Criminal Court of Appeal

Hon. Judge Dr. Edwina Grima LL.D.

Number of Appeal: 419/2017

The Police

Inspector Trevor Micallef

Vs

Gianluca Calo'

Elodie Didier Christine Moriceau

Today, 28th February, 2018,

The Court,

Having seen the charges brought against Gianluca Calo' holder of Italian Identity Card Number AT 8629351, and Elodie Christine Moriceau holder of passport number 15CV67910 before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having:

In these islands within the period of the 28th May 2017 and the previous months, by several acts committed by the offender, even if at different times which constitute violations of the same provision of the law, and are committed in pursuance of the same design (Art. 18 Chapter 9 of the The Laws of Malta).

1. During some time on the 25th March 2017 committed theft of a mobile phone from inside Corinthia San Gorg Hotel, St Julian's to the detriment of Margaret

Buhagiar and/or other persons, and/or other entities which theft is aggravated by 'means' and 'place' (Art. 261(b)(e), 263(a) 269(g) Chapter. 9 of the Laws of Malta)

2. Accused them further for having on the 28th April 2017 sometime in the afternoon, committed theft of objects from Radison Hotel, St. Julian's to the detriment of Robert Lyn Francis and/or other person which theft is aggravated by 'means', amount' (which exceeds two hundred and thirty-two euro and ninety-four cents (€232.94) but does not exceed two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37), and 'place' (Art. 261(b),(c),(e), 263(a), 267, 269(g), 279(a) Chapter. 9 of the Laws of Malta)
3. Accused them further for having on the 1st May 2017, sometime in the afternoon, committed theft of objects from Le Meridien Hotel, St. Julian's to the detriment of Claudio Morabito, BOV and/or other persons and/or other entities which theft is aggravated by 'means', amount' (which exceeds two hundred and thirty-two euro and ninety-four cents (€232.94) but does not exceed two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37), and 'place' (Art. 261(b),(c),(e), 263(a), 267, 269(g), 279(a) Chapter. 9 of the Laws of Malta)
4. Accused them further for having on the same date by means of any unlawful practice, or by the use of any fictitious name, or the assumption of any false designation, or by means of any other deceit, device or pretence calculated to lead to the belief in the existence of any fictitious enterprise or of any imaginary power, influence or credit, or to create the expectation or apprehension of any chimerical event made any gain to the prejudice of another person (Art. 308 Chapter. 9 of the Laws of Malta)
5. Accused them further for having on the same date committed fraudulent gain (Art. 309, 310(c) Chapter. 9 of the Laws of Malta)
6. Accused them further for having on the 07th May 2017 sometime in the morning committed theft from inside Corinthia San Gorg, San Giljan to the

detriment of Martina Caruana, BOV and/or other persons and/or other entities which theft is aggravated by 'means', amount' (which exceeds two hundred and thirty-two euro and ninety-four cents (€232.94) but does not exceed two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37), and 'place' (Art. 261(b),(c),(e), 263(a), 267, 269(g), 279(a) Chapter. 9 of the Laws of Malta)

7. Accused them further for having on the same date by means of any unlawful practice, or by the use of any fictitious name, or the assumption of any false designation, or by means of any other deceit, device or pretence calculated to lead to the belief in the existence of any fictitious enterprise or of any imaginary power, influence or credit, or to create the expectation or apprehension of any chimerical event made any gain to the prejudice of another person (Art. 308 Chapter. 9 of the Laws of Malta)
8. Accused them further for having on the same date committed fraudulent gain (Art. 309, 310(c) Chapter. 9 of the Laws of Malta)
9. Accused them further for having on the 26th May 2017 sometime in the morning and/or early afternoon, committed theft of objects from Marina Hotel, Room 2708, St. Julians to the detriment of Jan-Mortiz Peter Franosch and Mariana Frenosh Geb Rohnean and/or other persons which theft is aggravated by 'means', amount' (which exceeds two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37), and 'place' (Art. 261(b)(c)(e), 263(a), 267, 269(g), 279(a) Chapter. 9 of the Laws of Malta)
10. Accused them further for having on the 26th May 2017 sometime in the morning from Parisio Street, Sliema from inside vehicle make Hyundai bearing registration no. FCI 292 stole a mobile phone make Huawei and Euro 25 in cash to the detriment of Robert Azzopardi and/or other persons which theft is aggravated by 'means' and by' the nature of things stolen' (Art. 261(b)(g), 263(a), 271(g) Chapter. 9 of the Laws of Malta)
11. Accused them further for having on the 28th May 2017 sometime in the morning and/or early afternoon, committed theft from inside Corinthia San

