THE COURT OF CRIMINAL APPEAL

The Hon. Mr. Justice Aaron M. Bugeja M.A. (Law), LL.D. (melit)

Appeal number – 124/2019

The Police

(Inspector Bernardette Valletta)

vs

Rosalino Martins Pais De ALMEIDA

Sitting of the 26th of November 2019

The Court,

1. This is an appeal from a judgment delivered by the Court of Magistrates (Malta) on the 15th of April 2019 against Rosalino Martins Pais De Almeida holder of a Portuguese passport number N690800 and a Maltese Residence Permit number 66290A, who was charged with having:

   > On these islands, on the 17th March, 2019 and the preceding weeks, failed to observe any of the conditions imposed by the Court presided by Hon. Judge Consuelo Scerri Herrera LL.D. in its decree dated 12th February,

2019, granting bail under certain conditions, as per Article 579 (2) (3) Chapter 9 of the Laws of Malta.

Thus, the Court was requested that if same is found guilty to revoke 'contrario imperio' the bail of Rosalino Martins Pais De Almeida, order the re-arrest and for the sum stated in the bail bond to be forfeited to the Government of Malta.

2. By means of a judgment delivered on the 15th of April 2019, the Court of Magistrates (Malta), after having seen the charge brought against the accused, considered that:

Having seen all the acts and documents exhibited;
Having heard witnesses.
Having heard the prosecution and defence counsel make their submissions;

Considers:

Whereas defence counsel is not contesting that the accused is indeed the person appearing in the said footage.

Whereas it results that at such time and in accordance to the Court decree delivered by the Criminal Court on the 12th February, 2019, the accused's bail conditions were varied inter alia by a reduction in "the time within which the accused can be out of his home namely that he is to return home at 9:00pm every day including Sundays and Public Holidays".

Whereas the accused himself, whilst testifying before this Court, admits that he breached the bail condition regarding the hours within which he was ordered to retire in his residence;

Whereas the footage3 taken from the establishment styled as Bar Native in Paceville clearly shows the accused frequenting the said establishment on the 10th March, 2019 after 10pm;

Whereas the accused has been charged with the offence provided for in terms of article 579(2) of the Criminal Code which leaves the Court with no discretion as regards the forfeiture of the bail bond which is a mandatory consequence of a conviction under this same article:

(2) Any person who fails to observe any of the conditions imposed by the court in its decree granting bail shall be guilty of an offence and shall, on conviction, be liable to the punishment of a fine (*multa*) or to a term of imprisonment from four months to

two years, or to both such fine and imprisonment and the sum stated in the bail bond shall be forfeited to the Government of Malta.

For the said reasons the Court, after having seen section 579 of Chapter 9 of the Laws of Malta, found the accused guilty of the charge brought against him and condemned him to six (6) months imprisonment. The Court ordered the forfeiture in favour of the Government of Malta of the sum of twenty four thousand Euro (€24,000) representing the deposit and personal guarantee referred to in the bail bond as amended by the Criminal Court when the initial deposit of six thousand Euro (€6,000) was increased to ten thousand Euro (€10,000) in addition to a personal guarantee of fourteen thousand Euro (€14,000). Moreover, the Court revoked the decree delivered by the Court of Magistrates (Malta) of the 7th February 2019, by means of which the accused was released on bail and consequently ordered his immediate re-arrest.

3. Having seen the appeal application filed by Rosalino Martins Pais De Almeida in the registry of this Court on the 6th of May 2019 whereby this Court was requested **to vary** the said judgment by confirming the part where the appellant was found guilty of the charges brought against him and **to revoke and annul** the part regarding the punishment inflicted on the appellant by declaring the term of imprisonment of six (6) months as null and void or alternatively to apply a lesser, more appropriate and just punishment in the circumstances, as this Honourable Court deemed fit and opportune.

4. The grounds for appeal of Rosalino Martins Pais De Almeida consist of the following:

The appellant respectfully submits that as Article 579 (2) of Chapter 9 of the Laws of Malta stipulates, the First Court had the option that in case of guilt it could have condemned the appellant either to a fine (*multa*) or to imprisonment, or else to both such fine and imprisonment. The fact that the First Court opted to impose an effective term of imprisonment, is in the humble opinion of the appellant, a harsh and unjust punishment especially when one takes into account the particular circumstances that the appellant is in.

