Court of Criminal Appeal

His Honour Chief Justice Dr Joseph Azzopardi LL.D. – President

The Hon Mr Justice Dr Joseph Zammit McKeon LL.D.

The Hon Mr Justice Dr Giovanni M. Grixti LL.D.

Appeal Nr: 4/2015

The Republic of Malta

vs

Kingsley Wilcox

DECREE

The 13th. of February, 2019

The Court;

Having seen the application of Kingsley Wilcox of the 28 September, 2018 through which applicant requested leave to produce two new witnesses, namely Godfrey Zammit and a representative of Maltco

Lotteries Ltd as witnesses in the appeal proceedings pending before this Court in the above names;

Having seen its decree of even date wherby it ordered that the application be served upon the Attorney General with a twenty four hour time limit to file a reply;

Having seen the reply of the Attorney General presented during the sitting of the 3rd of October, 2018 objecting to applicant's request for the reasons therein stated;

Considered:

1. That applicant's request was entered in the appeal procedings pending before this Court lodged by him in the case The Republic of Malta vs Kingsley Wilcox (App 4/2015) following a guilty verdict by the jury for both charges proferred against him and this separately from the application of appeal which was due for hearing on the 3rd of October 2018;

2. That applicant states that the testimony of a certain Godfrey Zammit, operator of a Maltco lotto booth located in Msida could prove that some days before his arrest, applicant had cashed a Quick Keno winning ticket in the amount of three thousand euors (€3000.00) which could prove the source of the amount of €2,700.00 confiscated by the police and which was alleged to have been meant to finance the drugs in question;

3. Applicant puts forward the following reasons for his request:

"That during an exchange with the undersigned advocates, [that is the advocates now representing appellant in his appeal before this Court] applicant mentioned a witness, ossia Godfrey Zammit (KI 116660M), operator of a Maltco lotto booth located in Msida, having registration number 335, whose testimony could prove that a couple of days before his arrest appellant had cashed a Quick Keno winning ticket in the amount of three thousand (€3,000) euro, which can explain the source of the amount of money that the police confiscated from the appellant (€2,700), and which was alleged that such money was meant to pay for drugs.

That it transpires that this important witness was never questioned by the police and never produced as a witness before any court.

That the applicant genuinely believed that since his winning ticket was exchanged for cash there and then; the lotto receiver would not have a record of this transaction and that therefore it was futile to summon him to give evidence. That on the contrary, Maltco Lotteries Ltd, as the local operator of all lotto offices, has electronic data which keeps track of each and every transaction.

That the appellant respectfully recalls that he refused to be assisted by a court appointed lawyer during the trial by jury because he was not comfortable with the lawyer that was appointed to him since the same lawyer was also representing a third party that was connected to his case.

That consequently the applicant did not bring forward this witness in his defence."

4. The Attorney General registered his objection to this request basing himself on the premise that this witness was never refered to during the trial by jury and that appellant only made verbal

reference to a Quick Keno wager, which witness is not therefore a new witness and is not admissible at this stage of the proceedings. Considered further:

5. That the request as proposed by applicant is regulated by articles **506** and **507** of the Criminal Code which are being cited hereunder:

> **506. The Court of Criminal Appeal may, if it thinks it necessary or expedient in the interests of justice –**
>
> **(a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case; and**
> **(b) if it thinks fit order any witnesses who would have been compellable at the trial to attend for examination and be examined before the court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in any manner provided by law; and**
> **(c) if it thinks fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such application, subject ot the provisions of article 645**
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> **507. Without prejudice to the generality of the last preceding article, where evidence is tendered to the court under that article, the court chall, unless it is satisfied that the evidence if received would not afford any ground for allowing the appeal, exercise its power under that article of receiving it if -**
>
> **(a) it appears to it that the evidence is likely to be credible and would have been admissible at the trial on an issue which is the subject of the appeal; and**
>
> **(b) it is satisfied that it was not adduced at the trial, but that there is a reasonable explanation for the failure so to adduce it.**

