



Court Of Appeal

Judges

**THE HON. MR. JUSTICE GIANNINO CARUANA DEMAJO
(President)**

**THE HON. MR. JUSTICE TONIO MALLIA
THE HON. MR. JUSTICE ANTHONY ELLUL**

Sitting of Thursday 26th November 2020

Number: 1

Application Number: 231/18 JPG

Carmen Cachia

v.

Andreas Thomas Kummert

The Court:

1. Having seen the appeal filed by the plaintiff Carmen Cachia from a decree dated 7th February, 2019 delivered by the Civil Court (Family Section) in the proceedings in caption;

2. From the court proceedings it transpires that:

2.1. On the 3rd September, 2018, plaintiff filed an application confirmed on oath wherein she requested the Civil Court (Family Section): (i) to entrust her with the care and custody of the parties' minor child David Joseph Gunther Kuemmert Cachia, born to them out of wedlock on the 14th March, 2015; (ii) to authorise her to take any decision regarding said minor, whether of an ordinary or of an extraordinary nature, on her own without the need for any authorisation or intervention of the defendant; (iii) to order that the defendant be deprived of his rights of parental authority in terms of Article 154(1)(b) and/or (e) of Chapter 16 of the Laws of Malta; (iv) to liquidate the maintenance payable by the defendant to the plaintiff as maintenance for the said minor child and order defendant to pay same including cost of living increments; (v) to order defendant to pay plaintiff said maintenance for their minor child in a bank account indicated by the plaintiff; (vi) to order defendant to pay plaintiff all expenses relating to health, education and extra-curricular activities for said minor; (vii) to order that children's allowance and any other benefit that may be due to either parent to be given exclusively to the plaintiff; and (viii) to give any adequate and appropriate measures in the best interest of the minor child David Joseph Gunther Keummert Cachia;

2.2. On the 23rd October, 2018 the defendant filed a reply confirmed on oath,¹ and claimed that there is no reason why the care and custody of the parties' minor child should be entrusted exclusively to the plaintiff; that the

¹ Fol. 27 et seq.

second and third requests are unfounded; that he is already depositing maintenance in a bank account for their minor child; that whilst he has no objection that plaintiff receives *children's allowance* and any other benefits for their minor child herself, it is not acceptable that he should be the only one paying for all expenses relating to the minor child; and that his access to his son should be more free and he should be allowed to participate in decisions in the best interest of his minor son who should be brought up knowing his origins and learn both Maltese and German languages;

2.3. The case was appointed for hearing on the 29th October, 2018.² During its first sitting, the Court upheld the parties request for proceedings to be held in English and adjourned to the 26th November, 2018 for the summoning of witnesses;³

2.4. During the sitting of the 26th November, 2018⁴ the defendant objected to the witness Fr Michael Attard. Plaintiff insisted that Fr Attard is a competent witness since he confirmed that no information was given during a confession. The defendant insisted that the matter concerns the guarantee of confidentiality provided by a Roman Catholic priest whether lay or religious to two people consulting him and seeking his guidance regarding personal matters;

² Fol. 17.

³ Fol. 39.

⁴ Fol. 75 – 76.

2.5. The parties filed their respective notes of submissions on the matter;⁵

2.6. By a decree dated 7th February 2019, the Court decided as follows:

“The Court understands that the parties to the case sought the help and guidance of Fr Attard – and indeed his intercession – to help them overcome the various difficulties in their relationship.

“All information granted in this context is given on the basis of trust and an understood confidentiality that goes to the very core of the relationship between the Priest and the couple, which relationship is more profound and intimate than that of a marriage counsellor or social worker. Therefore in the absence of grave information which makes it legally incumbent on the witness to divulge such information, this Court believes that unless Fr Attard is released by Andreas Thomas Kummert himself, to give evidence in these proceedings, it would be unwise and improper for this Court to release the witness or authorise him to give evidence in these proceedings.

“Costs are reserved for the final award”.

2.7. By means of an application filed on the 13th February, 2019 in terms of Article 229 of Chapter 12 of the Laws of Malta, plaintiff requested the Court to grant her special leave to appeal from the aforementioned decree;

2.8. Defendant objected to this request⁶ and further stated that if the situation is reversed and Fr Michael Attard gives evidence in the context of the facts of the present case, he reserves the right to take criminal action according

⁵ Defendant's submissions at fol. 132 et seq; plaintiff's reply at fol. 116 et seq.