For this reason, the appellant will be referring to a number of Court decisions, both locally as well as European that have dealt with similar or even identical circumstances to his own in relation to bail conditions.

In **Lawrence Gatt vs Malta** (Application. No. 28221/08), the European Court of Human Rights had ruled that one must make a clear distinction between principle conditions for the bail bond and other ancillary conditions, precisely:

> "... The Court observes that Maltese law, in respect of the circumstances in which a bail bond will be forfeited to the Government as a result of a failure to observe bail conditions (Article 579 of the CC), makes no distinction between conditions related to the primary purpose of bail, namely appearance at the trial, or conditions related to other considerations. It however, gave the authorities discretion not to apply the said provision if the breach of conditions was not of a serious nature. In the present case where the condition breached, referred to a curfew and was not connected to the primary purpose of granting bail, the Court has difficulty in understanding the authorities` decision to apply the relevant article. In this light, the Court finds it relevant to point out that in the absence of proper guidelines as to the exercise of discretion under Article 579, or of a distinction between breaches of conditions relating to the primary purpose of bail and other considerations, Maltese law is deficient in that it can lead to arbitrary and disproportionate results."

The above observation is a direct reference to the situation that the appellant is facing. Even if one does not argue on the fact that the appellant was indeed past his time of curfew when was seen outdoors, this fact alone does not in itself mean that such a breach of conditions is of a serious, or grave, nature since it is not connected to the primary purpose of granting bail.

In another case, decided by the Criminal Court of Appeal on the 16th March 2011, in the names **John Grima vs Attorney General,** it was pointed out that a person failing to observe a bail condition that is only ancillary to the principle reasons granting bail from arrest is totally different from not observing a grave condition such as not appearing when ordered to, absconding or leaving Malta and attempting to interfere with witnesses or

obstructing the course of justice. In such an instance one would be harming and undermining the actual criminal proceedings in themselves.

Similarly, in the case **The Police vs Elaine Muscat** decided by the Criminal Court of Appeal presided by the Hon. Judge. David Scicluna, dated the 5th of August 2013, it was confirmed that Muscat had not observed one of the conditions imposed upon her for the granting of bail. The condition prompting such proceedings was actually that relating to the time that the Muscat had to be at home, indoors. Thus, breaching on of the ancillary bail conditions could be considered as contempt of court orders but one may argue that such inobservance, does not equate to an interference or harm to the course of justice in the said criminal proceedings.

> "F'dan il-kaz l-iskop tal-bail huwa essenzjalment wiehed; illi l-persuna tidher ghal-kull att tal-procediment. Sal-mument tas-sentenza hija ghadha prezunta innocenti minkejja l-akkuzi illi jkunu saru kontra taghha. Mela l-garanzija illi trid tinghata u anke l-kundizzjonijiet huwa biex proceduralment ma jkunx hemm hsara ghall-process kriminali illi jkun gust pero` fl-istess waqt, ma jipprivax il-persuna preventivament mill-liberta` taghha."

In the present case, it is evident that the appellant was given a harsh punishment when taking into consideration that he was handed over with a six (6) month term of imprisonment.

The appellant further submits that the First Court failed to take into consideration his clean conduct and that the pending criminal proceedings are the only proceedings being brought against him. The appellant has admitted in various instances that he is going through a hard and difficult time, is overly concerned and stressful, stating that he is struggling to accept the fact that he is faced with criminal proceedings in Malta, something which he never experienced or thought of before. His lack of observance to the curfew condition puts him in a bad light in the eyes of justice, a factor which he is conceding to. The forfeiture of his bail bond, amounting to a total of twenty-four thousand euros (€24,000) may be considered just in the particular circumstances of the appellant. Taking note of the facts of the case, the clean conduct of the appellant and his otherwise compliance with all other court orders, a six (6) month term of imprisonment can be said to be punitive and adverse to the appellant.

Considers:

5. That on the 7th February 2019 the Court of Magistrates granted bail to the appellant. Bail conditions were however subsequently varied

by the Criminal Court on the 12th February 2019. According to the revised bail conditions, appellant's curfew time was further increased, in that he had to return home by not later than 9pm every day, including Sundays and Public Holidays. Even the amount of monetary deposit was likewise increased from €6000 to €10,000.

