Court of Criminal Appeal

Hon. Ms. Justice Dr. Consuelo Scerri Herrera LL.D.

Appeal number: 27/ 2018

The Police

Inspector Trevor Micallef

Vs

Yuliyan Milchev Milushev

Today the, 11th December, 2018.

The Court,

Having seen the charges brought against Yuliyan Milchev Milushev holder of identity card number 0082700A, before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having:

On the 23rd July 2017 at around 00:37hrs as the operator of the shop which sells wine, beers and spirituous liquors named 'Hot Ice', situated in Paceville Ave, St. Julians:

1. Allowed young persons under the age of seventeen (17) years inside a place of entertainment.

Having seen the judgment meted by the Court of Magistrates (Malta) as a Court of Criminal Judicature proffered on the 18th of January, 2018 whereby the Court, having seen Article 6(1) and Article 15 of Sub Leg 10.40 found the accused guilty as charged and condemned him to a fine of €1,000 (one thousand Euro) in terms of Article 15

and an additional fine of €1,250 (one thousand, two hundred and fifty Euro) in terms of Article 6(5)(1).

Having seen the appeal application presented by Yuliyan Milchev Milushev in the registry of this Court on the 30th of January 2018 whereby this Court was requested to **CANCEL, REVERSE and REVOKE** the appealed and consequently **DISCHARGE** him from the charge brought against him; and in the absence of this, to **vary** the appealed judgement as regards the punishment inflicted and instead applies a lesser and more appropriate punishment.

Having seen the acts of the proceedings;

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

Having seen the grounds for appeal of Yuliyan Milchev Milushev:

That the appellant is raising three (3) main grievances, and that is that the First Honourable Court did not conduct a proper analysis of the evidence produced, and this being stated respectfully, that the First Honourable Court did not interpret the law properly and moreover, the punishment handed down on the appellant is surely disproportionate and excessive.

A. <u>An Improper Analysis of the Evidence Produced</u>

That the appellant, respectfully submits that the First Honourable Court did not conduct a proper analysis of the evidence produced, since the Honourable Court condemned the appellant without reaching a safe and satisfactory conclusion.

That the Prosecution did not produce the best evidence they could to prove the charge, the appellant was being accused of. That in fact, even though the appellant was being accused of allowing young persons inside a place of entertainment, for the charge to be sufficiently proven the Prosecution had to prove that in fact the place

mentioned in this case, 'Hot Ice', did in fact sell alcohol. In fact, this place is considered a snack bar, and thus, for the Court to reach a safe and satisfactory conclusion that this place did in fact sell alcohol, the Prosecution had to prove it beyond reasonable doubt. Even though the appellant was not charged of selling alcohol to people under the age of seventeen, he was charged of allowing people under the age of seventeen inside a place of entertainment. It is a recognized fact that people under the age of seventeen are not to be allowed inside a place of entertainment for the reason of alcohol being sold to them, in fact a licence is required to do so.

Therefore, as already remarked, it was unsafe and truly not satisfactory for the First Honourable Court to find the appellant guilty of the accusations imposed on him, with the evidence produced before it.

That in the case, **il-Pulizija v. Noel Buhagiar**, dated the tenth (10th) of April, 2008, the Court of Criminal Appeal (Inferior Jurisdiction) explained:

> Illi dan l-appell hu impernjat fuq l-apprezzament tal-fatti li sar mill-ewwel Qorti. Issa, kif dejjem gie ritenut minn din il-Qorti, l-Qorti tal-Appell ma tissostitwix id-diskrezzjoni w l-gudizzju taghha ghal dak tal-Ewwel Qorti meta si tratta t'apprezzament tal-fatti, izda taghmel apprezzament approfondit tal-istess biex tara jekk il-konkluzzjoni li tkun waslet ghaliha l-Ewwel Qorti fuq il-fatti li jkunu rrizultawlha setghetx tasal ghaliha fuq bazi ta' ligi w ta' ragjonevolezza. Fi kliem iehor tara jekk dik il-konkluzzjoni kienetx *wahda "safe and satisfactory"* fid-dawl tar-rizultanzi.

