COURT OF CRIMINAL APPEAL

JUDGE

H.H CHIEF JUSTICE SILVIO CAMILLERI LL.D.

Sitting of 17th March 2017

Appeal No: 591/2016

The Police

(Inspector Bernard C. Spiteri)

vs

omissis

Abdinasir Farah Ali

The Court:

1. Having seen the charges brought against Mohamud Ahmed Dahir and Abdinasir Farah Ali holder of Identity Card No. 9000669A, aged 20 years, son of Farah Ali and Fatima nee' Ali, born in Hiran Somalia on the 1st January 1996, and residing at "Ta Kelina", Block B, Flat G, Triq l-Arcipriet Saver Casar, Nadur

With having On the 6th November 2016, at around 02.45 am whilst at Munxar and/or villages around Gozo and/or in the vicinity:

1. Committed theft of a vehicle of the make Isuzu with registration plates CBT821, which value exceeds two thousand and three hundred and twenty-nine euro and thirty seven cents (2,329.37) to the detriment of Mario Vella, which theft is aggravated by amount, time and the nature of the thing stolen;

2. And also for having during the same date, place, circumstances and time, in Gozo, driven a vehicle of the make Isuzu with registration plates CBT 821, without a licence issued from the competent authority in a reckless, negligent and dangerous manner;

3. And also for having on the same date, time, place and circumstances, driven a vehicle of the make Isuzu with registration plates CBT821 without being covered with an insurance policy.

And Abdinasir Farah Ali was also charged:

4. For having on the 6th November 2016 at some time between 02.45 am whilst at Munxar and in other villages in Gozo through imprudence, negligence or unskilfulness in his trade or profession, or through non-observance of any regulation, whilst driving vehicle of the make Isuzu with registration plates CBT821, caused involuntary damage to a vehicle of the make Alfa Romeo with registration plates BCF794 to the detriment of Charlton Scicluna.

And Mohamed Ahmed Dahir was also charged:

5. For also having on the 6th November 2016 , at 02.45 am whilst at Xewkija in Gozo through imprudence, negligence or unskilfulness in his trade or profession, or through non-observance of any regulation, whilst driving vehicle of the make Isuzu with registration plates CBT821, caused involuntary damage to the property of Mario Saliba and Christopher Paul Bicker.

The prosecution asked the Court to disqualify the offender for holding or obtaining a driving license for a period of time that the Court deems it is fit.

2. Having seen the judgment of the Court of Magistrates (Gozo) as a Court of Criminal Judicature delivered on the 22nd November 2016 whereby the Court after having seen the Articles 261(c)(f)(g), 267, 270, 271(g), 325(1)(b) and 325(1)(c) of Chapter 9 and Article 15(1)(a) of Chapter 65 of the Laws of Malta, found the accused Mohamud Ahmed Dahir guilty of the first (1st), the second (2nd) and fifth (5th) charges brought against

him, and accused Abdinasir Farah Ali guilty of the first (1st), the second (2nd) and fourth (4th) charges brought against him and condemned both of the accused to two years imprisonment.

The Court also condemned both of the accused to a fine of one hundred Euro (€100) each and ordered that both of them be disqualified from holding or obtaining a driving licence for a period of eight (8) days starting from the date of the judgment.

3. Having seen the appeal application filed by Abdinasir Farah Ali in the registry of this Court on the 7th December 2016 whereby this Court was requested to vary the said judgment by confirming the finding of guilt in the first charge and revoking the finding of guilt in the second charge and fourth charge and acquitting the applicant of the same thereby varying the punishment meted out by the Court of Magistrates (Gozo) as a Court of Criminal Judicature and applying a lesser punishment; alternatively, and only in the event that this court should dismiss the grievance of the applicant regarding the finding of guilt of both or any one of the second and fourth charges, thereby confirming the said judgment as regards the finding of guilt, the applicant requested the Court to vary the said judgment by reducing the punishment meted out and applying a lesser and more appropriate punishment in light of the circumstances and the nature of the case as explained in the application of appeal and this in accordance with all appropriate and opportune measures that this Court deem fit to impose.