Gorg, St. Julian's to the detriment of Gary Martyn Withey and/or other persons which theft is aggravated by 'amount' which exceeds two hundred and thirty-two euro and ninety-four cents (€232.94) but does not exceed two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37), and 'place' (Art. 261(b)(c)(e), 263(a), 267, 269(g), 279(a) Chapter. 9 of the Laws of Malta)

12. Accused them further for having in the same period of time in these Islands, committed a crime in the operational period of a suspended sentence delivered by the Courts of Law (Malta), which sentence is definite and cannot be changed
13. Accused them further for having in the same period of time and circumstances in these islands rendered themselves recidivists under articles 49, 50 and 289 Chapter 9 of the Laws of Laws of Malta after they have been found guilty of a sentence or sentences from the Courts of Law (Malta) which sentences are definite and cannot be changed.

Having seen the judgement of the Court of Magistrates as a Court of Criminal Judicature of the 23rd October, 2017 wherein Having seen the guilty plea by accused given on the sitting of the nineteenth (19th) of June two thousand and seventeen (2017) and they confirmed their guilty plea after that they were given considerable time to reconsider;

Having seen that charges one (1), two (2), three (3), five (5), nine (9) and eleven (11) are all charges which fall under the disposition of Article 18 of Chapter 9 of the Laws of Malta;

After having considered that charges six (6), seven (7) and eight (8) are all absorbed in charge four (4);

After having seen that the accused are also being attributed the recidivism under Article 49 and 50 of Chapter 9 of the Laws of Malta;

After also seeing that both the accused had been sentenced for committing a crime whilst under a suspended sentence on the day of 19th October 2017 by this Court presided by Magistrate Dr Caroline Farrugia Frendo LL.D;

After having seen Articles 18, 49, 50, 261(b)(e), 261(b)(c)(e), 261(c)(e), 261(b)(g), 263(a), 267, 269(g), 271(g), 279(a), 279(b), 278, 280, 280(1), 289, 308, 309 and 310(1)(c) the Court found the accused **Gianluca Calo'** and **Elodie Didier Christine Moriceau** guilty of all the charges brought against them except the one of committing a crime whilst on a suspended sentence as aforesaid and condemns them to a punishment of four (4) years imprisonment each.

Having seen the appeal application presented by the appellants Gianluca Calo' and Elodie Didier Christine Moriceau in the registry of this Court on the 30th October, 2017 whereby this Court was requested to confirm the appealed judgement with regards to guilt and vary it with regards to punishment, in order to inflict a more lenient punishment that reflects the circumstances of the case.

Having seen the acts of the proceedings;

Having seen the updated conduct sheet of the appealed, presented by the prosecution as requested by this Court.

Having seen the grounds for appeal of the appellants.

Considers,

The grievance put forward by appellants to the judgment delivered by the First Court, is limited to the punishment inflicted upon them for the charges brought against them relating to the commission of a long string of thefts from various hotels, amongst other charges, and this consequent to their admission of guilt registered upon arraignment.

Now it has been constantly affirmed by local and foreign jurisprudence that a court of second instance will very rarely vary the punishment meted out in the appealed judgment and this where such punishment falls within the parameters defined by

law. The reasoning behind this legal maxim is that whoever admits to the charges proffered against him is assuming full responsibility for his decision and therefore is submitting himself to any decision which will be taken by the Court in considering a just and fair punishment to his case. Therefore the function of this court of second instance is to examine the circumstances leading to the decision being subject to appeal and this to examine whether such punishment was excessive in the circumstances.

In fact the main grievance put forward by appellants relates to the disparity between the punishment inflicted on them by the First Court in this case and that given in a similar judgment delivered against them a couple of days earlier where the term of imprisonment inflicted was shorter, the charges of theft in that case relating to incidents occurring after the ones with which the present case deals with. Appellants state that they fully co-operated with the police admitting to them even other thefts which had not resulted from police investigations, and also filing an early guilty plea upon their arraignment in court.