The same was stated by the Criminal Court of Appeal (Inferior Jurisdiction) in the case **Il-Pulizija vs Epifanio Azzopardi**, decided on the 30th of March, 2017:

> Illi ghalhekk, "kif dejjem gie ritenut minn din il-Qorti, l-Qorti tal-Appell ma tissostitwix id-diskrezzjoni w l-gudizzju taghha ghal dak tal-Ewwel Qorti meta si tratta ta' apprezzament tal-fatti, izda taghmel apprezzament approfondit tal-istess biex tara jekk il-konkluzzjoni li tkun waslet ghaliha l-

> Ewwel Qorti fuq il-fatti li jkunu rrizultawlha setghetx tasal ghaliha fuq bazi ta' ligi w ta' ragjonevolezza. Fi kliem iehor tara jekk dik il-konkluzzjoni kienetx wahda "safe and satisfactory" fid-dawl tar-rizultanzi. (Ara. App. Krim. **"Il-Pulizija vs. Raymond Psaila et"** [12.5.94] ; **"Il-Pulizija vs. Emmanuel Mifsud"** [11.7.94]; **"Il-Pulizija vs. Joseph Zahra"** [10.5.2002]…

LORD CHIEF JUSTICE WIDGERY, in the case, "**R. v. Cooper"** (1969) stated:

*court will be very reluctant to interfere with the jury's verdict (*f'dan il-kaz il-konkluzjonijiet raggunti mill-Magistrat*), because the jury will have had the advantage of seeing and hearing the witnesses, whereas the appeal court normally determines the appeal on the basis of papers alone. However, should the overall feel of the case – including the apparent weakness of the prosecution's evidence as revealed from the transcript of the proceedings – leave the court with a lurking doubt as to whether an injustice may have been done, then, very exceptionally, a conviction will be quashed."* (Confer also: BLACKSTONE'S CRIMINAL PRACTICE (1991), p. 1392).

Thus, when reviewing the evidence produced by the Prosecution, the appellant humbly submits that this Court should acquit the appellant from the charge brought against him.

B. <u>Wrong Interpretation of the Law</u>

That apart from an improper analysis of the evidence produced, the appellant humbly submits that the First Honourable Court made a wrong interpretation of the law, when it found the appellant guilty under two articles of the law, that is under article 6 (1) and article 15 of Subsidiary Legislation 10.40 of the Laws of Malta.

Firstly, the appellant would like to submit that the Prosecution did not even ask the Court to find the appellant guilty under Article 15 of the said Subsidiary Legislation, but only under Article 6(1) of the said same Subsidiary Legislation.

Thus, the Prosecution asked Court to find the appellant guilty that:

Persons under the age of seventeen shall not be allowed inside a place of entertainment, and young persons over the age of seventeen years shall prior to admission to any such place produce and show their legally valid identification document to the proprietor.

Further to that, Court found the appellant also guilty under Article 15, that is:

In the case of offences committed by the proprietor or his employees against these regulations, the court shall on conviction award a fine (multa) of not less one thousand euro (€1,000) but not exceeding two thousand euro (€2,000) and in the case of a second or subsequent conviction a fine (multa) of not less than two thousand five hundred (€2,500) but not exceeding five thousand (€5,000) saving the provisions of sub-regulation (2).

With reference to article 15, apart from the fact that the Prosecution did not make reference to it in the charge sheet, there was no evidence produced that the appellant is or was the proprietor or an employee of the said place of entertainment, 'Hot Ice'. For Court to find the appellant guilty under this article, the Prosecution had to prove beyond reasonable doubt that the said appellant was in fact the proprietor or an employee, which was not proven in any way, except for the fact that he was at Hot Ice at the time the Police went there.

Therefore, in view of the above, the Court cannot condemn the appellant to a fine under article 15 of Subsidiary Legislation 10.40, that is the fine of one thousand Euros (€1000).

C. <u>Disproportionate Punishment</u>

That the **<u>third grievance</u>** consists of the fact that, without prejudice to the first and second grievances, the punishment meted out, with all due respect, was disproportionate to the facts of the case and an exaggerated one. The First Honourable Court, with due respect, did not take into consideration enough the fact that the appellant is a person of a very good conduct. Furthermore, it is being humbly submitted, that even if the appellant was to be found guilty of the charge

brought against him, only the fine imputed under article 6(1) of Subsidiary Legislation 10.40 could have been applied against him, and this due to the reasons explained by virtue of the second grievance raised by the appellant in this appeal.