6. On the 10th March 2019, it transpired that the accused was detected at *Bar Native* in Paceville at 2200, that is beyond his curfew. When the accused was questioned and shown CCTV footage to prove same, at first he refrained from answering, as he had every right to; however during subsequent court proceedings he confirmed his identity from the footage portrayed.

7. The Police questioned the appellant about some Facebook posts or correspondence which he conducted with persons close to the victim in the principal pending proceedings. The Police tried to detect whether the accused was trying to indirectly contact or harass the victim. The accused denied any ill-intent on his part or even knowing about any such communication.

8. On the basis of his confession, ALMEIDA was found guilty and condemned :
   (a) to a term of 6 months imprisonment;
   (b) to the forfeiture in favour of the Government of his bail bond and deposit totalling twenty four thousand euro; and
   (c) to revoking his bail conditions and ordering his immediate re-arrest.

Considers:

9. The main grievance of the appellant concerns the punishment imposed. He considers the imprisonment term as being manifestly excessive considering that the breach of bail conditions was not serious in nature. The appellant argues that this breach was not in relation to any of the main bail conditions, such as that he ensures his presence during proceedings whenever called upon by the competent Court.

10. The scope of punishment meted out by a Court of Criminal Jurisdiction seeks achieve three main aims :
    (a) Retribution;
    (b) Prevention of further criminal offending; and
    (c) Re-education of the convict.

11. According to Italian Jurist Francesco Carnelutti, retribution seeks to re-establish the social and moral peace and harmony that would have been breached by the criminal offender's actions. Society requires the offender to make good for the harm and damage done to it through criminal activity.

12. The punishment must also serve as an instrument of prevention of crime. The fear of punishment should act as a safeguard against future criminal offending by encouraging the prosective perpetrator to think about the consequences of his criminal actions

before they are committed. This preventive aspect has generic and specific aims. The generic preventive aim is reflected in the correct practical application by Courts of Criminal Jurisdiction of the punishments established by criminal law. The more efficient the Criminal Justice System, the better the deterrent effect on society. On the otherhand, the specific preventive aim, focuses on the effect of the application of the punishment on the individual criminal offender himself, thus aiming to achieve a specific deterrent effect aimed at the particular offender.

13. Re-education of the convict departs from the repressive or retributive aims and focuses more on the rehabilitative aspect of punishments. Punishments ought to produce a therapeutic effect on the offenders aimed at their rehabilitation. Most of the time, this is a difficult process that the offender faces. It seeks to identify the causes condusive to the spread of crime as well as the conditions leading to criminal offending. This rehabilitative process aims at helping the offender to come to terms with himself, to acknowledge the actions committed in order for him to rebuild his life and refrain from being a future threat to society. The State has to provide the convict with the necessary support structures to help him to achieve this rehabilitative aim.

Considers that : -

14. Whenever a Court of Criminal Appeal is faced with an appeal from the sentence meted out by the Court of Magistrates, it must analyse:-

(a) whether the Court of Magistrates could legally and reasonably arrive at its conviction;

(b) whether the punishment inflicted by that Court was within the parameters established by law;

(c) whether the punishment was wrong in principle;

(d) or whether it was manifestly excessive. [1]

15. In order for this Court to be able to carry out this exercise it must first analyse the provision of the law creating the offence and establishing the punishment. Article 579 of the Criminal Code states as follows:

> **579. (1)** If the person charged or accused fails to appear when ordered by the authority specified in the bail bond, or fails to observe any of the conditions imposed by the court in its decree granting bail, or absconds or leaves Malta, or while on bail commits any crime not being one of an involuntary nature, or interferes or attempts to interfere with witnesses or otherwise obstructs or attempts to obstruct the course of justice whether in relation to himself or any other person, the sum stated in the bail bond shall be forfeited to the Government of Malta, and, moreover, a warrant of arrest shall be issued against him:
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> Provided that this article shall not apply where the court considers that the infringement of the condition imposed in the decree granting bail is not of serious consequence.

[1] See the judgment of the Court of Criminal Appeal in re ***The Police vs Massimiliano Maurizio***, dated 13th November 2003 per Judge Joseph Galea Debono; ***The Police vs Michael Zahra***, dated the 19th April 2001 per Judge Vincent Degaetano and ***The Police vs Joseph Attard*** decided on the 26th January 2001 per Judge Patrick Vella.

