



Criminal Court of Appeal

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

Appeal Nr: 384 / 2021

The Police

(Inspector Joseph Mercieca)

(Inspector Doriette Cuschieri)

Vs

Kefali Kibreab Elias

Today the 4th March 2022

The Court,

Having seen the charges brought against Kefali Kibreab Elias twenty-five (years of age, son of Kibreab Elias and Licia ne è Maradrab, born in Eritrea on the 9th September 1996, without fixed address, holder of Maltese Identity Card Number 152798 (A), before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having:

Between September 2019 and the 7th March, 2021, with several acts committed by the offender, even if at different times, which constitute violations of the same provision of the law, and which are committed in pursuance of the same design, from Ta Barbeta Bakery, in Triq San Girgor, Zejtun, and/or from contiguous and interconnected premises Ave Maria in Triq l-Isqof Emmanuel Galea, Zejtun:

- 1, Committed theft of cash and/or some antique coins, which theft is aggravated by means, by value, exceeding two thousand three hundred twenty nine Euros and thirty seven cents (2,329.37), by person, by place and by time, to the detriment of Mr. Emanuel Zammit and/or any other person/s and/or entity or entities;

Having seen the judgment meted by the Court of Magistrates (Malta) as a Court of Criminal Judicature proffered on the 23rd June, 2021, whereby the Court after considering Sections 18, 261 (b), (c), (d), (e), (f), 263 (a), 266 (1) (2), 267, 268 (a) (d), 269 (g), 270, 278 (1) (2) (3), 279 (b), 280 (2) and 281 (c) of Chapter 9 of the Laws of Malta, the Court, whilst reiterating that it is finding the accused guilty of the charge brought against him, by application of Section 21 of Chapter 9 of the Laws of Malta, on the grounds that the accused has a clean conviction sheet and he fully co-operated with the Executive Police, which the Court deems to be reasons which in this case call for a punishment below the minimum, condemns the accused to two years imprisonment however, since the Court is of the opinion that there are sufficient reasons which warrant that the said term of imprisonment hereby imposed be suspended, namely the reasons already given for the application of Section 21 of Chapter 9 of the Laws of Malta and the fact that the accused submitted a guilty plea at an early stage of the proceedings, in terms of Section 28A of Chapter 9 of the Laws of Malta the said term of two years imprisonment is being suspended for a period of four years from date of this judgement.

In terms of Section 28A(4) of Chapter 9 of the Laws of Malta the Court explained to the accused in plain language his liability under Section 28B of Chapter 9 of the Laws of Malta if during the operational period of this suspended sentence he commits an offence punishable with imprisonment.

In terms of Section 392 A of Chapter 9 of the Laws of, Malta, the Court orders that this judgement and the records of the proceedings be transmitted to the Attorney General within six (6) working days.

Having seen the appeal application presented by the Attorney General in the registry of this Court on the 12th July 2021, whereby this Court **reforms** the judgment proffered against the accused in these proceedings by:

- 1) **Confirming it** and in the part where it found the accused guilty of the charge proffered against him;
- 2) **Reversing it** in the part relating to the punishment meted out in particular to the part wherein the Court applied the provisions of Section 21 of the Criminal Code and instead condemn Kefali Kibreab Elias to a punishment in conformity with the law, without application of Section 21 of the Criminal Code.

Having seen the acts of the proceedings;

Having seen the updated conduct sheet of the appealed, presented by the prosecution as requested by this Court.

Having seen the grounds for appeal of the Attorney General:

- (i) WRONG APPLICATION OF SECTION 21 OF THE CRIMINAL CODE

That, on the 23rd June 2021 the Attorney General received the records of these proceedings and he felt aggrieved by the aforesaid judgment of the Court of Magistrates (Malta) as a Court of Criminal Judicature as **the First Court could not legally apply the provisions of Article 21 of the Criminal Code.**

That, the reasons due to which the appellant Attorney General feels aggrieved by the aforesaid judgment of the Court of Magistrates (Malta) are clear and manifest and consist of the following:

That Section 21 of Chapter 9 of the Laws of Malta provides that:

*21. Saving the provisions of article 492, the court may, **for special and exceptional reasons to be expressly stated in detain in the decision**, apply in its discretion any lesser punishment which it deems adequate, notwithstanding that a minimum punishment is prescribed in the article contemplating that particular offence or under the provisions of article 20, saving the provisions of article 7.*

