



Criminal Court of Appeal

Hon. Judge Edwina Grima, LL.D

Appeal No: 615/2022

The Police

vs

Anastasija Afanasjeva

Today, the 31st of May 2023

The Court,

Having seen the charges brought against accused Anastasija Afanasjeva, holder of identification card number 0160153A, wherein she was charged before the Court of Magistrates (Malta) of having on the 11th October 2022 and/or the preceding days and months, in Mellieha and in the Maltese Islands:

1. Harassed her ex-partner Darren Cuschieri on more than two occasions and behaved in a way, which she knows or ought to know amounts to harassment;
2. Harassed her ex-partner Darren Cuschieri on more than two occasions and behaved in a way which she knows or ought to know that such harassment amounts to stalking;

And further charged of having on the 21st October 2022 between 21:30hrs and 23:00hrs in Triq il-Mithna il-Ġdida, Mellieħa:

3. Disobeyed the lawful orders of Inspector Audrey Micallef, PS 2018, PS 1010, PC 2180, PC 8, PC 1514 and PC 1508, who are persons entrusted with a public service, or hindered or obstructed such persons in the exercise of their duties, or otherwise unduly interfered with the exercise of such duties, either by preventing other persons from doing what they are lawfully enjoined or allowed to do, or frustrated or undoing what has been lawfully done by other persons, or in any other manner whatsoever unless such disobedience or interference falls under any other provision of this Code or of any other law;
4. Moreover the accused Anastasija Afanasjeva is deemed to be a recedivist after being sentenced for an offence by a judgment which has become res judicata.

The Prosecution requested the Court to issue a protection order, during the proceedings against the accused to the benefit of the victim and his family as per Article 412C of Chapter 9 of the Laws of Malta.

The Prosecution also requested the Court to provide for the safety of the victim and his family or for the keeping of the public peace, in addition to, or in lieu of the punishment applicable to the offence, requires the accused to enter into her own recognisance in a sum of money fixed by the Court as per Article 383 et seq of Chapter 9 of the Laws of Malta.

The Prosecution also requested the Court that in case of a conviction, besides the decided punishment according to law, the Court orders the accused to incur the payment of costs in the employment of experts, as provided in Article 533 of Chapter 9 of the Laws of Malta.

Having seen the judgement of the Court of Magistrates (Malta) as a Court of Criminal Judicature dated the 23rd of October 2022, wherein the same Court, after having seen Articles 251A, Art. 251H(a)(b), 251HA, Art. 202, Art. 251AA, 251H(a)(b), 25HA, Art. 388(ee) and Art. 49/50 of Chapter 9 of the Laws of Malta, found the accused Anastasija Afanasjeva guilty of the said charges and by virtue of Article 28A of Chapter 9 of the Laws of Malta, condemned her to two (2) years imprisonment suspended for four (4) years together with a restraining order for a period of three (3) years.

Having seen the appeal application filed by the Attorney General on the 17th of November 2022, wherein he requested this Court to reform the judgment of the First Court by confirming the finding of guilt of the accused in virtue of the accused's guilty plea and impose the appropriate punishment in accordance with and within the established parameters of the law.

Having seen all the records of the case.

Having seen the updated conduct sheet of respondent, exhibited by the Prosecution as requested by this Court.

Having heard the testimony of Inspector Audrey Micallef, as requested by the defence.

Having seen that on the 17th of March 2023, Dr Joseph Giglio for respondent, in view of the testimony of Inspector Audrey Micallef requested that respondent be authorised to withdraw her admission of guilt filed before the First Court. Having seen that the defence also requested that appellee testifies with regards to the circumstances leading to said admission registered before the First Court.

Having heard the testimony of respondent with regards to the circumstances which led her to admit to the charges brought against her before the First Court.

Having heard verbal submissions made by the parties with regard to the plea raised by the defence regarding the validity of the admission of guilt filed by respondent Afanasjeva Anastasija before the First Court, and her right to withdraw her guilty plea at this stage of the proceedings.

Considers:

Respondent Afanasjeva Anastasija is, at this stage of the proceedings, contesting the guilty plea filed by her before the First Court and this within the proceedings of an appeal filed by the Attorney General, wherein the latter is contesting the punishment imposed on respondent by the First Court on the grounds that this was of its nature contrary to the provisions of the law.

