IN THE CRIMINAL COURT

Hon. Madame Justice Dr. Consuelo Scerri Herrera LL.D. Dip Matr., (Can), Ph.D.

The Police

Vs

Mihaela Milchova

Appeal number: 2265/2023

Today, the 13th of September 2024

The Court,

Having seen the charges brought against **Mihaela Milchova** daughter of unknown parents and born in an unknown place on the 13th December 1985 residing at 199, Assunta, Triq Sant Elena, Sliema holder of Identification number **212240A**, before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having by several acts committed by her, even if at different times which constitute violations of the same provision of the law and are committed in pursuance of the same design such acts shall be deemed to be a single offence. When so ordered by means of the Judge Dr Abigail Lofaro to grant access to a child in her custody to Ahmed Alaaeldin Ahmed Mabrouk refused without just cause to grant such access and this in breach of Article 338 ll of Chapter 9 of the laws of Malta.

Having seen the judgement of the Courts of Magistrates (Malta) as a Court of Criminal Judicature dated 10th June, 2024, the Court found the appellant Mihaela Milchova guilty of the charge brought forward against her and condemned her to two weeks detention.

Having seen the application of the appealed Mihaela Milchova where she asked that this Honourable Court revokes the judgment proffered against her in these proceedings and move on to declare the appellant not guilty of the charge and acquit her from the charge and revoke the punishment given and without prejudice to her first claim should this court still find her guilty of the charge then it should reform the punishment to a more proportionate, reasonable and just one according to the circumstances of the case.

Having seen the reply of the Attorney General presented in the acts of these proceedings on the 7th of August 2024 wherein he claimed that the judgment of the first court should be confirmed in its entirety.

Having heard the oral submissions of the parties.

Having seen the documents of this case.

Considers further.

That appellant's grounds of appeal are based on the First Court's wrong evaluation of the evidence. Now it has been firmly established in local and foreign case law that both in cases of appeals from judgements of the Magistrates' Courts as well as from judgements of the Criminal Court, with or without a jury, that the Court of Criminal Appeal does not disturb the evaluation of the evidence made by the Court of first instance, if it concludes that that Court could have reached that conclusion reasonably and legally. In other words, this Court does not replace the discretion exercised by the Court of first instance in the evaluation of the evidence, but makes a thorough examination of the evidence to determine whether the Court of first instance was reasonable in reaching its conclusions. However, if this Court concludes that the Court of first instance could not have reached the conclusion it reached on the basis of the evidence produced before it, than that would be a valid – if not indeed a cogent reason – for this Court to disturb the discretion and conclusions of the Court of first Instance (confer: "inter alia" judgements of the Court of Criminal Appeal in the cases :**Ir-**

Republika ta' Malta vs. George Azzopardi[1] [14.2.1989]; **Il-Pulizija vs. Carmel sive Chalmer Pace**[2]" [31.5.1991]; **Il-Pulizija vs. Anthony Zammit** [31.5.1991] and others.)

This Court also refers to what was held by **LORD CHIEF JUSTICE WIDGERY** in **R. v. Cooper** [3] (in connection with section 2 (1) (a) of the Criminal Appeal Act, 1968) :-

> *"Assuming that there was no specific error in the conduct of the trial, an appeal court will be very reluctant to interfere with the jury's verdict (in this case with the conclusions of the learned Magistrate), because the jury will have had the advantage of seeing and hearing the witnesses, whereas the appeal court normally determines the appeal on the basis of papers alone. However, should the overall feel of the case – including the apparent weakness of the prosecution's evidence as revealed from the transcript of the proceedings – leave the court with a lurking doubt as to whether an injustice may have been done, then, very exceptionally, a conviction will be quashed.*[4]"

In the Criminal Appeal **Ir-Republika ta' Malta vs. Ivan Gatt**[5], it was held that the exercise to be carried out by this Court in cases where the appeal is based on the evaluation of the evidence, is to examine the evidence, to see, even if there are contradictory versions – as in most cases there would be – whether any one of these versions could be freely and objectively believed without going against the principle that any doubt should always go in the accused 's favour and, if said version could have been believed and was evidently believed by the jury, the function, in fact the duty of this court is to respect that discretion and that evaluation of the evidence. These principles apply equally to cases where appeals from judgements of the Court of Magistrates are lodged by the Attorney General on behalf of the prosecution.

This Court has accordingly evaluated the evidence anew with a view to establishing whether the Court of first instance could have legally and reasonably found the appellant guilty of the charge. The appellant in this regard opines that the first court did not give regard to the fact that the decree of the Civil Court (Family section) dated

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[1] Decided 14 th February 1989
[2] Decided 31st May 1991
[3] ([1969] 1 QB 276
[4] Confer also : BLACKSTONE'S CRIMINAL PRACTICE (1991) , p. 1392
[5] Decided on the l st. December, 1994

18th of May 2022 granting access to the complainant had been revoked and that the original decree had been issued notwithstanding the fact that the appellant had not been notified with the application of the complainant prior to the decree being given by the court. This fact the appellant states was not even mentioned once in the judgment of the first court.

