



Court of Criminal Appel

Hon. Justice Dr. Consuelo Scerri Herrera, LL.D., Dip Matr., (Can)

Appeal Nr. 291/2017

The Police

Vs

Gervais Cishahayo

Today the 31st July, 2018,

The Court;

Having seen the charges brought against appellant, Gervais Cishahayo, holder of Maltese Identity Card, bearing number: 218199M charged in the Court of Magistrates (Malta), as a Court of Criminal Judicature with having:

For the month of October, 2016, in these Islands:

1. Failed to give Melissa Joan Bagley, the sum of 600 Euros, fixed by the Court or as laid down in the contract as maintenance for his child(ren) and/or wife, within fifteen days from the day on which according to such order or contact, such sum should have been paid.,

Having seen the judgement of the Court of Magistrates (Malta) as a Court of Criminal Judicature of the 19th June, 2017, where in the Court, after having seen article 338(z) of the Criminal Code, Chapter 9 of the Laws of Malta, found the accused guilty and condmned him for two weeks detention.

Having seen the appeal application, presented by Gervais Cishahayo, filed in the registry of this Court on the 28th June, 2017, wherein he requested this Court to quash the judgement of the first Court due to the nullity of service to the appellant or subordinately to vary punishment and condemn him to a fairer and appropriate sentence in the circumstances.

Having seen the grounds of appeal as presented by Gervais Cishahayo:

1. The fact that notification was invalid relative and the two weeks detention imposed on the applicant are completely exaggerated when taking the facts of the case into account.

That notification of the appellant was completely invalid as he was abroad for a long period of time.

2. The grounds of appeal with regards to punishment are the following:
 - a) Due consideration was not given to the fact that the appellant has a clean conduct sheet.
 - b) The appellant has held a job in Malta for a number of years and has now been looking for a job for a number of months.
 - c) Due consideration was not given to the fact that currently the appellant is unemployed and has no means to pay the maintenance due by him.
 - d) Due consideration was not given to the fact that the moment that the appellant is condemned to a custodial punishment, it will be impossible for him to pay the maintenance due and find another job to pay the said maintenance.
 - e) The longer the appellant is held in custody, the more difficult it will be for him to find a job and be in a position to start paying maintenance again.
 - f) The appellant has been for a number of years working in Malta:
 - Bighi Trade School (1997);
 - Maria Gioretti Tarxien Girls Secondary School (1997-1998);
 - Guze D'Amato Boys Secondary School (1998-1999);
 - Giovanni Curmi Higher Secondary School (2000-2001);
 - Nautical School - Late MCAST Maritime Institute (2000-2001);
 - University of Malta Junior College (1999-2000);
 - MCAST (various) Institutes, (2001-2007);
 - St. Aloysius Jesuit's College, B'Kara (2008-2009);
 - Don Bosco Salesian School, Sliema (2010-2011);
 - After he went back to his country, Burundi, to look for a job, however due to problems in Burundi, he returned to Malta to look for a job.

Article 338 (z) clearly explains the applicant's guilt and that there are no points on which he may complain. Indeed the Honorable Court of Appeal in the case '**II-Pulizija vs Alfred Camilleri**' [18.09.2002] quoting a number of judgements of the same court, (Criminal Appeal: Pulizija vs. Anthony Saliba [15.07.1998]) clearly explained "*.. il-fatt li persuna tisfa bla xoghol ma jiskuzahix mill-obbligu taghha li twettaq id-Digriet tas-Sekond'Awla tal-Qorti Civili, obbligu sancit bir-reat ta' natura kontravvenzjoni li tahtu hu akkuzat l-appellatn. Ir-rimedju li ghandu u li kellu l-appellant kien li jadixxi tempestivoament u fi zmien utli lill-Qorti Civili kompetenti biex din, wara li tiehu konjizzjoni tal-provi,. Tipprovidi billi se mai timmodifika l-ordni dwar il-manteniment. U biss wara li jottjeni tali modifika, li jkun jista' jhallas inqas jekk ikun il-kaz. Sakemm dan isisr, jibqa' marbut bl-obbligu tal-hlas skont l-ewwel Digriet. Fi kliem iehor, sakemm ikun ghadu vigenti id-digriet tas-Sekond' Awla jew digriet jew sentenza tal-Prim' Awla jew tal-Qorti tal-Appell, li jordna l-hlas ta' manteniment, din il-Qorti ma tistax hlief issib u tikkonferma l-htija, fejn l-appellant ikun naqas li jottempra ruhu ma tali digriet jew sentenza, tkun xi tkun ir-raguni, jew pretest biex jaghmel dan. Altrimenti, din il-Qorti minflok Qorti tal-Appell Kriminali tispicca tirriduci ruha f'wahda ta' revizjoni dwar l-effikacija u r-ragonevolezza ta' digriet jew sentenzi tal-Prim' Awla u tal-Qorti tal-Appell u Digrieti tas-Sekond' Awla, mansjoni li zgur ma taqax taht il-kompetenza taghha'.*