4. Having seen all the acts of the proceedings including the documents filed and having heard the oral submissions of the parties;

5. The facts of the case may be summed up as follows:

The appellant was charged as aforesaid before the Court of Magistrates (Gozo) as a Court of Inquiry on the 7th November 2016 together with Mohamud Ahmed Dahir. When the case was called the persons charged appeared without the assistance of legal counsel and the Court appointed a legal aid lawyer for each of the persons charged. The persons charged informed the Court that they did not understand Maltese and therefore they requested that the proceedings proceed in the English language which request was allowed by the Court. The defence did not contest the validity of the arrest of the accused and after the prosecuting officer read out the charges and confirmed same on oath he exhibited a statement by each of the accused together with other documents. The accused were examined and they pleaded not guilty, bail was requested and this was granted by the court.

During the next sitting of the 22nd November 2016, after the prosecution exhibited a number of documents, the accused Ahmed Dahir Mohamud admitted the 1st and 4th charges against him while the appellant admitted to the 1st and 5th charges brought against him. They both confirmed their guilty plea after having been given sufficient time to reconsider their guilty plea. During the same sitting the prosecution agreed that the accused were not guilty of the third charge and withdrew it. In respect of the second charge a minute was entered in the record to the effect that "It is agreed that the accused have driven with a reckless manner". The case was then decided on the same date and the Court ordered that the record be transmitted to the Attorney General.

6. The appellant's grievances substantially consist in the following:
the first grievance is to the effect that the first court was not correct in finding the appellant guilty of the second and fourth charges since he

had only admitted the first and fifth charges when in fact he had never been charged with the fifth charge and therefore could never register a guilty plea in respect of that charge;

the second grievance is substantially to the effect that the first court should have applied articles 279(b) and 280 of the Criminal Code and should not have applied article 325 of the Criminal Code which deals with wilful damage since the appellant had been charged with involuntary damage;

the third grievance is to the effect that the punishment meted out by the first court, even though it enters within the parameters of the law, is excessive.

7. Before the Court addresses the grievances raised by the appellant in his appeal the Court must first address the issue which it raised *ex ufficio* during the sitting of the 25th January 2017 since it is one of public order concerning whether the appellant could appeal according to law from the judgment of the first court once the judgment had commenced to be executed.

8. On the 2nd February 2017 the appellant filed an application requesting to be allowed to file a note of submissions on the said issue which request was allowed by the Court which ordered that the note was to be served on the Attorney General who could file a reply. The appellant filed his note of submissions which was served on the Attorney General who incomprehensibly did not consider it opportune to reply.

9. In his note of submissions the appellant refers to the judgment of this Court of the 24th October 2003 in the names P v Andre Sant where it was held that the request for the suspension of the execution of the

sentence need not necessarily be made immediately after the pronouncement of the sentence but may be made within the time limit allowed for the filing of the appeal, provided that the judgment had not been executed or not executed in full. This Court observes, however, that the case in question concerned a judgment where the party convicted was not in custody because the sentence of the court of first instance was to the punishment of a multa and to the binding over of the sentenced person and the legal provision which applied in the case was article 416(1) of the Criminal Code. In this case, however, the appellant was a person convicted who was in custody because he was sentenced to the punishment of imprisonment and the applicable legal provision was therefore article 416(3) of the Criminal Code. Moreover, although the appellant had requested a stay of execution of the sentence this was not granted because the court held that the request had not been made in due time.

10. Furthermore, in his note of submissions the appellant referred to a number of decisions of the Maltese Constitutional Court and of the European Court of Human Rights and submitted that the right to appeal a decision of the courts is a fundamental right which is intrinsic in the right to a fair hearing enshrined in Article 6(1) of the European Convention, Article 2 of the Seventh Protocol to the same Convention and Article 39(1) of the Constitution. Without venturing beyond the limits of its competence, the Court observes that the same judgments to which the appellant refers repeatedly emphasise the fact that the right in question is not absolute and calls for regulation by the State in particular where the conditions of admissibility of an appeal are concerned. Indeed, Article 2 of the Protocol abovementioned explicitly states that the exercise of the right of appeal, including the grounds on which it may be exercised, shall be governed by law.