With regard to a disparity in sentencing, Blackstone states[1]:

"*A marked difference in the sentences given to joint offenders is sometimes used as a ground of appeal by the offender receiving the heavier sentence. The approach of the Court of Appeal to such appeals has not been entirely consistent. The dominant line of authority is represented by Stroud (1977) 65 Cr App R 150. In his judgment in that case, Scarman LJ stated that disparity can never in itself be a sufficient ground of appeal - the question for the Court of Appeal is simply whether the sentence received by the appellant was wrong in principle or manifestly excessive. If it was not, the appeal should be dismissed, even though a co-offender was, in the Court of Appeal's view, treated with undue leniency. To reduce the heavier sentence would simply result in two rather than one, over-lenient penalties. As his lordship put it, 'The appellant's proposition is that where you have one wrong sentence and one right sentence, this court should produce two wrong sentences. That is a submission which this court cannot accept'. Other similar decisions include Brown [1975] Crim LR 177, Hair*

[1] *Blackstone's Criminal Practice*, 2001 (para. D22.47 a fol. 1650)

[1978] Crim LR 698 and Weekes (1980) 74 Cr App R 161…. However, despite the above line of authority, cases continue to occur in which the Court of Appeal seems to regard disparity as at least a factor in whether or not to allow an appeal (see, for example, Wood (1983) 5 Cr App R (S) 381). The true position may be that, if the appealed sentence was clearly in the right band, disparity with a co-offender's sentence will be disregarded and any appeal dismissed, but where a sentence was, on any view, somewhat severe, the fact that a co-offender was more leniently dealt with may tip the scales and result in a reduction.

"Most cases of disparity arise out of co-offenders being sentenced by different judges on different occasions. Where, however, co-offenders are dealt with together by the same judge, the court may be more willing to allow an appeal on the basis of disparity. The question then is whether the offender sentenced more heavily has been left with 'an understandable and burning sense of grievance' (Dickinson [1977] Crim LR 303). If he has, the Court of Appeal will at least consider reducing his sentence. Even so, the prime question remains one of whether the appealed sentence was in itself too severe. Thus, in Nooy (1982) 4 Cr App R (S) 308, appeals against terms of 18 months and nine months imposed on N and S at the same time as their almost equally culpable co-offenders received three months were dismissed. Lawton LJ said:

"'There is authority for saying that if a disparity of sentence is such that appellants have a grievance, that is a factor to be taken into account. Undoubtedly, it is a factor to be taken into account, but the important factor for the court to consider is whether the sentences which were in fact passed were the right sentences.'"

Archbold, in his *Criminal Pleading, Evidence and Practice*, 2001 (para. 5-174, p. 571) similarily comments:

"Where an offender has received a sentence which is not open to criticism when considered in isolation, but which is significantly more severe than has been imposed on his accomplice, and there is no reason for the differentiation, the Court of Appeal may reduce the sentence, but only if the disparity is serious. The current formulation of the test has been stated in the form of the question: 'would right-thinking members of the public, with full knowledge of the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice?' (per Lawton L.J. in R. v. Fawcett, 5 Cr. App.R.(S)

158 C.A.). The court will not make comparisons with sentences passed in the Crown Courts in cases unconnected with that of the appellant (see R. v. Large, 3 Cr.App.R.(S) 80, C.A.).."

That although in this case there is no disparity in sentencing between different offenders or accomplices, however appellants feel aggrieved by a disparity in the punishment handed down in a similar judgment delivered against them where the Courts were more lenient than in this case. What this Court has to examine however, is whether the punishment handed down was manifestly excessive in the circumstances rather than more severe than other judgments since it is not acceptable that this Court reduces a term of imprisonment such as to create a situation where there are "*two, rather than one, over-lenient penalties*".

This Court has examined all the circumstances revolving around this case both accused having committed a long string of thefts in a matter of a few days and also having being already found guilty of a similar offence a few months previously. It is clear that appellants are serial, habitual and persistent robbers, having come to Malta for the sole purpose of living off the proceeds of their crimes. It is therefore incumbent on these courts, faced with such a situation, to prevent, in its judgments, the commission of further offences, the rehabilition of the offenders evidently not leading to safeguarding society from such delinquents.

Now appellants are being charged with a string of seven thefts besides other offences, having already been found guilty by another court of another string of eighteen robberies and this in a matter of a few days as evidenced from their criminal conduct sheet. Consequently this Court is of the opinion that the punishment tendered by the First Court was well within the parameters of the law considering that appellants are unrepentant and persistent offenders, guilty of committing a repetition of offences similar in nature, to the detriment of society at large. If, by committing a criminal act, the offender signals that he values the act more than the cost that it imposes on society, then he should face a higher sanction if he chooses to commit the same act again and again! In such circumstances, as has already been emphasised, it is the duty of the courts to safeguard society from such

offenders in deciding the quantum of punishment to be meted out thus acting as a deterrent to the repetition of further offences.

Consequently for the above-mentioned reasons the appeal is being rejected and the judgment of the First Court confirmed in its entirety.

Edwina Grima

Judge