Respondent, however, does not feel aggrieved by the judgment of the First Court and the punishment imposed upon her so much so that she filed no appeal to the conviction and is contesting the validity of the proceedings before the First Court in view of the appeal filed by the Attorney General wherein the punishment is being challenged as one not in line with law, respondent having been condemned to a term of imprisonment which was suspended in terms of article 28A of the Criminal Code, when respondent could not benefit from the said disposition of the law since she was found guilty of being a recidivist in terms of articles 49 and 50 of the said Code. Therefore, there is no doubt that respondent Afanasjeva is having second thoughts at this late stage of the proceedings, not initiated by her good self, for the sole reason that she is facing a punishment which could lead to her incarceration. Suffice it to say that in criminal proceedings, no right exists for the filing of a cross appeal, as that envisaged before the Court of Appeal in its civil jurisdiction, Respondent party consequently having no right to make use of appeal proceedings filed by the opposing party in order to lay out his/her grievances too.

The defence, however, is of the firm opinion that since the circumstances leading to respondent's admission of guilt before the first Court were contrary to the provisions of the law and of all the safeguards therein imposed for the benefit of accused person, therefore such admission of guilt is null and void also because of the fact that respondent did not understand the nature of the proceedings at hand, and was misguided both by her lawyer, as well as the Prosecution as to the punishment to be imposed upon her, the First Court finally adhering to the request brought forward by both parties to the proceedings and passing on to inflict upon her, and without her knowledge, a punishment which was not in line with the law. Respondent states that if she had been cautioned correctly and according to law as regards to the consequences she would face upon admission, she would never have filed a guilty plea. Her admission was therefore based on a mistake which was borne by the wrong advice given to her by the legal aid lawyer assisting her on arraignment. Also, she was informed that the sentence which would be imposed upon her would be a

suspended sentence of imprisonment. Thus, she is now requesting to withdraw her guilty plea.

Defence, relying on legal doctrine as expounded by Blackstone in his book "*Criminal Practice*", is of the opinion that an accused person may withdraw his/her guilty plea at any stage of the proceedings even at appellate stage. Now the Court has taken cognisance of jurisprudence on the plea raised by the Defence and finds that a contested conviction based on an admission of guilt can only be raised by the person accused upon entering an appeal from the said conviction. Blackstone opines:

The judge has a discretion to allow the accused to withdraw a plea of guilty at any stage before sentence is passed. This was confirmed in *Plummer* (1902) 2KB339, where the major question for the court was whether P's conviction on a guilty plea in relation to a conspiracy charge could be sustained in view of the acquittal of his five alleged co-conspirators. P was not sentenced until after the acquittal of the others, and prior to sentence, asked to withdraw his plea.

Similarly, Bruce J held that the first-instance court clearly had a discretion to allow the change of plea; if it had exercised its discretion against the appellant, the appellate court might have had no power to interfere; but, in fact, the discretion was never exercised one way or the other and that had deprived the appellant of a chance of an acquittal, with the consequence that the conviction could not stand.

The existence of the discretion was indirectly confirmed by the House of Lords in *S v Recorder of Manchester* (1971) AC481, when it held that, in the context of change of plea, there is no conviction until sentence has been passed, and therefore, magistrates (like the Crown Court) can allow a change to not guilty provided they have not yet passed sentence.¹

This means that a withdrawal of a guilty plea can take place until judgment is delivered implying that this can happen until the moment of conviction. Once that conviction has taken place such withdrawal cannot be entertained, although the convicted person would still have a right of appeal from such a conviction. In fact, this right of appeal is granted in the Section 2 of the 1968 Criminal Appeal Act of England and Wales. Blackstone affirms:

¹ Page 1647,1648 D12.95

“The fact that a plea of guilty has been entered does not preclude an appeal against the resulting conviction. If the conviction is found to be unsafe despite the plea of guilty it will be quashed. However, the fact that an appellant was fit to plea, had received expert advice, had been aware of what he was doing and had intended to plead guilty would be highly relevant to the consideration of the safety of the conviction.”²

Having thus premised, the Court is of the firm opinion that in the present case once judgment has been delivered and the convicted person did not file an appeal from her conviction, consequently although no similar provision of the law exists as that found in the British counterpart, however procedurally the Court with its limited powers granted at law is not in a position to allow Respondent Anastasija Afanasejva to withdraw her guilty plea, once she filed no appeal from her conviction.