6. The above cited provisions are different than those regulating an appeal from the Courts of Magistrates as a Court of Criminal Judicature which state, in article 424 that no new witnesses may be

produced in an appeal except: (a) when it is proved by oath or other evidence that the party requesting the production of new witnesses had no knowledge of them, or could not, with the means provided by law, have produced them before the inferior court; (b) when the evidence shall have been tendered before the inferior court, and such court shall have wrongly rejected it. The test before this Court as a Court of Criminal Appeal hearing appeals from the Criminal Court is therfore subject to "the interest of justice" rule which, no doubt presents a wider scope than article 424 above cited.;

7. In a judgement of this Court delivered on the 15 May, 1990, **Ir-Repubblika ta' Malta vs Angel *sive* Angelo Bajada**, it was held that it in accordance with article 507 of the Criminal Code, it is incumbent on the Court to allow new witnesses to give evidence given the concurrance of all conditions as set out in that article:

> "Issa kif diga kellha okkazjoni tosserva din il-Qorti fis-sentenza taghha tal-5 ta' Marzu 1971 in *re* **Il-Maesta' taghha r-Regina vs Alfred *sive* Fredu Frendo u Vincent *sive* Censu Vella: "**Dawn id-disposizjonijiet huma modellati kelma b'kelma fuq id-disposizjonijiet korrispondenti tal-ligi ingliza kif emendata fuq ir-rakkomandazzjonijiet tal—Donovan Committee (Cmnd. 2755 para. 136) li qalu "*it would help the Court to avoid or correct any miscarriage of justice if evidence were admitted if there were a reasonable explanation for the failure to adduce it at the trial".* L-emenda giet l-ewwel introdotta bil-Criminal Appeal Act 1966 s.5 u imbaghad giet inkorporata fi-Criminal Appeal Act 1968 s.23*".*

8. Kif kienet spjegat din il-Qorti kif allura komposta fis-sentenza taghha citata:

9. "Bl-artikolu 508 (illum art. 506) (korrispondenti ghal disposizzjoni li kienet gia tezisti taht il-Criminal Appeal Act 1907) il-Qorti ghandha diskrezzjoni li tammetti provi godda jekk jidrilha xieraq u mehtieg jew espedjenti fl-interess tal-gustizzja. Il-Principji generali li fuqhom il-Qrati fl-Ingilterra kienu jiggwidaw ruhhom fl-ezercizzju ta' dik id-diskezzjoni jistghu jigu riassunti brevement hekk: (1) "*the evidence must be evidence which was not available at the trial; (ii) it must be evidence relevant to the issues; (iii) it must be credible evidence i.e. evidence well capable of belief; (iv) if the evidence is admitted the Court will, after considering it, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial (Cfr. Court of Appeal, Criminal Division; by Dr. Thompson & H.". Walleston, 1969, p. 121 and Archbold, 37th Ed. 890).* Biex provi godda kienu jigu ammessi *"a very strong case must be made out ...",* izda, mill-banda l-ohra, il-Qrati kienu jezercitaw id-diskrezzjoni taghhom *"where the interests of justice were plain"* u l-Qorti kienet tkun tal-fehma li seta' gie nkors *"miscarriage of justice"* f'liema kaz il-Qorti *"would not allow a technical point to stand in its way" (R. Vs Perry and Harvey, 2 CR. App. R. 89)";*

10. Guided by these principles, it is the firm belief of this Court that it must be convinced by applicant that there is a reasonable explanation for him not having produced such evidence during the trial in order to meet the requirement detailed in article 507(b) cited above. Applicant states that he genuinely believed that it would have been futile for him to request that the Maltco representative be included as as witness since he would not have any record of the transaction through which he cashed his winning lottery ticket.