⁶ Reply filed on the 18th March, 2019

to Article 257 of the Criminal Code against Fr Michael Attard as he has already violated and relayed to the plaintiff secret information;

2.9. In the meantime, during a sitting held on the 15th March 2019, the parties agreed that the acts in the mediation proceedings 1673/2017 should be annexed to these proceedings;⁷

2.10. By means of a decree given on the 15th April, 2019, the Court acceded to the plaintiff's request to appeal;

3. Having seen that by means of an appeal application filed on the 22nd April, 2019, the plaintiff requested this Court to revoke the decree delivered by the Civil Court (Family Section) on the 7th February, 2019 so that Fr Michael Attard may be authorised to testify, subject to such terms and conditions that this Court deems fit in the circumstances. Her grounds for appeal are the following: (i) the witness himself confirmed in Court that no information was divulged to him under the seal of confession; and (ii) the present judicial proceedings were filed in the best interest of the parties' minor child;

4. The defendant, citing Article 588(1) of Chapter 12 of the Laws of Malta, Cardinal Anthony Bevilacqua, American law, Article 257 of the Criminal Code

⁷ Fol. 143

and Article 12 of the Professional Secrecy Act, replied that the decision of the Civil Court, Family Section should be confirmed. He referred to the distinction between the words “*seal of confession*” and “*loco confessionis*” made in Article 588(1) of Chapter 12 of the Laws of Malta, and claims that whatever he told Fr Attard was strictly in confidence.

Considers:

5. The appellant complained that the decree delivered on the 7th February 2019 rejecting the evidence of Fr Michael Attard, does not reflect the applicable provisions of the law and jurisprudence.

6. Article 588 of the Code of Organization and Civil Procedure stipulates:

“588. (1) No advocate or legal procurator without the consent of the client, and no clergyman without the consent of the person making the confession, may be questioned on such circumstances as may have been stated by the client to the advocate or legal procurator in professional confidence in reference to the cause, or as may have come to the knowledge of the clergyman under the seal of confession or loco confessionis.

“(2) Unless by order of the court, no accountant, medical practitioner or social worker, psychologist or marriage counsellor may be questioned on such circumstances as may have been stated by the client to the said person in professional confidence or as may have come to his knowledge in his professional capacity.

“(3) This privilege extends to the interpreter who may have been employed in connection with such confidential communications”.

7. In the present case, the parties agree that anything divulged by the respondent to Fr Michael Attard was **not** under the seal of confession. However, in Article 588(1) the law makes a distinction between the seal of

confession and *loco confessionis* (in Maltese ‘*sigriet tal-qrar jew bħala qrar*’).

During oral submissions, counsel to plaintiff argued that the words have the same meaning. The Court does not agree.

8. The judgment Walter Mc Keon v Charles Lyons decided by the First Hall on the 11th June 1931 is relevant. The Court held:

“Attesoche’, e’ noto, ancora, come tra le idee prevalenti tra il popolo vi sia quella che in certi casi, dovendosi ricorrere al proprio Parroco, per la necessita’ di avere un consiglio qualunque attinente a materia spirituale, o intimamente connesso a materia spirituale, si puo’ con tutta sicurezza affidare al Parocco tutti i segreti, e senza tema che costui sia a svelarli in danno del confidente;

“Attesoche’ il disposto di dette Leggi di Procedura Civile, come fa appunto la legge canonica dell’Ecclesiastico pare che comprende e il Parroco e qualunque Sacerdote, e parla non soltanto del vincolo di confessione ma anche di circostanze che l’Ecclesiastico sia venuto a conscere in luogo di confessione – vale a dire: invece di confessione al posto di confessione, come se fossero fatte in confessione.