This notwithstanding the Court had also examined the acts and the testimonies tendered before this Court to establish whether Respondent’s admission of guilt before the First Court was safe and valid at law. The Court heard the testimony of Inspector Audrey Micallef, the Prosecuting and Investigating Officer who confirmed that respondent had been given all her rights at law. She had consulted with a legal aid lawyer prior to interrogation, Dr. Leontine Calleja, such lawyer however not present during interrogation. She was then arraigned in court when another legal aid lawyer on duty on the day was appointed by the Court. Both the witness and the lawyer were aware that accused was charged also with being a recidivist in terms of article 50 of the Criminal Code, when the lawyer put forward a plea bargain to the Prosecuting Officer wherein it was suggested that accused would be prepared to plead guilty on condition that she be condemned to a suspended sentence of imprisonment. This proposed plea bargain was then put forward **informally** to the Magistrate presiding over the Court who agreed to this sentence provided that a restraining order be imposed also on accused. The witness states that the Magistrate was also aware that accused was charged with a violation of article 50 of the Criminal Code. The Prosecuting Officer however stated that the Prosecution had no

² Page 2037 D26.9

intention of appealing the judgment, however the Attorney General was of a different opinion and an appeal had been filed without her knowledge.

Now from an examination of the acts of the case it results that respondent Afanasjeva was assisted all throughout the proceedings by a lawyer. The lawyer had consulted with her and explained to her that he was going to try and reach a plea bargain if she were to admit to the charges, seeking a suspended prison term. Respondent states that she agreed and then admitted to the charges after she was given a guarantee that the sentence was going to be delivered according to the agreed terms. Proceedings were carried out in the English language, so she understood the nature of the charges brought against her, which charges were read out to her. She was cautioned by the Court as to the consequences of her admission of guilt and was given time to reconsider the same, after which she confirmed her guilty plea once again. The minutes of the sitting read thus:

“Charges were read under oath by the Prosecuting Officer.

Defence does not object to arraignment under arrest.

Examination of the accused was made.

Accused pleads guilty.

Court heard oral submissions.

Prosecuting Officer presented consent by Attorney General Dok. AM1, conviction sheet Dok. AM2, person details Dok AM3, person details Dok AM4, report Dok AM5, DVD with statement of accused Dok. AM6.

Accused confirms her guilty plea after Court gave her time to think about the same and explained to her the consequences of her admissions.

Judgment was read. (2 years imprisonment suspended for 4 years, restraining order three years).”

Now it has been established many a time by jurisprudence that a guilty plea may be contested only in specific circumstances being:

1. If it is clear from the acts the accused has not understood the nature of the charges brought against him/her.
2. It was not accused's intention to admit to those charges.
3. If the Court could not reach a declaration of guilt according to law on the facts admitted by the person charged and this in the light of the evidence found in the acts.

6. Tajjeb li in rigward issir referenza ghal dak li rriteniet din il-Qorti diversament presjeduta fis-sentenza fl-ismijiet Il-Pulizija vs Martin J. Camilleri tal-20 ta' Jannar 1995: *"Dwar l-effett ta' ammissjoni fuq l-appell tal-persuna misjuba hatja din il-Qorti (jew ahjar, il-Qorti Kriminali li allura kienet tisma' l-appelli mid-decizjonijiet tal-Qorti tal-Magistrati tal-Pulizija Gudizzjarja) diga' kellha l-opportunita' li tippronunzja ruhha fis-sentenza taghha tas-27 ta' Ottubru, 1962 fil-kawza fl-ismijiet Il-Pulizija vs George Cassar Desain (Kollez. Deciz. XLVI.IV.911). F'dik is-sentenza gie ritenut, mill-kompjant Imhalled William Harding, fuq l-iskorta ta' gurisprudenza kemm Ingliza kif ukoll lokali, li fuq ammissjoni ta' l-imputat, Qorti ma tistax hliet tghaddi ghalli-kundanna tieghu ammenoke' ma jirrizultax li l-imputat ma jkunx fehem in-natura ta' l-imputazzjoni jew li ma kinitx l-intenzjoni tieghu li jammetti li hu hati ta' dik l-imputazzjoni jew li fuq il-fatti minnu ammessi l-Qorti ma setghetx skond il-ligi, tikkundannah, cioe' ssibu hati ta' reat. Anke recentement, fis-sentenza ta' din il-Qorti (diversament ippresjeduta) tat-28 ta' April, 1993 fil-kawza fl-ismijiet Il-Pulizija vs Joseph Mohnani, fejn il-kwistjoni kienet simili ghal dik odjerna, intqal li 'din il-Qorti ma tistax thares b'leggerezza ghal verbali ta' Qorti ohra fis-sens illi dawn ghandhom jaghmlu stat fil-konfront tal-partijiet almenu prima facie sakemm ma jirrizultax evidenti li tnizzel xi haga bi zball'. Dan qed jinghad biex hadd ma jifforma l-idea zbaljata li wiehed jista l-ewwel jammetti quddiem il-Qorti Inferjuri u wara, fuq ripensament, jappella billi jallega li hu ammetta bi zball jew li ma kienx jaf ghal x'hiex qed jammetti".* Insenjament dan citat b'approvazzjoni minn din il-Qorti fis-sentenza Il-Pulizija vs Rainer Grima tat-12 ta' Mejju 2004 u aktar rrecenti fis-sentenza Il-Pulizija vs Andre Falzon App Krim 19.11.2015 u Il-Pulizija vs Tamer Mohammed Hussein Rozik App Krim 4.2.2016.³