Applicants' declaration is unequivocal in that he knew of the existence of this witness and it now remains to ascertain whether there was any impediment which caused him to refrain from calling him as a witness;

11. Applicant argues that he was constrained to conduct his own defence during the trial by jury because he was not comfortable with the lawyer that was appointed in his defence since the same lawyer was also representing a third party connected to his case. The records of the case show that Dr. Leslie Cuschieri assisted the accused as legal counsel up until a hearing of the 24th November 2016 which hearing was put off for the 26 of January 2017 at the request of the parties in order to conduct plea bargaining which hearing was again put off for the 23rd of February 2017 as legal counsel to accused was not present. Dr. Cuschieri then filed an application before the Criminal Court requesting that the hearing be put off for another date as he was unable to attend for medical reasons. On the 23rd of February 2017, when the case was called, accused informed the court that he wanted to contest the case and did not want to be assisted by a lawyer and the case was adjourned for the 2 of March 2017;

12. On the day appointed for hearing accused again appeared before the Court without legal counsel and he **insisted** that he does not need the assistance of a lawyer. The Court then appointed the case for trial by jury for the 3rd April, 2017. In the interim, the Court issued a decree dated 16 March 2017 which is being reproduced as follows:

"Having heard the request of the accused that he does not wish to be assisted by an advocate dring the hearing of the trial by jury.

Since it is in the best interest of justice that the accused is assisted by an advocate in order that he may be directed as to the legal aspects of the procedure adopted during the trial. The Court is appointing Dr. Simon Micallef Stafrace as legal aid lawyer in order to assist the accused during the hearing of the said trial. Moreover, the Court also appoints a preliminary sitting for the 29th March, 2017 at 09.00 hours and orders that his decree is served upon the accused, the Attorney General and Dr. Simon Micallef Stafrace.

13. During the preliminary hearing of the 29th March 2017 Dr. Micallef Stafrace was present in order "*to assist the accused*". Accused registered his no objection to the Attorney General's request to exempt him from producing the witnesses therein indicated and the Court adjoured the case for trial for the 3rd of April, 2017;

14. On the first day of the trial by jury Dr. Micallef Stafrace was again present in order to assist the accused, appointed as aforesaid by the Court as lawyer for legal aid after having heard the insistence of the accused to represent himself;

15. The records of the case demonstrate that the accused conducted his own defence from the first day of the trial by jury and not before that stage. Accused also registered a no objection to the prosecution's request for copies of documents to be made available to the jurors and also cross-examined witnesses himself. Accused presented his defence during the sitting of the 6th of April 2017 and addressed the jurors on the 7th of April and made his own submissions regarding the penalty on the 8th of April after delivery of verdict by the jury;

The preliminary stage:

16. Accused was always assisted by his legal counsel up to the day immediatly the day appointed for the trial by jury. By means of a note dated **23 March 2015** entered into the records by accused and signed by his legal counsel in terms of article 438(2) of the Criminal Code, accused entered a preliminary plea to the Bill of Indictment contesting part of the narrative and the value of the drugs as described in the said Bill and further more declared:

> *2. Exponent would like to indicate all the witness of the prosecution as his own witnesses, but then he has no further witnesses to produce*
>
> *3. Exponent has no documents to exhibit.*

17. This declaration was made **two years** before the trial by jury when appellant was duly assisted. During those two years and indeed during the trial when the legal aid lawyer was put at his disposal for any assistance he may require having insisted on making his own defence, appellant failed to make use of the exception provided by subarticle (3), (4) and (5) of article 440 of the Criminal Code which provides the following:

> **440 (1) .....**
>
> **(2) .....**
>
> **(3) No witness, document or exhibit, which is not indicated in the lists or filed as provided in article 438, may be produced at the trial, without special leave of the court.**
>
> **(4) Leave shall only be granted if the evidence is considered to be relevant, and the Attorney General or the party accused shall not have been prejudiced by the omission**

from the said list or by the default of filing within the term specified in article 438.