“Attesoche’, ove le detti Leggi avessero voluto escludere le confessioni non sacramentali, si sarebbero dovute contentare colla espressione ‘sotto il vincolo di confessione’ e non aggiungere anche ‘in luogo di confessione’, il che vale a dimostrare che altre confessioni, all’infuori di quelle, cioe le sacramentali, fatte all’Ecclesiastico sono contemplate, in riguardo alle quali questo ultimo non puo’ essere interrogato in giudizio e cosi emerge che le leggi di procedura, nello stabilire quel disposto, hanno voluto equiparare indipendentemente dalla confessione sacramentale e dal vincolo a sigillo che ne sorge pel confessario – tutt’altre confessioni fatte all’Ecclesiastico ad un deposito di un secreto inviolabile qual si potesse fare all’Avvocato, al Procuratore Legale e al Medico, in ragione del loro rispettivo ufficio o ministero – e cio’ per la identica ragione, che tali confessioni sarebbero tanto necessarie che il non darle, per timore di essere in futuro rivelate, risulterebbe di danno a colui che avrebbe interesse di farle a la rivelazione delle stess sommamente odiosa”.

9. The appellant on the other hand refers to the judgment delivered by this Court on the 1st December, 2006 in the names **Maria Dolores sive Doreen Polidano v. Carmel Polidano**:

“... with regard to the legitimacy of priests’ evidence, canon 1550(2)(ii) prohibits priests from testifying in respect to that ‘which has become known to them in the sacramental confession’. This means that priests who include confessors are not incapable of being witnesses; they are prohibited from testifying only in matters pertaining to what they came to know in confession ...

“anke fil-prassi tal-Qrati taghna, kemm fil-kamp civili kif ukoll f’dak penali, sacerdot jigi ezentat milli jiddeponi biss jekk hu jistqarr li, fir-rigward ta’ dak li huwa jkun gie mitlub jiddeponi, huwa vinkolat bis-sigriet tal-qrar. Mill-bqija ma hemm xejn li josta li sacerdot, li jkun konfessur ta’ parti jew ohra, jigi prodott bhala xhud favur jew kontra dik il-parti wahda jew ohra.”.

10. In that judgment the Court of Appeal confirmed that a clergyman is exempt from testifying if he declares that he is bound by secrecy. Apart from that, there is nothing that precludes a clergyman from giving evidence.

11. It is evident that the defendant spoke to Fr Attard in confidence at a time when the couple were trying to solve the problems they were having in their relationship. Evidently the defendant felt comfortable in confiding to Fr Attard certain matters which could have been the cause of such problems.

12. There is no evidence that what defendant told Fr Attard was said during a confession irrespective of whether it was under the seal of confession or not. Not all communications to a clergyman of a confidential nature qualify as a confession. The wording of the law gives one to understand that confessions to

a clergyman are made in connection with or in discharge of a religious duty or calling. There is no indication that during the meetings the defendant sought penitential acknowledgement and forgiveness, or religious or spiritual guidance. However, what is clear is that the defendant went along with plaintiff's proposal, to meet Fr Attard and discuss matters in confidence. Evidently both parties considered Fr Attard to be a person who could guide and advise them.

13. The first Court based its decision on the fact that any information which came to Fr Michael Attard was given on the basis of trust and an understood confidentiality that goes to the very core of the relationship between Fr Attard and the parties who had originally sought his intercession to resolve the various difficulties in their relationship. In the words of the Court of First Instance the relationship the parties had with the priest in question '*is more profound and intimate than that of a marriage counsellor or social worker.*' This suggests that the first instance Court based its decision on the second rather than the first limb of Article 588 of Chapter 12.

14. In respect to other professions mentioned in sub-Article (2) of Article 588, the professional may be questioned regarding facts which came to his/her knowledge in his/her professional capacity or which the client confided in professional confidence, if ordered to do so by the Court.

15. The respondent did not base his arguments on Article 588(2) of Chapter 12. However he did argue⁸ that Article 257 of the Criminal Code, which provides that disclosure of a professional secret is a criminal offence punishable on conviction with a fine (*multa*) and/or imprisonment, is sufficiently clear in that it also refers to persons who become the depositary of any secret confided in them by reason of their '*calling*'. The respondent also refers to Article 12 of the Professional Secrecy Act.

