COURT OF CRIMINAL APPEAL

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

Appeal no: 140 / 2020

The Police

vs

Rade Djinovic

Today the, 10th November 2020

The Court,

Having seen the charges brought against Rade Djinovic, bearer of Identity Card Number: 214407 L, accused before the Court of Magistrates (Malta):

That from the 28th June, 2018 till 28th November, 2018 in the Maltese Islands:

By several acts committed by him, even if at different times, which constituted violations of the same provisions of the law, and were committed in pursuance of the same design, are deemed to be a single offence, called a continuous offence (Chapter 9, Article 18).

1. He failed to give Antonia Djinovic, the sum fixed by the Court or as laid down in the contract as maintenance for his child(ren) and / or wife, within fifteen days from the day on which according to such order or contract, such sum should have been paid (Chapter 9, Article 338 (z))

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 20th July, 2020, by which, the Court after having seen Articles 7, 18 31g and 338 (z) of the Criminal Code, Chapter IX of the

Laws of Malta, found the accused guilty of the charges brought against him and condemns him to three months imprisonment which, by application of Article 28A of the Criminal Code, are being suspended for there years from today.

The Court explained to the defendant in ordinary language the significance of this judgement and of the consequences should he fail to observe the conditions imposed.

Having seen the application of the appellant Rade Djinovic filed on the 4th August, 2020, wherein he humbly requests that this Honourable Court to confirm that part whereby appellant was declaredguilty of the charges brought agaist him and cancelling that part where he was condemned to three months improsonment which by application of Article 28 A of the Criminal Code have been suspended for three years, and instead a far more lenient and just punishment which should fit better the merits of the present case.

That the appellant's grievance is clear and manifest and consists in the following:

That the punishment awarded against appellant is clearly unjust and exsessive and makes no justice to the case at hand and this for several reasons which shall all be duly explained and expounded in the course of oral pleadings before this Honourable Court in relation to this present appeal and which included but are not limited to the following:

1. That the first Court little or none consideration to the fact that this was the first occasion where he failed to abide by the family court's order awarding maintenance;

2. That albeit that he was failing to honour the said court order, he was doing so only in part as he has to date never minimally failed to duly abide by that same order in that part that interests the minor children.

And several other reasons which shall be duly put forward as said in the course of the oral pleadings of this appeal.

Having heard the parties make their oral submissions in regard to this appeal during the court appointed sitting of the 27th October 2020.

The Court considered,

The aggravations contained in the appeal application are merely two that the appellant has a clean conduct sheet and thus should have been considered as a first time offender and not been given this excessive punishment and secondly the appellant filed an admission so the punishment should not have been given in its maximum.

It is to be noted at this very early stage of the proceedings that in this case the appellant filed a plea of guilt during the siting of the 27th January 2020[1] and notwithstanding that he was given time to reconsider his admission he insisted in the presence of his lawyer to register such guilty plea

In hearing appeals of this nature, Maltese case law has shown that the situation is crystal clear . As indicated in the case in the names **Ir-Repubblika ta' Malta vs. Serag F. H. Ben Abid**[2] the court held that : -

Issa fit-termini tal-gurisprudenza ormai kostanti tal-Qrati taghna, meta jkun hemm ammissjoni huwa xi ftit jew wisq odjuz appell minn piena sakemm din tirrientra fil-limiti

[1] Fol. 14
[2] Decided on the 4th December 2003

li tipprefiggi l-ligi. Dan huwa hekk peress illi min jammetti jkun qieghed jassumi r-responsabilita` tad-decizjoni li jkun ha u jirrimetti ruhu ghal kull decizjoni dwar piena li l-Qorti tkun tista' tasal ghaliha. Naturalment dan ma jfissirx li din il-Qorti u Qrati ohra ta' appell ma jidhlux f'ezami akkurat tac-cirkostanzi kollha biex jaraw jekk il-piena nflitta kenitx eccessiva jew le. Mhuwiex normali pero`, li tigi disturbata d-diskrezzjoni ta' l-ewwel Qorti jekk il-piena nflitta tkun tidhol fil-parametri tal-ligi u ma jkun hemm xejn x'jindika li kellha tkun inqas minn dik li tkun inghatat.

