Court of Criminal Appeal

The Honourable Madame Justice Dr. Consuelo Scerri Herrera LL.D.

Appeal Number: 263/2018

Il-Pulizija

Spettur Colin Sheldon

Vs

Zhang Li

Today 15th January, 2018

The Court,

Having seen the charges brought against the appellant Zhang Li holder of Maltese Identity Card Nr. 20608A, charged before the Court of Magistrates (Malta) as a Court of Criminal Judicature with having:

For and on behalf of and/or in representation of Dig 8 Ltd. (C76114) and/or as a registered person with the Commissioner for Revenue as per Act XXIII of 1998 and regulations made thereunder, during a surprise inspection which was carried out on the 1st October, 2016 at Sesame situated at Old Theatre Street, Valletta, failed, either her or an employee of hers or any other person acting on her behalf, offered to provide services to another person and/or exhibited goods for sale whilst not being in possession of a fiscal cash register and/or manual fiscal receipt books as issued or approved by the Commissioner for Revenue, and this in breach of items 1, 2, 3 and

10 of the Thirteenth Schedule of the VAT act, and articles 51, 77(o), 81 and 82 of Act XXIII of 1998.

Having seen the judgement of the Court of Magistrates (Malta), as a Court of Criminal Judicature of the 30th May, 2018, where the Court, after seeing articles 1, 2, 3 and 10 of the 13th Schedule of the Act of 1998 regarding Value Added Tax (Act Nr. XXIII of 1998) and articles 51 and 77 (o), 81 and 82 of that same act. The Court found the accused guilty and condemned her to a fine (multa) of € 2000.

Having seen the acts of the proceedings.

Having seen the appellant's updated conduct sheet, presented by the prosecution, as ordered by this Court.

Having seen the appeal application presented by Zhang Li, in the registry of this Court on the 15th June, 2018, wherein this Court was requested to cancel and revoke the appealed judgement where she was found guilty of the charges brought against her and consequently acquit her of all the charges brought against her, alternatively the Court can reform the appealed judgement with regards to punishment and inflict a lesser penalty more appropriate for the circumstances of the case.

Having seen appellant's grievances wherein it is submitted:

In the first grievance the appellant is pleading the nullity of the judgement given by the first Court, wherein it was submitted that the first Court had not even written the judgement when this appeal was filed as when the appellant asked for the judgement he was only given the correspondence attached as Dok A, which cannot be considered as a judgement since it is not in conformity with the terms set out in article 382 of the Criminal Code. Moreover, on the 5th June, the undersigned asked again for the correct judgement and the response via email on the same day was that the Magistrate only writes the judgement when the appeal is filed.

This correspondence is being filed together with this appeal and marked as Dok B.

It is the fundamental right of every accused or party to the case that he is given the judgement, which judgement should be complete with all the reasoning of the Court

pertinent to that decision. This is a requirement stipulated *ad validate* in the Criminal Code. It is clear and manifest that in this case that at the moment that the judgement was given, there was neither no motivation for the judgement, not even during the writing of this appeal. Moreover, this is confirmed by the above mentioned correspondence, consequently the appealed judgement is null and void as it was reiterated in a number of judgement by the European Court of Human Rights - Papon v France, Ruiz Torija v Spain, Van de Hurk v Netherlands, Boldea v Romania, Hadjianastassiou v Greece, Fomin v Moldova, Salov v Ukraine u Gradinar v Moldova. In this respect, this honourable Court has no alternative but to nullify the judgement of the 30th May, 2018 and return the acts of the proceedings to the Court of Magistrates in order for that Court to give a judgement that complies with the law.

Without prejudice to the first grievance, the appellant in his second grievance submits that the proceedings in this case are also null since they have been submitted in the Maltese Language and even the judgement was given in Maltese, when the Magistrate knew that the accused did not understand the Maltese Language.

In his third grievance the appellant submits that the prosecution did not manage to prove the case as it is required in criminal law, that is, beyond reasonable doubt and therefore the appealed judgement is unsafe and unsatisfactory.

With all due respect, the first court did not take into consideration all the defences that were submitted by the appellant during oral submissions and this is reflected in Dok A.

With all due respect, when Inspector Christopher Spiteri testified on oath, he said that he had spoken in the English Language with a certain Lu Shou, who told him that she would be issuing fiscal receipts afterwards, on the other hand Inspector Clayton Tabone said that Li Shou told them that she would be issuing them later. Both witnesses said that Li Shou communicated with them in the English language and in their deposition both of them emphasised that the place in question was not

served with a fiscal cash register. On the other hand, when the prosecution brought Li Shou to the stand to testify on oath, she could not communicate in the English Language as she is only conversant in Chinese.