16. Article 257 of the Criminal Code reads as follows:-

*“257. If any person, who by reason of his **calling**,⁹ profession or office, becomes the **depositary of any secret confided in him**, shall, except when compelled by law to give information to a public authority, disclose such secret, he shall on conviction be liable to a fine (*multa*) not exceeding forty-six thousand and five hundred and eighty-seven euro and forty-seven cents (46,587.47) or to imprisonment for a term not exceeding two years or to both such fine and imprisonment:*

“Provided that, notwithstanding the provisions of any other law, it shall be a defence to show that the disclosure was made to a competent public authority in Malta or outside Malta investigating any act or omission committed in Malta and which constitutes, or if committed outside Malta would in corresponding circumstances constitute –

“(a) any of the offences referred to in article 22(2)(a)(1) of the Dangerous Drugs Ordinance; or

“(b) any of the offences referred to in article 120A(2)(a)(1) of the Medical and Kindred Professions Ordinance; or

“(c) any offence of money laundering within the meaning of the Prevention of Money Laundering Act:

“Provided further that the provisions of the first proviso of this article shall not apply to a person who is a member of the legal or the medical profession”.

⁸ Other than references to Theologians and American Law which fall outside the remit of this Court.

⁹ Emphasis by the respondent; The Maltese text of this provision reads '*l-istat, professjoni jew kariga tiegħu*'.

17. In this regard reference is also made to the Professional Secrecy Act, Chapter 377 of the Laws of Malta which provides that:

*“3. (1) The persons who, by reason of their **calling**,¹⁰ profession or office, fall within the scope of article 257 of the Criminal Code **include the following**: members of a profession regulated by the Medical and Kindred Professions Ordinance, advocates, notaries, legal procurators, social workers, psychologists, accountants, auditors, employees and officers of financial and credit institutions, trustees, officers of nominee companies or licensed nominees, persons licensed to provide investment services under the Investment Services Act, stockbrokers licensed under the Financial Markets Act, insurers, insurance agents, insurance managers, insurance brokers and insurance sub-agents, officials and employees of the State.*

“(2) Subject to article 10, a person shall still remain subject to the provisions of article 257 of the Criminal Code after he has ceased to exercise the relevant calling or profession, or to occupy the relevant office.

“(3) References in statutory enactments to “the duty of professional secrecy” or similar expressions shall henceforth be interpreted, unless the context otherwise requires, as references to the duty imposed by article 257 of the Criminal Code not to disclose a secret covered by that article”.

18. Priests or clergymen are not specifically included in the list of persons to which Article 3 of the Professional Secrecy Act refers. Yet the words ‘*include the following*’, give reason to understand that the said list is not exhaustive. In other words, it is not excluded that other persons, including those by reason of their calling, could fall within the scope of Article 257. This interpretation is supported by Article 12 of the Professional Secrecy Act to which the respondent also referred. It states that:

“12. Nothing in this Act shall restrict or limit, or be deemed to restrict or limit, the laws or custom on the protection of privileged communications”.

¹⁰ Emphasis by this Court; The maltese text of this provision also reads ‘*I-Istat, professjoni jew kariga*’

19. It is the understanding of this Court that the said provisions are also providing *inter alia* for circumstances such as these.

20. Article 9 of the Professional Secrecy Act is also relevant. It provides as follows:

“Saving the provisions of article 642(1) of the Criminal Code and of article 588(1) of the Code of Organization and Civil Procedure, a court may authorise or make an order requiring the disclosure of secret information pursuant to an express provision of law for the specific purposes for which that provision was enacted, or for the specific purpose of preventing, disclosing or detecting the commission of acts that amount or are likely to amount to a criminal offence:

“Provided that in the absence of any specific provision in relation to any particular calling, profession or office, nothing in this article shall be construed as modifying the existing rules of law in relation to the courts’ power to release a witness in court belonging to any such calling, profession or office from the duty of professional secrecy.”¹¹

21. The evidence does not show that Fr Attard was a friend or acquaintance of the respondent. The latter was asked to speak with him purely as an attempt to seek outside help in overcoming certain relationship issues between the parties. The respondent is therefore justified to expect that whatever came to Fr Michael Attard’s knowledge would be treated with confidence. Fr Attard was acting as a conciliator due to problems that the parties were having in their relationship. Although approached by the plaintiff, the defendant approved of Fr Attard’s involvement. The priest’s involvement was to listen to the parties in the hope that they are frank and confide in him all the difficulties they were

¹¹ Emphasis by this Court.

encountering in their relationship. The defendant could not have understood that if matters were not resolved the priest would end up as a witness in court, repeating what was said during the confidential meetings.

22. It follows that, insofar as the appellant summoned Fr Michael Attard to give evidence purely in regard to said confidential exchanges, it was within the Court's discretion whether to order Fr Michael Attard to be questioned or otherwise in the proceedings before it. The outcome of the exercise of the Court's discretion is a separate issue and the subject of the second grievance.