That, as has been established in numerous judgments, including the judgment delivered by this Honourable Court, Madame Justice Dr Consuelo Scerri Herrera LL.D on the 4th December 2018, in the names of **Il-Pulizija vs Andrew Depasquale**¹, it was held that:

*“Illi, ukoll, l-Ewwel Qorti **ikkunsidrat l-ammissjoni bikrija tal-appellat bħala raġuni speċjali u straordinarja** sabiex nizlet taħt il-minimu. B’kull doout rispett, dan huwa raġunament li ma jregix. Ghalkemm il-fatt li huwa ammetta għandu jiġi kkunsidrat ai fini ta’ piena, pero’, minn naħa l-oħra, dan **m’għandux jkun ikkunsidrat bħala raġuni “speċjali u straordinarja”** ai termini tal-Artikolu 21 tal-Kodiċi Kriminali;”*

¹ Appeal Number: 349/2018

As maintained in the judgment delivered by this Honourable Court, Chief Justice Vincent De Gaetano on the twenty-third (23rd) July 2010 in the names of **Il-Pulizija v. Stephen Mammo**² it was held that:

*“Stante li l-**fedina penali** tieghu mhiex wahda daqstant refrattarja [recte: refrattarja] ma thossx li ghandha timponi piena karcerarja izda ghandha tikkundannah ihallas multa sabiex f’kax ta’ ripetizzjoni ta’ reat iehor, l-imputat ghandu jitqies li huwa recidiv” b’ebda tigbid ta’ l-immaginazzjoni **ma tista’ titqies bhala raguni specjali u straordinarja, sakemm wiehed ma jasalx għall-assurd li jghid li hija xi haga straordinarja li wiehed ma jkollux fedina penali refrattarja!**”*

By judgement delivered on the 4th of April 2017, by this Honorable Court, by Mr. Justice Antonio Mizzi in the names **Il-Pulizija vs Wayne Camilleri**³ said:

*“Filwaqt li huwa koncess li l-appellat **ikkopera mal-Pulizija**, din mhijiex raguni għall-applikazzjoni ta’ l-artikolu 21, u, fil-fatt, l-Ewwel Onorabli Qorti, korrettement, ma applikatux.”*

The judgments cited above are being quoted to illustrate that this Honourable Court has **invariably** retained that an early guilt plea, a clean conviction sheet and cooperation with the Executive Police **do not** qualify as “*special and exceptional reasons*” as required by section 21 of the Criminal Code.

It is pertinent to note that as maintained in judgment delivered by this Honourable Court, Mr Justice Vincent De Gaetano on the fifteenth (15th) November nineteen ninety-six (1996) in the names of **Il-Pulizija vs Joseph Difesa** it was held that:

² Appeal Number: 27/2010

³ Appeal Number: 382/2013

“Mhux kull ma l-Ewwel Qorti tipprospetta fis-sentenza bhala ragunijiet specjali u straordinarji ghandhom necessarjement jigu accettati mill-Qorti ta' l-Appell Kriminali bhala tali. Fi kliem iehor, ir-ragunijiet specjali u straordinarji migjuba fis-sentenza appellata huma sindakabbli mill-Qorti ta' l-Appell Kriminali ghall-finijiet ta' appell taht l-artikolu 414 (1) (b) (iii) tal-Kodici Kriminali. Huwa proprju ghall-finijiet ta' tali sindakabilita' li l-istess artikolu 21 jipprovdli li dawn ir-ragunijiet specjali u straordinarji ghandhom "jissemew bir-reqqa kollha fis-sentenza".

Hence, the reasons explained above and with reference to local jurisprudence on the matter, the First Court could not legally apply the provisions of Article 21 of the Criminal Code.

Having heard the oral submission put forward by the parties during the sitting of the 24th February;

Considers further:

Therefore, this appeal is based on the interpretation that must be given to the applicability of article 21 of Chapter 9 of the laws of Malta.