Moreover, the accused was shown and confirmed the Z reading issued on the 2nd October, 2016 at around seven in the morning and two other Z readings that were issued before. This shows that it is not true that the place was without a fiscal cash register. When the witnesses for the prosecution were asked whether they had checked for a fiscal cash register they only said that they had asked Li Shou about it, the same witness which is unable to communicate in the English Language. Moreover, appellant produced an official log book and the cash register book which bring to naught the prosecution's thesis.

In this respect, the first court decided against the appellant, when it results that there was a total conflict with regards to the evidence produced by the prosecution and the testimony given by Li Shou.

This conflict in the prosecution's evidence should have brought to a reasonable doubt as to whether the appellant should be found guilty and in Criminal Law, the prosecution should prove the case without reasonable doubt. In this respect, the appellant should have been acquitted of the charges brought against her.

Without prejudice to the previous grievances the fourth grievance is being submitted subsidiary and is being given with regards to the punishment inflicted. The fine (multa) that was inflicted is disproportionate and excessive given the circumstances of the case and the conduct sheet of the appellant.

The Court heard the parties make their oral submissions during the sitting of the 11th December 2018.

The Court took note of the verbal dated 11th December 2018 wherein it ordered that proceedings are held in the English language and that the case is being adjourned for a decree regarding the first two aggravations of the appellant dealing with alleged lack of adherence to procedural matters.

Considers.

The appellant based his appeal on two aggravations claiming the nullity of the judgment delivered. Namely that the judgment was given in the Maltese language when the appellant does not understand the Maltese language, that the judgment has no motivation in it as requested by article 382. The applicant then went on to make two other aggravations alleging that the first Court made a wrong appreciation of the facts of the case and that the punishment meted out was excessive.

With regards to the first aggravation the facts are as follows, namely:

1. The appellant was charged before the Courts of Magistrates as a Court of Criminal Jurisdiction on the 20th March 2018 and charged with offences relating to the VAT Act.

2. That the Chares in question was issued both in the Maltese language as well as in the English language.

3. During the first sitting held on the 20th March proceedings were held in the English language presumably according to article 4 of the Judicial Proceedings Act possibly because the accused is a foreigner and does not understand the Maltese language.

4. In the following sitting on the 30th May 2018, the language of the Court was in the Maltese language and the accused was assisted by her lawyer Dr. Charlon Gouder who did not object to the case being heard in the Maltese language,

5. On that same day of 30th May 2018 the Court of Magistrates (Malta) as a Court of Criminal Judicature went on to deliver the judgement in the Maltese language.

6. That an application was presented by the applicant on the 29TH October asking for an adjournment of the sitting of the case and this too was presented in the Maltese language.

7. The appeal of the applicant was filed in the Maltese language too.

It does not transpire from the acts of the proceedings that the appellant dos not understand the Maltese language and this is being said because there is no reference as to where she was born or to her nationality. It is true that she has a freeing name and surname but that on tis own merit does not mean much to the Court since there are many Maltese speaking persons with foreign names. The appellant never objected to the Maltese language being used before so much so that t=during the sitting of the 30th May 2018 appellant was present in court assisted by her lawyer when the proceedings were held in Maltese and no request was made by her for the proceedings to be held in English.

Reference is here made to article 4 of the Judicial Proceedings Act (Chapter 189 of the Laws of Malta) which provides the following in cases where the person brought before the court is a person who has not a sufficient knowledge of the Maltese language fully to understand and follow the proceedings if conducted in that language[1]

"*In all cases the decision or decree of the court determining the language in which proceedings are to be conducted shall be registered in the language in which it is delivered, together with a translation into English or Maltese, as the case may be, where any of the parties within three working days from the date when the decision or decree has been delivered applies for such a translation and satisfies the registrar that he does not understand the language in which such a decision or decree has been delivered but that he understands the language into which he requests the translation to be made*"

It is to be pointed out to that no request was made by the applicant to have a decree given by the Court to order that proceedings are held in the English language and thus it follows that in the absence for such a request the Court was correct to

[1] Article 7 (b) of Chapter 189 of the laws of Malta.

pronounce judgment in the Maltese language and the applicant was correct to present her appeal in the same language that was used by the Court.

Thus this first aggravation is being rejected.

The applicant however also claims that the judgment is null because there is no motivation and reasons given by the Court to find guilt on the appellant. The requisites of what a judgement should contain are found in section 382 of Chapter 9 of the laws of Malta.

Article 382 of the Criminal Code is a very important article since it embodies the necessary requisites which a judgment delivered by the Court of Magistrates must possess. In fact, Article 663 (5) in establishing what shall be mentioned in the summary of the judgment delivered by the Court of Magistrates provides that the elements found in Article 382 shall be present too. Thus, the elements found in this article are a *sine qua non* elements for the validity of judgments.