11. The Court, therefore, reviewed the judgments to date on the matter here in issue, and in particular those reviewed and analysed in the judgment of this Court of the 27th November 2008 in the names P v Raymond Pace et including the judgement of this Court of the 23rd April 1997 in the names P v George Cefai to which this Court made specific reference in its minute registered during the sitting of the 25th January 2017. In the latter judgment this Court came to the conclusion that the demand for the suspension of the judgment must be made immediately the judgment is delivered and this was the only way one could avoid the immediate execution of the judgment in terms of article 665 of the Criminal Code which provides that every decision shall be enforceable as soon as delivered. It went on to say that once the judgment of the court had been given execution the judgment could no longer be suspended and the sentenced person could not appeal that judgment.

12. However, the issue of whether the sentenced person who fails to obtain a stay of execution of the judgment may nevertheless appeal that judgment must today be re-examined in the light of subarticle (3A) of article 416 of the Criminal Code which was added to the Code by Act XVI of 2006[1]. The said subarticle (3A) provides:

> "The failure to make a declaration of appeal as provided in subarticle (3) shall not preclude the party convicted from appealing the judgment provided that such appeal is filed within the time allowed for entering such appeal."

13. On account of the said subarticle (3A) the conclusion reached in the aforesaid decision P v George Cefai is no longer sustainable. It is true that the said decison was founded upon a joint reading of articles 416(1) and 665 of the Criminal Code, both of which have remained unaltered since that decision, but today subarticle (3A) of article 416 clearly leads to an opposite conclusion. This is so because,

[1] Article 10

notwithstanding the said articles 416(1) and 665 of the Criminal Code, the said subarticle (3A) clearly provides that the failure to make a declaration of appeal which stays the execution of the judgment in regard to the party convicted who is in custody shall not preclude the party convicted from appealing the judgment provided that such appeal is filed within the time allowed for entering the appeal. Therefore, although in these proceedings the appellant has been held not to have made a declaration of appeal as provided in article 416(3) he must be held not to be precluded from entering the present appeal which was filed within the time allowed by law for entering the appeal.

14. The Court will therefore proceed to consider the appellant's grievances concerning the judgment appealed from.

15. The appellant's first grievance is to the effect that the first court was not correct in finding the appellant guilty of the second and fourth charges since he had only admitted the first and fifth charges when the fifth charge did not even concern him.

16. The Court notes that while the annotation, apparently in the presiding Magistrate's own hand, on the face of the summons of the first court's decision may be unclear and equivocal the same cannot be said of the typewritten judgment which is signed by the presiding Magistrate and is inserted in the record and which is clear and unequivocal. In accordance with that judgment signed by the presiding Magistrate the first court found the appellant guilty of the first, second and fourth charges when according to the minutes of the sitting of the 22nd November 2016 the appellant had declared himself guilty of the first and fifth charge. Since the fifth charge did not concern the appellant his admission of that charge could have no legal effect and in fact the first Court did not find him guilty of that offence.

17. The Court did find the appellant guilty of the second charge however. In so far as the second charge is concerned, the minute in the record stating that "It is agreed that the accused (sic) have driven with a reckless manner" is manifestly equivocal since from the said minute it does not result who is agreeing to what is being stated; and when this is taken jointly with the unequivocal statement in the minute of the same date which states that "The accused Farah Abdinasir Ali Farah is admitting to the 1st and 5th charges brought against him", where no mention is made of the second charge, the first court could not, only on on the ground of the appellant's plea, find the appellant guilty of the second charge.

18. The Court therefore finds this first grievance of the appellant well founded in the sense that the first court wrongly found the appellant guilty of the second and fourth charges.

19. The appellant's second grievance is to the effect that the first court should have applied articles 279(b) and 280 of the Criminal Code and should not have applied article 325 of the Criminal Code which deals with wilful damage. Apart from considerations relevant to the issue of the amount of punishment, it is not quite clear from the appeal what conclusion the appellant wants the Court to draw from his submissions on this account. In the course of oral submissions before this court, however, the appellant appeared to invite the Court to conclude that as a consequence of the wrong articles of law cited by the Court in its judgment as well as in consequence of the omission of the correct articles of law this Court should find that the judgment of the first court is null.

20. It is true that the first Court did not cite article 279 of the Criminal Code and in particular did not quote article 279(b) thereof but the

omission of these articles does not lead to the nullity of the judgment since in accordance with article 382 of the Criminal Code the article or articles which must be quoted by the Court are those "creating the offence" and article 261(c)(f)(g), cited in the judgment, is sufficient to meet this requirement.