As stated in the judgment delivered by this court though presided by a different judge in the names **Il-Pulizija vs Justin Gambin**⁴

L-artikolu 21 tal-Kodici Kriminali jipprovdli ghal ragunijiet specjali u straordinarji li ghandhom jissemew bir-reqqa kollha fis-sentenza abbazi ta' liema l-Qorti tista` taghti pieni taht il-minimum stabbilit mill-ligi. L-esponenti jirreferi ghal-gurisprudenza tabilhaqq kopjuza ta' din l-Onorabli Qorti, li nvarjabbilment

⁴ Decided by the Criminal court of Appeal on the 2nd July 2012

*irriteniet illi biex Qorti tkun tista` tapplika dan l-artikolu, irridu tabilhaqq jikkonkorru cirkostanzi specjali u straordinarji, u li l-Qorti, fis-sentenza taghha, trid mhux biss tindika dawn ic-cirkostanzi, izda tidhol fihom bir-reqqa. Il-Qorti ta' l-Appell Kriminali taghmilha cara daqs il-kristall li dan l-artikolu ghandu jigi nterpretat b' **mod ristrettio**⁵, tant li cirkostanzi bhal-ammissjoni bikrija, koperazzjoni mal-Pulizija, konformita` mal-ligi wara r-reat, tnehhija ta' l-illegalita` wara li jkun ikkunsmat ir-reat, eccetera, noarjabbilment gew ritenuti li ma jammontawxghal cirkostanzi specjali u straordinarji ai termini ta' dan l-artikolu.*

As likewise held in the judgement in the names **Ir-Repubblika ta' Malta vs Omissis u Soko Moussa Shah Ali**⁶ given by the same judge presiding over this same case though in the Criminal Court :

L-artikolu 21 tal-Kap 9 huwa car u ghandu jigi rispettata kemm fil-forma kif wkoll fis-sustanza mill-Qorti fil-ghoti tas-sentenzi taghhom. Ghandu jigi interpretat bl-aktar mod strett u l-applikazzjoni tieghu fi kliem l-istess ligi jirrikjedi:

- a. ragunijiet specjali u straordinarji, u*
- b. li dawn r-ragunijiet specjali u straordinarji ghandhom jissemmew bir-reqqa fis-sentenza.*

This article is in the plural and thus means that there must be a number of reasons as to why there should be the applicability of Article 21 and not solely one reason and moreover that the reasons have to be *special and*⁷ extraordinary and such reasons have to be mentioned in the court judgment [vide **Il-Pulizija v Pierre Bugeja**⁸ u **Il-Pulizija v Simon Camilleri**⁹ .

⁵ Emphasis of this honorable court

⁶ Decided by the Criminal court of Appeal on the 2nd December 2020

⁷ Emphasis of this honorable court

⁸ Decided by the Criminal court of Appeal on the 11th December, 1998

⁹ Decided by the Criminal court of Appeal on the 5th January, 1999

As was opined by this court though presided by a different judge in the case in the names **Il-Pulizija vs Kenneth Ellul**,¹⁰

*“Illi fil-fehma ta' din il-Qorti l-applikazzjoni ta' l-artikolu 21 tal-Kodici Kriminali ma tirrikjediex sensiela interminabbli ta' ragunijiet straordinarji u specjali”. Cio nonnostante irid ikun hemm ragunijiet impellanti. Il-Qorti taghmel referenza ghas-sentenza fl-ismijiet **Il-Pulizija (Supt. P. Abela/A. Farrugia Mamo Vs Carmel Sive Charles Zammit**¹¹ fejn gie rilevat fir rigward ta' meta il-Qorti ghandha tghati piena inqas mill-mimimu stabbilit mill-ligi li Kull kaz irid jigi ezaminat bir-reqqa u fuq il-meriti tieghu; Wiehed irid iqis kollox: in-natura tar-reati u kif dawn effettwaw lill-vittma jew vittmi (jekk kien hemm..... u hafna u hafna affarijiet ohra li din il-Qorti ma tarax li tista' telenkahom kollha.*

In the case **Il-Pulizija vs. Raymond Bugeja**¹², it appears that the Courts of Magistrates had applied Article 21 in its judgement in circumstance where it resulted that one of the children of the accused was suffering from a serious illness. The learned Judge Galea Debono was very clear in his judgment and stated that Article 21 cannot be applied in this contest. In fact he said that:-

Illi mill-ezami tas-sentenza appellata johrog li l-motivazzjoni ghala l-Ewwel Qorti ddecidiet li tapplika piena taht il-minimu preskritt mill-Ligi kienet bazata fuq il- "fatt principali li t-tifel ta' l-imputat ibati minn marda severa daqs kemm hi rari, u cioe': 'fragile X syndrome', marda li ghaluha ma hemmx fejqan. Illi din il-marda tirrikjedi kura kostanti, stante li dan it-tifel, Juan Matthias, ibati minn accessjonijiet spissi u qawwija u jehtieg ukoll ilkura li trid tinkiseb minn barra dawn il-Gzejjer....."