However, in the case decided by the Court of Criminal Appeal, presided by Mr. Justice J. Galea Debono on the 27th July, 2006 in the Criminal Appeal nr. 84/2006 '**II-Pulizija vs Joseph Micallef**' reference was made to another Criminal Appeal "**II-Pulizija vs Publius Said**" [25.09.2003], "*... l-ghan ewlieni tal-legislatur meta ntroduca din il-kontravvenzjoni xi ftit tas-snin ilu kien li jgib pressjoni fuq persuni li jkunu riluttanti li jhallsu manteniment lid-dipendenti taghhom biex effettivoament ihallsu w mhux biss li jipponixxi ghall-ksur tal-ordnijiet tal-Qrati, li, kif intqal, ghandhom dejjem jigu obduti w osservoati skrupolozament. F'dan il-kaz dan il-ghan ghan issa ntlahaq bil-hlas fuq imsemmi".*

The imposition detention in these cases is odious if ultimately it does not lead to the payment of maintenance due under contract or order in question. The fact that the First Honorable Court added month of detention merits to the period of imprisonment that the appellant was already serving, effectively increases the suffering of the complainant as the appellant cannot pay the maintenance due whilst he is imprisoned.

Moreover, it has to be said that it is an absolute fact that if the applicant is again given a custodial sentence on the merits of this appeal, he will not be observing the scope of this legislation – but the contrary.

Having seen the acts of the proceedings;

Having seen the updated conduct sheet of the appellant, presented by the prosecution upon this Court's request.

Duly considers,

The Court examined the sworn affidavit of **WPC 342 F Formosa** presented in these acts of the proceedings wherein it results that the complainant Melissa Joan Bagley presented a report at the Birzebbugia Police Station and stated that she had obtained a court decree issued by the Family court (decree number 109/12 RGM) which was not being adhered to by her ex partner, the current appellant. He was obliged to pass her on the sum of six hundred euros per month as maintenance for their two minor children. She stated that he failed to give her this maintenance for the month of October 2016.

She further explained that she had got in contact with the appellant and asked him to go over to the police station so that she could speak to him. However, he told that that he was at the airport and was leaving Malta. When asked what flight he was about to alight he aid that he did not want to give any information to the police.

On the 12th July, 2018, the Court once again heard the complainant **Melissa Joan Bagley** give evidence viva voce whereby she confirmed that the appellant is the father of her two minor children and confirmed that he had failed to give her the maintenance due for the month of October 2016. Asked if she knew whether the appellant had a job she said that she did not know although she knew that he had several jobs in the past. She also stated that he had a property in Birkirkara which he was renting out as this was listed with an estate agency.

The Court also heard the appellant, **Gervais Cishahayo** give evidence voluntarily. He confirmed that he knew that there was a decree issued by the Family Court wherein he was obliged to maintain his two minor children and hand over the monthly sum of six hundred euros to the complainant. He however stated that he had no employment and thus was not in a position to make such payments. He explained that in the past he did hand overs some money to his children though he did not keep any records of the payments he made. So much so, he exhibited haphazard receipts issued by local banks wherein payments were made. Asked by the Court how he lived he said that he receives help from the African community and also confirmed that he had rented out a place in Birkirkara and he is sub-letting

rooms in it. He said that this is his only income at present. Asked by the Court if he took steps to revoke or alter the Court decree above mentioned he replied by saying that he had spoken to his legal lawyer though as far as he is concerned he did nothing about it, and confirmed that the decree mentioned above is still *in vigore*.

The Court considers the following:

It is not contested that the Family Court had given a decree number 109/12(RGM) wherein the appellant is obliged to pay the sum of six hundred (€600) per month to his ex-partner as maintenance for their two minor children. It is not contested either that in fact the appellant failed to pay maintenance for the month of October 2016. That although all this time has passed, the appellant still has not met up with his obligation and this is why the complainant is insisting on these proceedings.