Moreover, various times the Court has accentuated the importance of punishment in having a rehabilitative effect rather than having a deterrent effect. In fact, in the judgment delivered by the Criminal Court of Appeal dated 22nd of September, 2013, in the names **Il-Pulizija vs. Stephen Spiteri**, the Court held that:

> Konsiderata l-piena bhala mezz ta' riforma tal-imputat fl-interess tieghu u tas-socjeta', izjed u izjed din il-piena karceraja tidher inadatta. Infatti, permezz taghha, tifel ta' kondotta sa issa tajba, u li diga', bil-fatti, wera' soghba tarreat li ghamel, ser jinxtehet ghal soggorn ma' nies li filmaggjoranza taghhom huma delinkwenti recidivi multipli. B'hekk minflok jigi riformat, hemm il-possibilta' illi huwa jiehu lezzjonijiet fid-delinkwenza ... tara illi huwa opportun illi inehhi l-impressjoni illi l- iskop tal-ligi kriminali u talpiena huwa biss illi jkun ta' deterrent biex jghallem lil dak li jkun illi 'crime does not pay'. Huwa certament kuncett illi ghamel zmien u kien il-kuncett predominanti, pero llum ilkuncett m'huwiex aktar ta' piena retributtiva, imma ta' sistema restorattiva, fejn anke jekk hu possibbli u safejn hu possibbli, u tenut kont anki tac-cirkostanzi kollha tal-kaz, kif ukoll tal-precedenti kriminali tal-imputat, isir tentattiv biex mhux biss issir rikonciljazzjoni bejn l-agent tad-delitt u l-vittma li tkun sofriet danni u anke sofferenzi ohrajn, imma anki illi jkun hemm possibilita' illi dak li jkun jigi nformat u jikkonvinci ruhu illi ghandu jsegwi t-triq it-tajba.

Reference is also made to various judgments where even accused who were recidivists were given another window of opportunity since an effective term of imprisonment was seen as too harsh as a punishment. In fact, in the case of **Il-Pulizija vs Charlot Aquilina**, decided by the Court of Magistrates (Malta) on the

seventh (7) of November, 2008, the Court stressed the importance of giving the accused another chance and in fact the Court imposed a Probation Order notwithstanding that the accused was recidivist:

> Ghal finijiet ta' piena il-Qorti kkunsidrat bir-reqqa kollha dovuta is-Social Inquiry Report esebit a fol. 104 et sequitur tal-process minn fejn jirrizulta li l-imputat kellu trobbija instabbli**, li huwa kellu problema serja ta' abbuz mid-droga … u li huwa ilu ma jabbuza mid-droga b'mod kontinwu ghal dawn l-ahhar erba' snin**… **li tul dawn l-ahhar erba' snin kienu qed isiru urine sample tests lill-imputat u dawn dejjem irrizultaw fin-negattiv**… Il-Qorti wara li kkunsidrat dan kollu jidrilha li ghalkemm mill-fedina penali tal-imputat jirrizulta li huwa inghata opportunitajiet rega' qabad it-triq il-hazina ghaliex kien ghadu jabbuza mid-droga, irrizulta wkoll li dawn l-incidenti jirrisalu ghal qabel is-sena 2003, u cioe' ghal qabel ma l-imputat beda u ttermina b'success il-programm residenzjali, **u ghalhekk l-imputat ghandu jinghata l-ahhar opportunita' sabiex jirriforma ruhu u jaqbad definittivament it-triq it-tajba specjalment meta wiehed jikkunsidra li llum il-gurnata l-imputat** oltre li ttermina b'success il-programm residenzjali **ghandu xoghol stabbli u anki hajja familjari wkoll pjuttost stabbli.**

In the case of **<u>Il-Pulizija vs Ritmar Hatherly u Justin Farrugia</u>**, decided by the Criminal Court of Appeal on the ninth (9) of October, 2008, the Court whilst making reference to other judgments held that:

> Issa, ghalkemm huwa veru li qorti ghandha dejjem toqghod attenta li ma tizvalutax il-mizuri mhux karcerarji a disposizzjoni taghha b'applikazzjoni taghhom bl-addocc u minghajr ma tiehu kont xieraq tal-antecedenti penali ta' dak li jkun, mill-banda l-ohra s-semplici fatt li persuna tkun precedentement inghatat probation jew conditional discharge ma jfissirx necessarjament li ma tkunx tista', jew li m'ghandhiex, fil-kazijiet li jikkwalifikaw terga' tinghata probation jew conditional discharge jew tigi applikata fil-konfront taghha xi mizura ohra taht il-Kap. 446. F'dan ir-rigward din il-Qorti taghmel referenza