(5) Nevertheless, if in the course of the trial, the necessity or utility shall arise of examining any witness or of having for actual inspection any document or exhibit not indicated in the list of any of the parties, the court may *ex officio* cause such witness which was not indicated in the list, to be produced.

18. The Court deems it relevant to refer to Archbold – Criminal Pleading, Evidence and Practice – Sweet & Maxwell 2014 (7-208) citing caselaw on the matter of fresh evidence during the appeal stage:

In *R. v Erskine; R. v Williams [2009] 2 CR. App. R. 29, the court said that the decision whether to admit fresh evidence is case and fact specific; the discretion to receive such evidence is a wide one focusing on the interests of justice, with the considerations listed in section 23)2)(a) to (d) being matters that require specific attention but being neither exhaustive nor conclusive; the fact that the issue to which the fresh evidence relates was not raised at trial does not automatically preclude its reception; however, it is clear from the statutoryu structure, as explained in the autorities, that unless a reasonable and persuasive explanation for the omission is offered, it is highly unlikely that the "interest of justice" test will be satisfied.*

It was held in *R. v Beresford, 56* Cr.App.R. 143, CA, that theres is a "reasonable explanation for a failure to adduce evidence at trial if the evidence sould not with reasonable diligence have been obtained for use at the trial. Reasonable diligence must include the need for the defendant himself to play a proper part in assisting in the preparation of the defence.

Nowhere is that more important than in the case of an alibi (as to which, see *R. v Hamption, post,* S 7-214)

..../....

Evidence of facts of which the appellant was aware at the time of trial cannot constitute "fresh" or "new" evedence, even though his legal representatives may have had no knowledge of it: *R. v Hayes*, unreported, July 19, 2002, CA [2002) EWCA Crim. 1945];

19. It is the considered conclusion of this Court that the above tests are also applicable to the issue under discussion which lead this Court to the further conclusion that appellant's declaration that his failure to call the Maltco employee as witness due to having to conduct his own defence as being incorrect and frivolous. Article 438(2) of the Criminal Code grants the accused a time period of fifteen working days from the date of notification of the Bill of Indictment and the list of witness and documents mentioned in article 590, in order to present his pleas and also a list of witness and documents which accused intends to bring bring forward. Appellant entered the relevant pleas and declaration of witness on the 23 of March 2015, that is two years before the trial by jury and at a time when he was assisted by a legal representative. When appellant declared that he will be representing himself, the Court, in terms of article 445 Criminal Code, informed him that he has the right to be assisted by a lawyer and apppointed the lawyer for legal aid to assist him nonetheless. If appellant was still in this state of uncertainity as to whether Maltco keeps records of encashment of winning tickets, appellant could also have made use of the exceptional provision of article 464 Criminal Code, which states that:

464. After the close of the defence, the Attorney General shall be allowed to reply, if he so desires; but, in such case, the accused shall have the right to a rejoinder: Provided that no fresh

evidence may be produced, without the special permission of the court, either in the reply or in the rejoinder*".*

Recourse to this provision of the law would again have provided appellant with another opportunity to call as witness a Maltco representative otherwise already know to him since the day of his arrest and which seems to be a key fact in that upon taking the witness stand in his trial by jury started by recounting his winning experience of a Quick Keno lottery ticket at Birkirkara (pg 2 of 274 of appellants transcript of evidence given on the 6 of April 2017);

20. Appellant's failure to request that a Maltco representative be included as a witness at any stage of the proceedings before the Criminal Court was not due to his lack of knowledge of such witness and that failure to include same as a witness was of his volition and cannot, therefore, at this stage of the proceedings be admitted to give evidence.

21. For the above reasons, this Court turns down the request of appellant made through his application of the 28 September, 2018 namely to order Godfrey Zammit and a representative of Maltco Lotteries Ltd to be admitted as witness at this stage of the proceedings.

His Honour Chief Justice Joseph Azzopardi – President

The Hon Mr Justice Joseph Zammit McKeon

The Hon Mr Justice Giovanni M. Grixti