> **(2)** Any person who fails to observe any of the conditions imposed by the court in its decree granting bail shall be guilty of an offence and shall, on conviction, be liable to the punishment of a fine (multa) or to a term of imprisonment from four months to two years, or to both such fine and imprisonment and the sum stated in the bail bond shall be forfeited to the Government of Malta.
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> **(3)** Notwithstanding the provisions of any law, any person charged with any offence as mentioned in sub-article (2) shall be arraigned in Court under arrest, and it shall be lawful for the Police to request in the same proceedings the revocation of bail and the rearrest of such person. The proceedings for an offence under subarticle (2) shall be taken by the Police and shall be decided by the Court with urgency.

16. This clearly shows that the punishment of imprisonment as imposed by the Court of Magistrates falls within the parameters of Section 579(2) of the Criminal Code. The forfeiture of the bail bond is part of the punishment to be imposed by the Court upon the finding of guilt for the offence created by article 579(2) of the Criminal Code. Moreover arraignment in Court under arrest, the revocation of bail conditions and the re-arrest of the appellant are applicable, provided that the Prosecution would have made a request to this effect upon arraignment. These requests however remain subject to the discretion of the presiding judge or magistrate. In any case these proceedings are to be conducted and decided with urgency.

17. This Court must analyse, therefore whether in awarding the punishment abovementioned, the Court of Magistrates was wrong in principle, or whether the punishment meted out was manifestly excessive. In ***The Republic of Malta vs. Kandemir Meryem Nilgum***

and Kucuk Melek decided by the Court of Criminal Appeal in its superior jurisdiction on the 25th August 2005, it was held that:

> It is clear that the first Court took into account all the mitigating as well as the aggravating circumstances of the case, and therefore the punishment awarded is neither wrong in principle nor manifestly excessive, even when taking into account the second and third grounds of appeal of appellant Melek. As is stated in Blackstone's Criminal Practice 2004 (supra):
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> "The phrase 'wrong in principle or manifestly excessive' has traditionally been accepted as encapsulating the Court of Appeal's general approach. It conveys the idea that the Court of Appeal will not interfere merely because the Crown Court sentence is above that which their lordships as individuals would have imposed. The appellant must be able to show that the way he was dealt with was outside the broad range of penalties or other dispositions appropriate to the case. Thus in Nuttall (1908) 1 Cr App R 180, Channell J said, 'This court will...be reluctant to interfere with sentences which do not seem to it to be wrong in principle, though they may appear heavy to individual judges' (emphasis added). Similarly, in Gumbs (1926) 19 Cr App R 74, Lord Hewart CJ stated: '...that this court never interferes with the discretion of the court below merely on the ground that this court might have passed a somewhat different sentence; for this court to revise a sentence there must be some error in principle." Both Channell J in Nuttall and Lord Hewart CJ in Gumbs use the phrase 'wrong in principle'. In more recent cases too numerous to mention, the Court of Appeal has used (either additionally or alternatively to 'wrong in principle') words to the effect that the sentence was 'excessive' or 'manifestly excessive'. This does not, however, cast any doubt on Channell J's dictum that a sentence will not be reduced merely because it was on the severe side – an appeal will succeed only if the sentence was excessive in the sense of being outside the appropriate range for the offence and offender in question, as opposed to being merely more than the Court of Appeal itself would have passed."[2]
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> This is also the position that has been consistently taken by this Court, both in its superior as well as in its inferior jurisdiction.

18. In order to determine whether the Court of Magistrates was wrong in principle when meting out a punishment of imprisonment in this case, this Court analysed in detail the case law which was quoted by Defence in their appeal application.

19. The excerpt quoted in the appeal application from the case ***The Police vs Elaine Muscat*** does not reflect the conclusions or considerations of the Court of Criminal Appeal, but was rather part of the arguments raised in the appeal application lodged by the accused in that case. The Court of Criminal Appeal confirmed the findings of the Court of Magistrates declaring the accused guilty and the punishment imposed.