ghal dak li nghad fis-sentenza taghha tat-18 ta' Jannar 2001 fl-ismijiet **Il-Pulizija v. George Farrugia**: "*Issa, huwa veru li l-appellat ghandu fedina penali li ftit din il-Qorti rat bhalha. Bizzejjed jinghad li dina l-fedina penali tiehu xejn anqas minn 42 faccata. L-appellat illum ghandu erbghin sena, u f'dawn l-erbghin sena huwa kellu xejn anqas minn 77 kundanna mill-Qrati ta' Gustizzja Kriminali. Kien hemm xi okkazzjonijiet fis-snin sebghin u fil-bidu tassnin disghin meta l-qrati applikaw fil-konfront tieghu sia l- Artikolu 5 kif ukoll l-Artikolu 9 tal-Kap. 152; il-bqija talkundanni, pero`, jinvolvu multi u habs…*"Apparti li din il-Qorti ma tistax taqbel ma' l-Avukat Generali fejn dan jghid li s-sitwazzjoni ta' l-appellat hija "irriversibbli" – fil-fehma tal-Qorti hija l-mewt biss li ggib stat jew sitwazzjoni ta' irriversibilita` assoluta – anqas ma tista' din il-Qorti tikkondividi l-fehma ta' l-Avukat Generali li Ordni ta' Probation hu indikat biss ghal "first offenders" zghazagh. **Anke fil-kaz ta' persuna ta' eta` mhux zghira u li forsi hu recidiv, tista' titfacca fil-hajja ta' dik il-persuna a window of opportunity li permezz taghha jkun jista' jinkiser ic-ciklu ta' kundanni u ta' prigunerija.**

The Court heard the parties make their oral submissions during the sitting of the 6th November, 2018.

Having seen all the acts of the proceedings and heard the evidence brought forward before her.

Considers the following.

Malcolm Zerafa on behalf of the Tourism Authority gave evidence by means of a sworn affidavit presented in the acts of these proceedings. He stated that he was asked to carry out a research in the system of the Authority regarding the premises Hot Ice , number 15, Triq Paceveille, Paceville. He presented a copy of the license covering such premises. From an examination of this document it results that the licensee is a certain Steve Grima. It is licensed as a 2nd Class snack bar with an imposition that no cooking or preparation of foods is allowed on the premises. From the top part of the license exhibited it appears that the reference to such application

is BAR/0390 Wines & Spirits. It also results that the accused was registered as a substitute with effect from the 2nd June 2015.

The Court heard **Christa Falzon** give evidence before her on the 6th of November 2018. She stated that she was born on the 27th August 2001 and thus on the day in question when she was stopped inside the Hot Ice bar namely on the 23rd July 2017 she was only 16 years of age. She explained that on the night in question she had entered the bar and stood by the bar waiting for a friend of hers. Asked by the Court if anybody stopped her as she was entering the bar she replied in the negative, Asked if there was aby security person or bouncer by the door she also replied in the negative. Asked if anybody asker her for her identity or particulars at any time that she was in the bar she replied in the negative once again.

WPC 166 D'Amato gave evidence on the same day of the 6th November 2918 and she confirmed that on the 23rd July 2018 at about 00.37a.m. when she was in the company of her colleague WPC 59 Abigail Gordon she entered the bar and saw that there was an underage girl by the bar. She approached her and asked her for her particulars and it transpired that the person was Christa Falzon and she was underage in that she was only 16 years old.

WPC 59 Abigail Gordon confirmed that on the night in question of the 23rd July 2018 she was on duty in St Julian's and at about 00.37 a.m. as she was doing a patrol in Paceville she entered the Hot Ice bar together with her colleague WPC 166 D'amato and found a young girl by the bar who was later identified as Christa Falzon. She spoke with her and took her particulars and took note of her date of birth being 27th August, 2018 and thus it transpired that in the day in question she was only 16 ears of age.

It is to be noted by this court that it is not the function of this Court as a Court of appellate jurisdiction to disturb the discretion used by the First Court as regards the appreciation of the facts carried out by that court, unless such discretion has been exercised incorrectly . In other words this court does not substitute the discretion

used by the first court but carries out a detailed examination of the same facts in order to establish whether the first court was reasonable in the conclusion it reached. However, if on the other hand it appears to this court that the First Court could not have reached the decision it in fact reached, on the basis of the evidence that was brought before it, then this would be a valid reason or rather an obligation on this court to disturb the discretion used by the First Court in reaching its conclusions. (vide "**Il-Pulizija vs. Raymond Psaila et**.[1]")

The facts of the case are as follows.