The Court makes reference to the judgment delivered by this same court in the names **Il-Pulizija vs. Jacqueline Zammit** on the 15th March, 2003 whereby the Court insisted that “ *l-ordnijiet tal-Qrati jridu jigu osservati skrupolozament u minghajr tfettieq u kavillar zejzed*”

In addition this Court makes reference to another judgement delivered by this same court in the names “**Il-Pulizija vs. Raymond Cutajar**” delivered on the 2nd of September 1999 whereby the Court explained the following:-

“.....Din il-Qorti wara li rat is-sentenzi (**Pol. vs. Lawrence Cutajar**¹ u **Pul. vs. Carmelo Farrugia**²) u wara li rat l-argumenti kollha migjuba mill-appellant fir-rikors tieghu hi tal-fehma li ma tistax taqbel mall-appellant . Ordni għall-hlas ta’ manteniment kontenut f’Digriet moghti mis-Sekond’ Awla jibqa’ validu għall-fini w effetti kollha tal-art. 338(z) kemm il-darba ma jkunx irrizulta li dak id-Digriet gie espressament revokat jew altrimenti mibdul mill-istess Sekond’ Awla u salv il-prova tar-rikonciljazzjoni jew ta’ dikjarazzjoni ta’ Qorti ohra kompetenti li dak id-Digriet jew dak l-ordni kien null.”

For this contravention mentioned in article 338(z) of Chapter 9 of the Laws of Malta to subsist it is enough if the prosecution proves the following two elements namely:-

1. That there was a Court Order or a Court judgment (by producing a

¹ Decided on the 10th March ,1995.

² Decided on the 25th January, 1998.

copy of this order unless there is agreement to it) where in the accused is bound to pay maintenance

2. And that such maintenance was not paid within a period of fifteen days from when it is due according to that same order.

Consequently, the accused would be expected to prove on a balance of probabilities that the Court order was revoked or altered or declared null by a competent Court or that reconciliation took place. Or alternatively that payment was effectively made. In default of this, the contravention is said to subsist.

This Court is also making reference to another court judgment in the names "**Il-Pulizija vs. Mario Mallia**"³ whereby it was also held that :-

"...ghal finijiet ta' kawza penali meta l-imputazzjoni tipotizza r-reat kontravvenzjonali fil-paragrafu (z) tal-Artikolu 338 tal-Kap.9 , hu rrilevanti meta giet intavolata l-kawza ta' separazzjoni jew jekk intalbitx o meno proroga tad-digriet originali ; galadarba l-ordni kontenut f' dak id-Digriet ma kienx gie espressament revokat jew altrimenti mibdul mill-istess Sekond' Awla jew mill-Prim' Awla (u salv il-prova ta' rikonciljazzjoni jew ta' dikjarazzjoni ta' Qorti ohra kompetenti li dak id-digriet jew dak l-ordni kien null) l-ordni ghall-hlas tal-manteniment jibqa' validu ghall-finijiet u effetti kollha tal-artikolu 338(z) tal- Kodici Kriminali .

Regard must be had in this sense to the judgments given by this same Court in the names "**Il-Pulizija vs. Lawrence Cilia**"⁴ and "**il-Pulizija v. Carmelo Farrugia**"⁵.

The appellant stated that he could not honour his commitment because he has become indigent. To this effect, the Court makes reference to the judgment in the names "**Il-Pulizija vs, Alfred Camilleri**"⁶ where reference was made to the case in the names "**il-Pulizija vs. Anthony Saliba**"⁷ particularly when the accused was faced with a change in his circumstances namely that he ended up unemployed . The Court held that this does not in any way exonerate him from honouring his obligation of maintenance and scrupulously follow the Court Order. The only remedy that the accuse has in such circumstances is to apply to the competent court to have a review of his court order so that such order may be altered or revoked. It

³ Decided on the 8th May 1998.

⁴ Decided on the 10th March 1995

⁵ Decided on the 23rd January 1998.

⁶ Decided on the 18th September 2002.

⁷ Decided on the 15th July 1998

is only after such order is altered or revoked that the accused can change the modality of his payments.

In view of this jurisprudence the Court cannot but condone the appellant for having unilaterally decided not to affect payment and thus the Court is rejecting the appeal and confirming the judgment delivered by the Courts of Magistrates as a Court of Criminal Judicature in the above names on the 19th June 2017.

(ft) Consuelo Scerri Herrera
Judge

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Franklin Calleja
Deputy Registrar