20. In ***The Police vs Tony Armando Zahra,***[2] commenting on the issue of breach of curfew, the Court of Criminal Appeal considered as follows : -

> Skond l-artikolu 5(3) tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u Libertajiet Fundamentali, il-helsien waqt pendenza tal-proceduri "jista' jkun taht kundizzjoni ta' garanziji biex jidher ghall-proceduri". Il-kundizzjoni msemmija hija kundizzjoni valida sabiex ikun hemm il-kontroll mehtieg biex jigi assigurat li l-appellant jidher ghall-proceduri peress illi tali mizura tnaqqas il-possibilita` li persuna imputata tallontana ruhha mill-pajjiz jew anke tinheba. Issir referenza wkoll ghal dak li jghidu Harris, O'Boyle u Warbrick fil-ktieb taghhom "Law of the European Convention on Human Rights":
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> > "'Article 5(3) can be read as meaning that the only conditions that can be attached to release pending trial are those relating to appearance at trial. <u>However, it would be unsatisfactory if Article 5(3) did not allow any considerations other than appearance at trial to be taken into account when allowing bail</u>.[3] Such an approach might work to a person's disadvantage in that it might prevent his release altogether if, for example, a condition as to the suppression of evidence or the prevention of crime were not permissible.'

21. Therefore, Article 579 of the Criminal Code refers to the breach of any of the bail conditions imposed; and is not simply confimed to the condition obliging the bailee to appear in Court during the course of proceedings whenever called for by the competent Court.

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[2] Decided by this Court on the 9th February 2007 presided by Mr. Justice David Scicluna.
[3] Emphasis of this court.

22. In this particular case, the breach consisted of the violation of the conditions of curfew. This can also be seen from the wording of the judgment of the Court of Magistrates : from where it transpires that the breach attributed to the appellant is limited to the fact that he stayed out in Paceville after 9pm - which fact the appellant did not deny. Although the Prosecution implied that the appellant may have attempted to make indirect contact with the victim in the case instituted against him, the Court of Magistrates seems not to give any consideration to this argument. Though there seems to have been some conversation between appellant's friend Saddam Azhari Eltahir Ahmed and the victim, where Saddam clearly queries about Sena's situation with the appellant, it transpired also that this conversation was carried out without the appellant's knowledge. This was Saddam's declared insistent position when he took the witness stand before the Court of Magistrates.

23. The appellant complains about the fact that he received a harsher punishment than that meted out by the Court of Magistrates in other cases. He argues that the circumstances of this case were not serious enough to warrant a punishment of imprisonment – and more so when this case is compared to others dealing with similar subject matter.

24. Disparity in sentencing is the subject of long standing debate. Thus in the judgment delivered by this Court, as differently presided in the case ***Il-Pulizija vs Ludvic Bugeja*** of the 9th February 2011,

quoted ***Blackstone*** that makes reference to when Courts in England and Wales would be willing to favourably consider an appeal stemming from disparity in sentencing as follows: -

> 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* [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.
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> 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:
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> 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."

25. Of course there were no co-accuseds in this case; and the cases mentioned by Defence are separate and distinct from this one. In view of this, reference needs to be made ot the judgment in re ***Ir-Repubblika ta' Malta vs. Omissis u Ali Aibrahim Algaoud*** decided by the Court of Criminal Appeal in its Superior jurisdiction on the 20th May 2004 wherein the principles expounded by ***Archbold*** were quoted with approval :-

> 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.). There is some authority for the view that disparity will be entertained as a ground of appeal only in relation to sentences passed on different offenders on the same occasion: see R.v. Stroud, 65 Cr. App.R. 150, C.A. It appears to have been ignored in more recent decisions, such as R. v. Wood, 5 Cr.App.R.(S) 381. C.A., Fawcett, ante, and Broadbridge, ante. The present position seems to be that the court will entertain submissions based on disparity of sentence between offenders involved in the same case, irrespective of whether they were sentenced on the same occasion or by the same judge, so long as the test stated in Fawcett is satisfied".

26. Therefore invoking disparity in sentencing by reference to separate and distinct proceedings does not necessarily produce a valid argument at Law. However, that does not go to say that this Court should stop with its analysis as to whether the punishment meted was wrong in principle or manifestly excessive in the circumstances of the case. As mentioned in re ***Kandemir*** and later confirmed in ***Ir-Repubblika ta' Malta vs. Marco Zarb***, decided on the 15th

December 2005 a Court of Criminal Appeal does not vary the punishment meted out by the Court of First Instance simply because the Appellate Court would have meted out a lower punishment than that meted out by the Court of First Instance. In order for an appeal from punishment to succeed, the appellant must show that the punishment meted out by the Court of Magistrates was wrong in principle or beyond the legal parameters. The Appellate Court does not interfere with punishments that are not wrong in principle, even though they may appear to be harsh to individual Judges. Hence the basic principle that in order for an Appellate Court to vary a sentence, the appellant must show that the punishment meted out was somehow wrong in principle.