And carries on explaining that :

¹⁰ Decided by the Criminal court of Appeal on the 12th May, 2015

¹¹ Decided by the Criminal court of Appeal on the 29th July, 2002

¹² Decided by the Criminal court of Appeal on the 10th January 2008

"Illi din il-Qorti temmen illi taghbija finanzjarja fuq l-imputat minhabba l-htigijiet medici u kontinwi tat-tifel, kienet il- kawza li ghelbet lill-imputat f' tentazzjoni ghal "'proverbial quick buck' biex ghamel dak li ghamel.' "Illi b' konsegwenza ta' dan l-agir iddisprat ta' l-imputat, huwa mhux biss tilef l-impieg tieghu, imma ghad irid ihallas efuf kbar lil terzi persuni ghal xorb illegali li akkwista. Di piu', jidher illi l-mara ta' l-imputat dahlet f' depressjoni konsegwenza mhux biss tas-sahha dgħajfa tat-tifel, imma wkoll bl-inkwiet tar-ragel tagħha. Li kieku din il-Qorti tinfliggi l-multa stabbilita ordinarjament għar- reati dedoitti kontra l-imputat, tkun qeghdha in effett, tiddistruggi l-familja intiera ta' l-imputat.

Though in the opinion of the judge the reasons mentioned by the first court to justify the applicability of Article 21 in regard to laws mentioned in the judgment cannot be considered as special and extraordinary. If the Courts were to accept such reasoning whoever is suffering from an illness or has a member of his family suffering from an illness would be given a 'carte blanche' to go against the dispositions of criminal law in particular fiscal laws as was the case in question thus will not face the hands of the law in punishment and possibly thus may also be given absolute impunity. The court concluded that it could never accept the reasons mentioned by the first court as those reasons which could justify the applicability of Article 21.

This court is bound to apply the law as it is and not how it wishes it may be. If the law does not allow a diminution in punishment dues to the circumstances of the case, then the court should stop there and not try and fond superficial reasons to justify the applicability of Article 21. This is a question of *dura lex et lex*.

As held in the judgment in the names il-Pulizija vs Albert Caruana¹³ the law provides a latitude in the punishment that can be awarded. In particular, according to Article 279 the accused can be condemned to a punishment from 5 months to three years and since the offence of theft is accompanied with four aggravations the punishment cannot be given in its minimum. However, Article 21 should not be applied as to bring the effect of the latitude provided by the court to be useless and without effect. Naturally each case must be examined on its own merits however our courts have held even in those instances where a father steals to pay for the terminal illness of his son as not being a special and extraordinary reason for the applicability of Article 21 and therefore for the court to go below the minimum established by law in the punishment it arrogates.

The Court examined the acts of these proceedings in detail and took note of the fact that the facts leading to the case are scarce. The first court based its judgment on applying Article 21 based on an early conviction, clean conduct sheet and co operation of the police. These three reasons as outlined in the application of the Attorney General and by the Court in this same judgement are not reasons which can be considered as special and extraordinary. Thus, the court is hereby revoking the judgment delivered by the first court. However, the court proceeded to pass judgment afresh. It took note of the fact that the accused registered an early admission, and co operated with the police and also that the accused has a clean conduct sheet. It must be noted that the accused has been in Malta at least since 16th May 2016 when his first employment was registered with Jobplus and thus for the last six years the accused was on the right side of the law with no convictions registered on his conduct sheet. It also considered the fact that the accused has a full employment¹⁴ with a reputable company and thus does not wish to let him loose this opportunity that has been given to him and thus in these circumstances feels that since the offence is aggravated by four aggravations punishment cannot be

¹³ Decided by the Criminal court of Appeal on the 26th June 2017

¹⁴ Vide dok LB exhibited during the sitting of the 24th February 2022

given in the minimum but neither does the court have to apply the maximum. Thus, in the circumstance this court feels that the punishment of two years suspended for four years by reason of Article 28A of Chapter 9 of the laws of Malta is the most befitting punishment in the circumstances.

The court explained the significance and importance of the punishment it is awarding to the accused.

(ft) Consuelo-Pilar Scerri Herrera
Judge

True copy

Nadia Ciappara
Deputy Registrar