Article 382 provides that:

The court, in delivering judgment against the accused, shall state the facts of which he has been found guilty, shall award punishment and shall quote the article of this Code or of any other law creating the offence.

Therefore, according to this Article the Court in delivering the judgment must clearly mention the:

(i) Facts of which the accused has been found guilty;

(ii) Punishment meted to the accused; and

(iii)The article of the Code or of any other law creating the offence.

All these three elements must be found in the judgment delivered by the Court of Magistrates. Various times before our Courts the issue of which judgment should be considered as the final and binding one since these three requisites must be found in the final written judgment.

The first requisite which Article 382 mentions is that the judgment must '*state the facts of which he [accused] has been found guilty*'. Article 382 does not define or state what constitutes the facts of which the accused has been found guilty and as a result one should look at jurisprudence in order to understand what the phrase facts of which he has been found guilty means.

First of all, the Court of Magistrates in delivering judgment must explicitly either discharge or sentence the accused and if it mentions the facts of which the accused has been found guilty it must necessarily declare that the accused has been found guilty. Therefore, the Court of Magistrates in delivering judgment must on pain of nullity declare that the accused has been either found guilty or not guilty of all or any of the charges brought against him. In fact, in **Il-Pulizija vs Joseph Agius**[2], the Court of Criminal Appeal held that the first court after mentioning the article of the law went on to deliver the punishment without declaring the accused guilty and as such this constituted a breach of the elements found in Article 382:

"*Ovvjament la l-Qorti hija marbuta illi taghti l-fatti illi taghhom l-appellant ikun gie misjub hati dana jfisser illi ghandu jkun hemm id-dikjarazzjoni ta' htija ghax altrimenti huwa inutli illi ssemmi l-fatti*".

Article 382 refers to the facts of which the accused has been found guilty. In **Il-Pulizija vs Elton Abela** the Court of Criminal Appeal gave a definition of these facts;

"*Il-fatti li l-artikolu 382 jirreferi ghalihom huma l-fatti tar-reat u mhux, kif jippretendi l-appellant, il-fatti li jiggustifikaw ilkundanna ossia l-motivazzjoni. Fis-sentenza appellata l-fatti tar-reat huma effettivament elenkati fil-bidu nett. L-ewwel Qorti mbaghad ghaddiet biex telenka l-artikoli tal-ligi relattivi ghal dawk ir-reati kollha u ddikjaratu hati wara li qalet li kienet semghet ix-xhieda kollha u ezaminat id-dokumenti esibiti. Dak li kellha f'mohha l-ewwel Qorti huwa car, cioe` li kienet qed issib il-htija ghall-imputazzjonijiet kollha peress li ma ghamlet l-ebda kwalifika, u wiehed m'ghandux ghalfejn janalizza s-sentenza biex jipprova*

[2] decided by the Court of Criminal Appeal on the fifteenth (15) of March 2012

jiddetermina ta' x'hiex hija kienet qed issib lill-appellant hati. Certament kien ikun deziderabbli li kieku l-ewwel Qorti ziedet il-kliem "ta' limputazzjonijiet kollha" wara l-kelma "hati". Dan in-nuqqas pero` fil-kaz in dizamina ma jrendix is-sentenza nulla.

Usually *il-fatti tar-reat* are read out viva voce in open court when the officer of the Executive Police in charge of the prosecution or the complainant or his advocate or legal procurator appear before the Court of Magistrates. As rightly pointed out in **Il-Pulizija vs Philip Schembri[3];**

"*L-uzu tal-kliem testwali tal-ligi hu mehtieg biss fil-kaz tal-Att ta' Akkuza migjub mill-Avukat Generali quddiem il-Qorti Kriminali (ara Art. 589 (d) tal-Kap 9). Fil-kaz tac-citazzjoni mahruga mill-Pulizija Ezekuttiva, din tirrikjedi biss li jkun fiha il-fatti tal-akkuza (Art. 360 (2)) u dan bl-istess mod bhalma meta tinqara l-akkuza fil-qorti mill-prosekuzzjoni din l-akkuza jehtieg li jkun fiha il-fatt tar-reat (Art. 374 (i) (i) u 375 (c)). Dawn il-fatti, naturalment, iridu juru b'mod car ir-reat li tieghu il-persuna tkun qed tigi imputata, minghajr il-htiga ta' tigbid ta' kliem jew immaginazzjoni, jigifieri b'mod li l-imputat ikun jaf ta' liema reat jew reati qed jigi akkuzat u ghal liema reat jew reati jrid iwiegeb*".