23. In her second complaint, the appellant contends that she filed the judicial proceedings in the Civil Court (Family Section) in the best interests of the parties' minor child. She therefore argues that even if the testimony of Fr Michael Attard were to be considered confidential, said information ought to be disclosed given the particular circumstances of this case. She contends that *"the circumstances known to the witness are very relevant to the case since it is essential for the Honourable Court (Family Section) to be given full information about important matters in relation to the appellate to ensure that the interests and well-being of the minor child are protected in the best way possible at all times"* and that *'if the witness is precluded from giving evidence, important information in relation to the parties, the defendant and the minor child will not be made known to the Honourable Civil Court (Family Section) hearing the above-cited case, in delivering its decisions in relation to the minor child'*.

24. The first Court based its conclusions “*in the absence of grave information which makes it legally incumbent on the witness to divulge said information*”. There is no proof that the facts that Fr Attard was given by the defendant has caused or is likely to cause serious harm to the well-being of the child.

25. The fact that the proceedings refer to a minor does not mean that any information is relevant. The first Court was without doubt in the best position to decide on this matter, and this Court totally approves of the Court’s reasoning.

26. The Court however notes that during the sitting of the 15th March 2019, after the applicant had already filed an application for leave to appeal from the Court’s decree of the 7th February 2019, both parties agreed that “*the acts in the mediation proceedings 1673/2017 should be annexed to these proceedings*”. Those acts, which have thereafter been annexed to these proceedings, contain **an affidavit sworn by Fr Michael Attard on the 25th April 2018**. The affidavit was an annex to the application filed by the plaintiff on the 25th April 2018. The defendant replied to that application on the 17th May 2018 and argued:

“9. Dwar l-appuntament għas-smiġħ l-esponenti jirrimetti ruħu pero jinsisti li għandhom jinstemgħu s-Social Worker Daniela Darmanin illi ġiet attakkata fl-operat tagħha u jigi wkoll imsejjaħ biex jixhed Fr Michael Attard peress li Carmen Cachia tagħmel użu kbir minnu meta l-affidavit tiegħu kien assolutament barra minn loku.

“... ”

“20. Carmen Cachia takkuża illi Andreas Kummert għandu fissazzjoni dwar il-pornografija u għal dan iġġib affidavit ta’ Fr Michael Attard. Dan Fr Michael Attard jagħmilha ta’ psikologu, ta’ lingwista, ta’ Social Worker u ta’ kollox. Kull ma jgħid pero huwa li huwa tkellem ma Andreas u li huwa se jirrangà. Għandu jingħad illi meta jidhol qassis jew patri f’dawn l-affarijiet, dejjem żammew riżerva li jkun qiegħed isir in “in loco confessionis” u dan biex titkattar il-fiduċja fit-terz newtru li ma jirrepetix dak li jingħad quddiemu. Dan l-istess kuncett jintuża fil-medjazzjoni li l-medjatur ma jistax jissejjaħ biex jagħti xhieda u x’ikunu qalulu l-partijiet. Dan is-sacerdot huwa speċjali, kważi qisu jagħti l-impressjoni li kien jgħix magħhom. Anke jagħti l-kummenti u l-opinjoni li effettivament m’huma xhieda ta’ xejn ... dak kollu li seta’ qal Andrewas Kummert lil Fr Attard kien in loco confessionis u qatt ma missu ġie żvelat anke kieku filfatt kienet dik il-pożizzjoni. Andreas Kummert jicħad li tkellem fuq dan is-sugġetti ma’ Fr Michael Attard bħala li kellhom xi rilevanza għar-relazzjoni tiegħu ma Carmen. Il-patri ndaħal biex jirrangahom bejniethom, wara kollox, ħalli jiġi salvat il-konkubinatu!!!”.

27. This notwithstanding there was never a request to remove Fr Michael Attard’s affidavit from the acts of the mediation which is now annexed to these proceedings as a result of the agreement by both parties.

For these reasons the Court dismisses plaintiff’s appeal and all judicial costs are at her expense.

The Registrar is to ensure that the court file is sent back to the Court of First Instance to proceed with the hearing of the case.

Giannino Caruana Demajo
President

Tonio Mallia
Judge

Anthony Ellul
Judge

Deputy Registrar
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