Thus in these type of proceedings regarding punishment, the Court has to examine and see whether the courts of Magistrates could have legally and reasonably award such punishment meaning that it has to examine and see whether the punishment inflicted by the first court is in accordance with the quality and quantity established by law or if alternatively the court was incorrect in principle or was manifestly excessive.

As held in the case in the names **The Republic of Malta vs. Kandemir Meryem Nilgum and Kucuk Melek[3]:**

"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):

*"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 Page **9** of **12** 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*

[3] Decided by the Criminal Court of Appeal Superior Jurisdiction on the 25th August 2005

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]

This is also the position that has been consistently taken by this Court, both in its superior as well as in its inferior jurisdiction.

On the other hand this court has to carry out an evaluation to see whether the courts of Magistrates applied a punishment which was manifestly excessive when taking into consideration the aspects of retribution and prevention. As held in the case **Ir-Repubblika ta' Malta vs. Marco Zarb**[4], this court does not disturb the judgment delivered by the first court simply because it prescribed a punishment which is higher than that which it would have given itself in the first place. For this court to uphold an appeal application it is necessary that the first court in delivering punishment went beyond the parameters established by law regarding the punishment prescribed by law. This court does not interfere with regard to those punishments that are no wrong in principle even though they may appear to be harsh for this court . So that punishment is changed the appellant has to prove to this court that there is a change of circumstance for example that payment or that there was a mistake in principle when meting out the punishment given. The

[4] Decided by the Criminal Court of Appeal Superior Jurisdiction on the 15th December 2005

Appeal Court of United Kingdom developed the principle of checking the punishment awarded by a lower court in those cases where the punishment given is excessive or manifestly excessive. However this does not simply mean that a judgement where punishment is awarded in the higher bracket means that it is equates to excessive punishment. In fact that same court believes that an appeal regarding punishment can be upheld if it results that the punishment awarded was not in line with the parameters provided for by the legislator in awarding the given punishment for the offence in question and not in line with the circumstances of the guilty person and not because the punishment given is more severe than that which would have been given by the appeal court

In fact these latter principles have been discussed in the case in the names **Ir-Repubblika ta' Malta vs Carmen Butler et** [5] wherein the court held that:-

". 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.

The prevalent view regarding case law in this context is that when a Court is faced with awarding punishment it has to take into consideration all the circumstances meaning those which affect the victim, the interest of society at large including those of the accused person who forms part of this same society.

[5] Decided by the Criminal Court of Appeal Superior Jurisdiction on the 26th February 2009

In this regard there is local and English case law which establishes principles which must be taken into account for there to be a revision of the awarded punishment. In which case this court would have to point out which are the circumstances which induced her to alter or revoke the punishment awarded by the first court as was identified in the **Butler case** mentioned earlier.

In this case it appears that the punishment given was within the parameters established by law for the offence under examination namely failing to abide by a court order and pay maintenance to his wife in terms of section 338z of Chapter 9 of the laws of Malta.

The fact that the appellant failed to pay maintenance to his wife even though a year has passed from its due date means that that appellant is either not realising that he is committing an offence against the administration of justice and insists in remaining in such default or otherwise is simply being in defiant and oblivious to the laws of the country. It is not acceptable that the appellant does not abide by a court order capriciously. The appellant gave no reason for his default and even if there was a financial reason this is not the proper court where to vent such an issue. The law is very hard on these type of contraventions because it provides a prison sentence for those who fail to abide by the law in this regard. Even if one where to be condemned to an effective prison term the obligation to pay the maintenance is still due. Thus the appellant would still find himself in avicious circle that he cannot run away from unless he obtains a revocation of such a decree from the family court.

The court *ex ufficio* asked the appellant if he had paid the maintenance due pending these proceedings so that it could perhaps help him to find a valid reason why it should change the punishment given though even in this circumstance the court was faced with a brick wall in that no payment was affected and thus there is no reason why this court should be lenient with the

accused and indirectly encourage him to remain in default of honoring his obligations at law to pay maintenance.

This Court does find no reason why it should depart from the punishment awarded by the first court and therefore decided to uphold the judgment given by the first court in tis totality.

(ft) Consuelo Scerri Herrera
Judge
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Franklin Calleja
Deputy Registrar