On the 23rd July 2017 WPC 166 and WPC 59were on patrol in Paceville when at about 00.37a.m. they entered the premises known as Hot Ice Bar, in Triq Paceville and found a young lady by the bar. When they approached her and took her particulars it transpired that she was Christa Falzon who at the time was only 16 years of age. The Police then issued charges against the registered substitute of this place

Now this brings us to the appeal presented by the appellant in that the Court is going to examine the grievances brought forward by him.

In the first instance the appellant states that the prosecution did not bring forward the best evidence to prove its charge. It felt that the prosecution did not prove that the place Hot Ice was in fact a place licensed to sell alcohol. However, the Court begs to differ. The Prosecution brought forward a representative of the Tourism Authority to give evidence and explain what type of license the premises in question has namely it is license as a 2nd Class bar which in itself signifies that there is the selling of alcohol. However, this is not enough on the license itself it appears that next to the reference number being BAR /0390 there are the words Wines/Spirits. Therefore, this is indicative that on the premises wines and spirits ae sold. Therefore, such grievance is being rejected,

[1] Decided by the Crminal Court of Appeal on the 12th May 1994)

In the second place the appellant claims that the Court made a wrong interpretation of the law when it found the appellant guilty under two articles of the law, that is under article 6(1) and article 15 of SL 10.40 of the laws of Malta known as Maintenance of Good Order at Places of Entertainment regulations. The appellant high lightens the fact that the prosecution only indicated article 6 (1) of the SL 10.40 on the charge sheet and therefore the Court should not have applied section 15 of AL 10.40 in this case.

Article 6 (1) of the SL 10.40 provides the following:-

> 6.(1) "*Persons under the age of seventeen shall not be allowed inside a place of entertainment, and young persons over the age of seventeen years shall prior to admission to any such place produce and show their legally valid identification document to the proprietor*"

Therefore the prosecution has to prove that in the place of entertainment Hot Ice there was a young person under the age of 16 or if over the age of 17 shall prove that such person was not asked for his/her identification before entry . In this case we are talking of a 16 year old Christa Falzon who should never have been allowed entry since she was still 16 years old on the 23rd July 2017. Therefore the prosecution proved its case.

However, the Court need to make reference to article 15 of SL.10.40 which speaks of 'Offences by proprietor or his employee' and this it had to do to see what is the applicable punishment for the offence stipulated in article 6(1) as above.

Article 15 of SL.10.40 provides the following:-

> 15(1) "*In the case of offences committed by the proprietor or his employees against these regulations, the court shall on conviction award a fine (multa) of not less one thousand euro (€1,000) but not exceeding two thousand euro (€2,000) and in the case of a second or subsequent conviction a fine (multa) of not less than two thousand five*

hundred (€2,500) but not exceeding five thousand (€5,000) saving the provisions of sub-regulation (2)"

Therefore, despite the fact that the prosecution made no reference to this provision the Court had every right to make reference to it in its judgment, actually was obliged to make reference to it since it is the provision at law which provides for the punishment to be awarded in case of guilt under article 6() of the same SL 10.40.

It is to be noted that in the charges brought forward by the police before the Courts of Magistrates it is not obligatory for the prosecution to indicate the articles at law though it is recommendable.

In this case the prosecution proved that the accused was the registered 'substitute' of the bar on the ay in question and thus can be considered legitimately as the employee of the license holder Steve Grima and therefore it was correct for the court to find the appellant guilty of this charge and therefore this second grievance is also being rejected.

In this instance the appellant the grievance of the appellant consists of the fact that he claims that the punishment awarded was disproportionate to the facts of the case . He held that the first Court should have taken into consideration that the appellant is of good conduct. He held that the punishment should have been restricted to section 6(1) of LS 10.40 without the application of article 15 of the same legislation. Section 6 (5) provides a punishment if the person to be found guilty is the proprietor in which case the multa to be applied is even harder since the aw speaks of a multa of one thousand, two hundred and fifty euros (1,250). Section 15 provides of those eventualities where the person to be found guilty for the first time of this offence is an employee wherein the court shall on conviction award a fine (multa) of not less one thousand euro (€1,000) but not exceeding two thousand euro (€2,000). Therefore, the parameters of the fine are set out by law with a minimum and maximum established therein.

The court took note for the fine imposed by the first court being that of one thousand euros (€1,000) and thus the minimum that can be imposed.

Therefore, in these circumstances the Court is confirming the judgment delivered by the First Court both with regards to the establishment of guilt as well as to the fine imposed and thus rejects the appeal of the appellant *in toto*.

(ft) Consuelo Scerri Herrera

Judge

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Franklin Calleja

Deputy Registrar