21. The appellant is correct, however, where he points out that the judgment of the first court wrongly quoted article 325 of the Criminal Code on wilful damage to property when the appellant was found guilty of involuntary damage to property. The correct article creating that offence is article 328 of the Criminal Code. This would lead to the nullity of the judgment appealed from in so far as the finding of guilt of the fourth charge is concerned. However, since the Court has already found that the relevant part of the judgment of the first court convicting the appellant of the fourth charge is to be revoked and the appellant could not be found guilty of that charge since he never pleaded guilty to that charge and the prosecution did not produce any evidence with respect to the same charge, there is no further need to consider this grievance except as may be necessary for the purposes of calibrating the punishment which may be due as a result of the findings in this judgment.

22. It remains for the court to consider the third grievance which concerns the punishment meted out by the first Court which the appellant holds to be excessive even if it enters within the parameters of the law.

23. The jurisprudence of this court in so far as the issue of punishment is concerned is well established in the sense that this Court, as a court of revision, does not as a rule disturb the evaluation of the first court regarding the nature and amount of punishment where this falls within the parameters laid down by law and for as long as the

punishment imposed is not one which is manifestly excessive or unless other serious reasons exist as a result of which this Court would need to intervene by mitigating the punishment imposed by the first court. Moreover, the appellant pleaded guilty before the first court and the courts of appeal have had occasion to remark several times that appeals against punishment following the entering of a guilty plea will only be considered favourably in exceptional cases.

24. In mitigation of punishment the appellant pleads 1) the nature of the offence 2) his character 3) his clean conduct 4) his early guilty plea to the first charge.

25. In so far as the offence is concerned the appellant is to be found guilty of the first charge viż. of the offence of theft aggravated by amount exceeding €2,329.37, time and the nature of the thing stolen. The theft was that of a parked car around 2 am after a late night out attending a discotheque and which ended with very serious consequences and considerable damage to the property of others. Moreover it does not result that any reparation has been made for the damage caused. The court does not see any mitigating factor in the nature of this offence.

26. Defence counsel made a number of statements and allegations in the course of oral submissions but no evidence was offered. Neither does the court have anything to go on in so far as the character of the appellant is concerned since again no evidence was produced in this respect. The appellant also invoked his clean conduct. This of course will be taken into account but it has to be balanced with all other considerations including the seriousness of the offence which attracts a punishment of a minimum of 13 months to a maximum of 7 years imprisonment which punishment is not to be imposed in its minimum on

account of the aggravated nature of the offence[2] which means that the minimum punishment is close to 2 years imprisonment[3] and this is the punishment to which the appellant has been sentenced by the first court.

27. Reference was also made to the appellant's guilty plea which was described as an early one. The Court observes, however, that this "early" guilty plea was not forthcoming on the appellant's first appearance before the court but only at the second sitting some fifteen days later after the prosecution had produced the appellant's statement to the police, the incident report and a number of other documents consisting of quotations of damages caused.

28. The appellant also mentions the punishment awarded in what he refers to as an analogous case where the accused was sentenced to two years imprisonment suspended for a period of two years. In this regard the courts have often said that comparisons are odious and each case has to be decided on its own particular merits. In the case quoted by the appellant, apart from the fact that it dealt with the offence of theft similarly aggravated, there is no indication of the particular circumstances of the offence of which the accused was found guilty in that case.

29. In the light of the above considerations and the fact that the punishment imposed by the first court is already in its minimum for the offence for which this court will be confirming the appellant's guilt, this court will be confirming the punishment of two years imprisonment imposed on the appellant. However, since the court, will revoke the judgment of first instance against appellant in so far as the finding of guilt of the second and fourth charges is concerned it will

[2] Article 279(b), 280(1) of the Criminal Code
[3] Article 20 of the Criminal Code

consequentially also revoke the punishment to a fine of one hundred Euro (€100) and the disqualification from holding or obtaining a driving licence.

For the above reasons the Court reforms the judgment appealed from by revoking it where it found the appellant Abdinasir Farah Ali guilty of the second (2nd) and fourth (4th) charges and where it condemned him to a fine of one hundred Euro (€100) and where it ordered that he be disqualified from holding or obtaining a driving licence for a period of eight (8) days starting from the date of that judgment, and confirms the said judgment for the remainder.

(ft) Silvio Camilleri
Chief Justice

(ft) Silvana Grech
D/Registrar

True copy

f/ Registrar