



THE COURT OF CRIMINAL APPEAL

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

Appeal number - 30/2020

The Police

vs.

Gervais CISHAHAYO

Sitting of the 24th November 2020

The Court,

1. This judgment relates to an appeal lodged from a judgment delivered by the Court of Magistrates (Malta) on the 17th February 2020 against Gervais CISHAHAYO, holder of a Maltese identity card number 218199M, who was charged with having for the month of November and December 2018 and from January till June 2019 by several acts committed by him, even if at different times, which constitute violations of the same provisions of the law, and which were committed in pursuance of the same design, and which

are deemed to be a single offence called a continuous offence, failed to give Melissa Joan Bagley, the sum fixed by the Court or as laid 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 in terms of article 338(z) of Chapter 9 of the Laws of Malta.

2. By means of the said judgment, the Court of Magistrates (Malta), after having seen the charges brought against the accused, found the appellant guilty and condemned him to three months imprisonment.
3. Gervais CISHAHAYO filed an appeal in the Maltese language in the registry of this Court whereby this Court was requested as follows: -

Għaldaqstant, l-esponenti Appellant fil-waqt li jagħmel referenza għall-provi miġjuba w jirriserva li jgħib kull prova oħra permessa mill-liġi, jitlob bil-qima lill Din l-Onorabbli Qorti tal-Appell jogħgobha tvarja s-sentenza tal-Ewwel Onorabbli Qorti billi tissolleva l-eċċezzjoni tal-preskrizzjoni hekk ġa sollevata mill-istess Appellanti jew billi tagħti piena aktar xierqa w ġusta għaċ-ċirkustanzi biex b'hekk l-esponenti Appellanti jkun jista' jkompli bil-kuntratti temporanji li atwalment jgawdi w b'hekk jkun f'posizzjoni li jkompli jhallas il-manteniment lill uliedu, ovjament kemm l-istess Appellanti jiflah jgħamel hekk finanzjarjament;

4. Having heard the submissions of the parties relating to the plea of prescription of the criminal action and having seen the records of these proceedings;

5. Having seen the preliminary judgment delivered by this Court on the 10th September 2020 concerning the plea of prescription raised by the appellant whereby this Court dismissed this plea and ordered the continuation of these proceedings on the other grievance mentioned by the appellant in his appeal application;
6. Having heard oral submissions on the outstanding grievance during the sitting dated the 6th October 2020;

Considers the following

7. That the outstanding plea concerns the punishment which was imposed by the Court of Magistrates amounting to three months imprisonment. Other than the plea of prescription raised primarily and decided by this Court as mentioned above, the appellant is not contesting his finding of guilt *per se*.
8. The appellant is being accused of not having paid maintenance for the months of November 2018 up to June 2019 to his wife Melissa Joan Bagley and his two minor children Shannon and David as ordered by a Court decree delivered by the First Hall of the Civil Court on the 27th May 2013.
9. During the sitting of the 6th October 2020, this Court was informed by the *parte civile* that the appellant had settled all maintenance dues for the periods above indicated. While insisting that the appellant

should honor his financial commitments in a timely fashion, *parte civile* also declared that she is not insisting on a custodial sentence.

Considers as follows :-

10. In this particular case the Court of Magistrates could increase the punishment due to the continuous nature of the offence as well as the considerable period of time over which the offence occurred. The Court of Magistrates could lawfully inflict a custodial sentence in this case. The quantum of the said sentence fell within the parameters established by Law. Hence said punishment was neither wrong in principle nor manifestly excessive.

In the appeal proceedings decided by this Court, collegially composed in the names *Ir-Repubblika ta' Malta vs. Carmen Butler et* decided on the 26th February 2009, it was 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.

11. This Court is satisfied that subsequent to the judgment delivered by the Court of Magistrates there were concrete positive developments

reflected in appellant honouring his legal obligations, albeit belatedly. This development means that the appellant adhered to the orders imposed on him by the Court. This change in attitude is being taken into consideration by this Court by reference to the punishment that ought to be meted out at this stage – such that this change in punishment will, hopefully, effectively deter the appellant from repeating such behaviour in the future.

12. The appellant must understand that he has to honour his maintenance obligations strictly as ordered in the Court decree and contract giving rise to maintenance obligations. The offence he was convicted of is not simply based on his lack of payment of maintenance. The offence is based on his failure to adhere to the Court's orders and his Court approved contractual obligations. Court orders and Court approved contractual obligations are to be obeyed and adhered to in full and in a timely fashion. Anything short of that carries serious consequences.

Decide

13. Consequently, the Court partially upholds the appellant's appeal such that while confirming that part of the judgment of the Court of Magistrates (Malta) of the 17th February 2020 wherein the appellant was found guilty of the charge proffered against him, it varies that part of the judgment dealing with the punishment such that it revokes that part where the appellant was condemned to the

punishment of three months imprisonment and instead, this Court, after having seen article 22 of Chapter 446 of the Laws of Malta, and after taking into consideration the fact that it is of opinion that, having regard to the circumstances of the case, including the nature of the offence and the character of the offender, it is inexpedient to inflict punishment and that a probation order, a community service order or a combination order are not appropriate, the Court discharges the appellant subject to the condition that he commits no offence during a period of three years from the date of this order.

14. The Court explained to the appellant, in ordinary language, that if he commits another offence during the period of three years from this order, he will be liable to be sentenced for the original offence.

15. The Court ensured that the appellant understood this sentence and the consequences arising should he fail to adhere to the said conditions.

Aaron M. Bugeja

Judge