left to his ordinary civil remedies, this would not be a ground for refusing an order. But we are not satisfied that any such deprivation would follow in this case, so that if there were an error in that regard in the exercise of the Judge's discretion, it would not result in the exercise of discretion by this Court to a different effect. In the result we consider that no case has been made out for annulling the order for compensation.

That leaves only the custodial sentence. It is not contended that the main sentence was excessive. What was contended was that the allegedly subordinate part played by the applicant in the offence and the evidence adduced on his behalf of good character demanded the fixation of a lower minimum term. We can only say that, taking into account all that was alleged in this respect, we are unable to accept the contention.

The application for leave to appeal must therefore be dismissed. Application dismissed.

Solicitor for the applicant: George Madden, Public Solicitor.
Solicitor for the Crown: John Downey, Crown Solicitor.
Solicitor for the respondent, Australia and New Zealand Banking Group Limited: RJ Trevor.