The Court of Criminal Appeal in **Il-Pulizija vs Carmel Polidano[4]**, after differentiating Article 382 to Article 662 (2) stated that:

"*Jiġifieri sentenza tal-Qorti tal-Maġistrati li ma ssemmix ir-raġunijiet li wassluha għad-deċiżjoni tagħha ma titqiesx nulla. Naturalment huwa dejjem rakkomandabbli li jissemmew almenu minimu ta' raġunijiet, iżda n-nuqqas tagħhom ma jwassalx għan-nullita` tas-sentenza*".

In fact, according to jurisprudence, judgments delivered by the Court of Magistrates which are not motivated are not null and void.

This same court has already had the opportunity to state what it thinks with regards to this aggravation particularly when it is faced with a judgment that lacks

[3] decided by the Court of Criminal Appeal on the 18th of November 1994

[4] decided on the 11th December 2013

motivation and thus feels the need to repeat what was held by this court in the case in the names : "**Il-Pulizija vs. Joslann Brignone**[5]":-

"*…..din il-Qorti thossha ……fid-dmir li taghmel l-osservazzjoni segwenti. Qed jigri ta' spiss fil-Qrati tal- Magistrati - w partikolarment fl-awla li minnha emanat is-sentenza appellata - li kawzi ta' certa portata w gravita' qed jigu decizi bla ebda motivazzjoni kwalsiasi. Illi hu minnu li, kif inhi l-ligi - bl-emendi kollha bis-sulluzzu li saru fil-Kodici Kriminali f' dawn l-ahhar tlitt decenni w li mhux dejjem saru b' koerenza mall-hsieb inizjali tal-Kodici kif kien koncepit - in-nuqqas ta' motivazzjoni ma jgibx per se in-nullita' expressis verbis ta' tali sentenzi ghax il-motivazzjoni mhix wahda mir-rekwiziti mehtiega ad validitatem fl-art. 382 tal-Kodici Kriminali. Dan ghaliex meta saru dawn l-emendi kollha, ma saret ebda emenda li tkopri l-kontenut ad validitatem ta' sentenziu f' kawzi fejn l-akkuzi jkunu johorgu mill-kompetenza tal-Qorti tal- Magistrati bhala Qorti ta' Gudikatura Kriminali, kif kontemplata fl-art. 370 tal-istess Kodici w partikolarment fejn jew l-Avukat Generali jkun ta l-kunsens tieghu biex jigu decizi bi proceduri sommarji jew fejn, wara li l-atti tal-kumpilazzjonijigu rimessi lilu, jipprezenta n-nota bl-artikoli li tahthom jidhirlu li tista' tinstab htija biex il-kaz, fl-assenza ta' oggezzjoni tal-imputat, jigi gudikat minn dik il-Qort2i.*

It certainly appears fit to the Court in the primary interest of Justice that an amendment is carried out in the law whereby an added requisite is inserted in article 382 of the Criminal Code which binds the Court delivering a judgment to insert some kind of motivation which led it to its judgment

The Court notices that in many case which are delivered by the Courts of Magistrates after making reference to the charges given out it then proceeds to pronounce itself as follows

"Ikkonsidrat"

"….issib jew ma ssibx htija skond l-akkuzi.

This Court is of the opinion as was held in the above mentioned case of Brignone that:-

[5] decided by the Court of Criminal Appeal on the 8th February 2007

"Illi tali stezura, ……. zgur li hija ghal kollox karenti minn dak li hu mistenni ordinarjament mill-gudikant meta jkun qed jiddeciedi kawzi bhal dawn u taghmilha difficli kemm ghall-parti vincitrici li ssostni w tiddefendi s-sentenza appellata kif ukoll ghall-parti sokkombenti li tintavola appell kontra motivazzjoni fantomatika, li forsi tkun tezisti biss f' mohh il-gudikant. Inoltre fejn il-Qorti tal-Appell thoss li jkun il-kaz li tikkonferma s-sejbien ta' htija w l-piena erogata, jkollha ta' spiss taghmel ix-xoghol tal-Qorti tal- Magistrati hi stess billi timmotiva ghall-ewwel darba tas-sejbien ta' htija w piena. Din il-prattika ghalhekk hija wahda rregolari w trid tigi evitata ghax qed twassal ghal stultifikazzjoni tal-operat tal-Qorti involuta." (vide also App. Krim. "**Il-Pulizija vs. James Grima**[6]" [8.3.2007]).

However this Court is of the opinion that until such an important amendment is carried out judgments cannot be declared null on the basis of lack of motivation and thus this court cannot move on and re evaluate the evidence brought forward before it . Thus, this aggravation is being rejected.

The Court is thus rejecting both grievances and orders the continuation of the case on the merits.

(ft) Consuelo Scerri Herrera

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Franklin Calleja

Deputy Registrar

[6] decided by the Court of Criminal Appeal on the 8th March, 2007