The Court reiterates that from the acts of the case and from the testimony tendered by Inspector Audrey Micallef before this Court, it is evident that respondent Afanasjeva was informed from the initial stages of her interrogation as to the nature of the charges brought against her amounting to the harassment of her ex-partner and this in view of the continuous messaging by SMSs and telephone calls as well as stalking. In her statement released to the Police, which the Court has taken cognisance of, although accused chose not to answer the questions put to her regarding the said harassment, as was her right to do so, however, she admitted that she was still in love with her partner and that he had indicated to her that he was still interested in her and that is why she had not given up on their relationship. From the acts it also results that Darren Cuschieri, injured party, had reported to the Police that after an incident where respondent had used violence against him, which incident is subject to separate criminal proceedings still pending against respondent

³ Il-Pulizija vs Ivanova Parashkeva – App.Nru 426/2016 – 27/10/2016.

Afansjeva, she started stalking him and sending him continuous messages, 168 of them he had not even read or answered.

Also from the evidence tendered by respondent Afansajeva before this Court it is clear that she knew that she was being charged with the crime of harassment and that the legal aid lawyer appointed to assist her in Court, had put before her the option of admitting to the charges by trying to plea bargain a suspended sentence of imprisonment, or not to admit and then putting in a request for bail which request could be denied and she would be sent to prison. She states that faced with these two options, although she believed she was not guilty of the charges since the messages she had sent her ex-partner were messages of love, yet she decided to take up her lawyer's advice and admit to the charges on condition that she will be condemned to a term of imprisonment which would be suspended, and she could go home. In fact, respondent was handed down a sentence as indicated to her by her lawyer. Therefore, she had expressed a clear intention that she wished to admit to those charges. This means that the above requisites have been adhered to in this case thus rendering respondent's guilty plea valid at law. Respondent has had a change of heart with regards to her guilty plea only upon realising, after an appeal was filed by the Attorney General, that the punishment inflicted upon her was not one contemplated by law.

The Court is in this case faced with legal and procedural obstacles. As already pointed out the Court's powers as a court of appellate jurisdiction is to review the judgment of the First Court and this by considering the grievances put forward by the party filing the appeal, which in this case is not the accused Anastasija Afansjeva. Moreover, the Court cannot order the annulment of the proceedings since the First Court adhered to all the legal requirements laid out in article 392A of the Criminal Code after the guilty plea was registered. The Court cannot take cognisance also of any plea bargaining which could have taken place informally, since the same was not carried out in terms of article 392A(5) of the Criminal Code, and this in view of what is stated in sub-article 6 of this provision of the law:

“In pronouncing judgement the court shall not take into consideration any agreement on the sentence to be awarded which is not made in accordance with sub-article (5).”

Thus when accused decided to accept her lawyer’s advice and admit to the charges brought against her, although on a mistaken premise that she would receive a suspended sentence of imprisonment, however she assumed the responsibility of the said admission of guilt and this after, as results from the case, the Court gave her time to re-consider the same and warned her of the consequences of her guilty plea, the First Court not being bound by the informal plea bargaining reached between the Prosecution and the Defence. Appellant was aware of the charges brought against her and so did not register her admission of guilt by mistake. She is reconsidering her guilty plea at this stage after realising that the Attorney General had filed an appeal claiming an erroneous application by the First Court of the punishment applicable at law, thus putting her today at risk of getting a different punishment from that handed down to her and which she had agreed to. Thus, the Court cannot conclude that the conviction was unsafe, although the punishment given could not have been one according to law.

Having thus premised the Court cannot uphold appellee’s request to withdraw her admission of guilt since in the first place no appeal was filed by her before this Court from her conviction thus empowering this Court to review the same at appellate stage, and furthermore her admission is valid at law, her only objection being to the Attorney General’s appeal with regard to the punishment inflicted.

Consequently, for the above-mentioned reasons, the Court rejects the request brought forward by Respondent Anastasija Afanasjeva and is thus ordering the continuation of the hearing of the appeal, with regards to the grievances put forward by the Attorney General in his appeal application.

Edwina Grima
Judge