27. However the Court of Appeal in England and Wales developed a doctrine of review of punishment when it deems that the punishment meted out by the Court of First Instance is manifestly excessive. This procedure does not bring about variation of punishments simply because they would appear to be on the severe side of the legal spectrum. This doctrine holds that the Appellate Court could uphold an appeal based on punishment if the appellant shows that the sentence was outside the legal parameters of the applicable punishment in relation to (a) the offence in question or (b) in relation to the circumstances of the convict and not simply because the punishment would have been more severe than that which the Appellate Court would have meted out in those circumstances had it been endowed with the power to mete out such punishment.

28. These principles were also embraced by the Maltese Court of Criminal Appeal in its Superior Jurisdiction in the case ***Ir-Repubblika ta' Malta vs Carmen Butler et*** decided on the 26th February 2009 where it held as follows :

> 8. Fil-verita`, dawn il-principji huma rifless tal-principju l-iehor li meta jkun hemm sentenza li tigi appellata mill-hati, il-Qorti tal-Appell Kriminali, bhala regola, ma tiddisturbax il-piena erogata mill-ewwel qorti sakemm dik il-piena ma tkunx manifestament sproporzjonata jew sakemm ma jirrizultax li l-ewwel qorti tkun naqset milli taghti importanza lil xi aspett partikolari tal-kaz (u anke, possibilment, lil xi cirkostanza sussegwenti ghas-sentenza ta' l-ewwel qorti) li kien jincidi b'mod partikolari fuq il-piena. S'intendi, kif diga` nghad, "sentencing is an art rather than a science" u wiehed ma jistax jippretendi xi precizjoni matematika jew identita` perfetta fit-tqabbil tal- fatti ta' kaz ma' iehor jew tal-piena erogata f'kaz ma' dik erogata f'kaz iehor.

29. In the particular circumstances of this case as portrayed above, this Court considers that even though the punishment meted out falls fairly and squarely within the legal parameters, this Court deems that the Court of Magistrates did not delve sufficiently in the analysis of the nature of the breach committed by the accused, and therefore the *circumstances of the convict* in the specific case. This Court needs to take in consideration the nature of the breach of bail conditions and their objective seriousness. As Defence rightly point out, the breach of curfew, while still remaining a breach of the conditions of bail, cannot be deemed to form part of the core bail conditions. Moreover, it results that at arraignment stage the appellant had a clean criminal record.

30. As a consequence of this breach of this curfew condition - committed once - apart from the punishment of imprisonment, the Court of Magistrates also ordered the forfeiture in favour of the Government of Malta of the bail bond and personal guarantee of the accused to the tune of twenty four thousand euro (€24,000). As already mentioned above, this forfeiture is mandatary; and in the circumstances quite a hefty punishment in and of itself. Furthermore, the Court of Magistrates aceeded to the request of the Prosecution to revoke the bail conditions imposed on the appellant and to order his rearrest. This Court considers that the imposition of an effective prison sentence over and above the abovementioned punitive measures imposed is, in the circumstances of the case disproportionate and hence wrong in principle by reference to the circumstances of the convict.

Decide:

Consequently for the above mentioned reasons, the Court upholds the grievance filed by Rosalino Martins Pais De Almeida in his appeal application and varies the judgment delivered by the Court of Magistrates on the 15th April 2019 by confirming that part where it finds the appellant guilty of the only charge proferred against him, the forfeiture of the bail bond and personal guarantee in favour of the Goverment of Malta in the aggregate amount of twenty four thousand euro (€24,000), the revocation of the bail conditions duly imposed upon him by the Court of Magistrates (Malta) on the 7th February 2019 as varied by the decree of the Criminal

Court on the 12th February 2019 as well as his rearrest, whilst revoking that part of the judgment of the Court of Magistrates wherein it condemned the appellant to the term of six months imprisonment, and instead it condemns the appellant to a fine (multa) of two thousand euro (€2000). The Court confirms the remaining parts of the judgment of the Court of Magistrates that were unchanged by this judgment.

Aaron M. Bugeja
Judge