In the second grievance the appellant states that the first court did not deem the decree dated 30th January 2023 presented in the acts of these proceedings to be admissible because it was a photocopy and not a true copy of the original decree. The appellant states that it is not always that the courts accept only the best evidence rule but the best evidence that can be provided. Thirdly, the appellant believes that there was a just cause as to why she the appellant was refusing to give access to the complainant of the child they had between them.

The court examined all the evidence brought forward in this case to be able to make a good judgment of the facts of the case and be in a better position to entertain the grounds of appeal.

The court took note of the affidavit of **PC 1429 D Pace** exhibited in the acts of these proceedings at page 2. In his evidence he states that on the 13th of October 2022 whilst he was working as an Orderly n the Sliema police station Ahmed Alaaeldin Ahmed Mabrouk holder of Identity card number 0246934A reported a case of lack of access to his son from his ex-wife the appellant. He stated that according to the decree of the Civil Court delivered y Madame Justice Dr Abigail Lofaro he should see his son every Tuesday and Thursday between 5.00p.m and 7.00p.m and once on a Saturday or Sunday between 10.00 a.m and 5.00 p.m. He confirmed that on the 13th of October 2022 he was denied access to his son by the appellant. In fact, he went to the police station on several occasions to update his report failed to give him access to his son on the following dates namely on the 15th, 16th, 18h, 20th, 22nd and 23rd October 2022.

The witness tried on several occasions to get in touch with the appellant for her to go to the police station to be spoken to in regard to this report. However, she never turned up despite many attempts and letters to call were sent to her at 199 Triq Sant Elena Sliema. He exhibited a copy of the police report at page 3 of the acts of the proceedings.

The complainant **Ahmed Alaaeddin Ahmed Mabrook** testified viva voce in court on the 20th of November 2023 and confirmed that he had met the appellant via a dating site application in the year 2019 and went on to marry her in the same year. In common they have a son who was four years old in February 2023. He said that he had not seen his sone of three years and nine months. He exhibited a copy of the decree of the court marked as doc AA1[6] dated 18th May 2022. Asked if this decree has been revoked or not, he says that he does not know.

The Court examined the decree wherein the court ordered with effect from the 18th of May 2022that the complainant can have access to his son every Tuesday and Thursday from 5.00p.m to 7.00p.m and every alternative weekend once on Saturday from 1.00 a.m and the following week on a Sunday.

The appellant **Mihaela Milchova** gave evidence under oath on the 20th November 2023 and confirms that on the 18th May 2022 the Family Court issued a decree in relation to access of her son to her ex-husband even though she had not been notified with the application that her ex-husband had presented in court. She exhibited a document marked as doc MM1 which is a photocopy of an alleged decree given by the Family court on the 30th of January 2023 ordering the Directorate of the protection for children to investigate and see what the best manner is how the father the complainant can best have access to his son. She confirms that she is not giving access to her husband to see his son as she believes he is a dangerous man and thus the Child Protection Services are investigating her ex-husband on such allegations. She says that the court decree dated 18th May 202 was rejected by the decision given by the Family court in January 2023.

The court feels that at this juncture it should address the question of best evidence as raised by the appellant in her appeal application. Whenever a party to a suit wants to prove anything, it must bring forward the best evidence it has in its hands In the

[6] Fol. 19 0f the proceedings.

judgment in the names Ir**-Repubblika ta' Malta vs George Spiteri** [7]the following was held:

> *Huwa principju fondamentali fil-process kriminali li l-ligi tesigi li kull min jrid jipprova xi haga, ghandu jressaq l-ahjar prova, u dan jista' biss jaqa' fuq prova sekondarja kemm il-darba din l-ewwel jew l-ahjar prova mhiex disponibbli. Hu veru wkoll, izda, li min ghandu jiggudika jista', skond il-ligi, u minkejja dan il-principju fondamentali appena msemmi, joqghod fuq ix-xhieda anke ta' persuna wahda jekk b'dak li tghid din il-persuna, jikkonvinci lill-gudikant sal-grad tal-konvinciment morali mill-htija tal-persuna akkuzata.*

There is no doubt that as was correctly stated by the first court, the document that was exhibited by the appellant marked a dok MM1 at fol. 28 is not admissible at law since it is not an original or authenticate document. Article 559 of the Code of Civil also applicable to criminal proceedings in view of article 520(1)(d) of the Criminal; Code provides as follows:

> *In all cases the court shall require the best evidence that the party may be able to produce*

A leading case that dealt with the probative value to be given to a document which is not duly authenticated and thus does not constitute the best evidence rule is **Il-Pulizija vs Carmelo Antonio sive Charles Bianco**[8]:

> *Ghalhekk una volta l- original ma giex esebit fil-Qorti, jew addirittura ma giex muri lill-Qorti, l-Qorti ma tistax taqbad u taccetta affermazzjoni ta' xhud li jghid li dawn id-dokumenti esebiti huma fotokopji tal-orginal. L-ewwelnett għaliex il-Qorti m'ghandha l-ebda kontroll jekk in effetti ix-xhud li qal li dawn huma fotokopji qattx ra l-original jew jekk qalx hekk ghax assuma li kien hekk, u fit-tieni lok għaliex hija qatt ma kienet f'posizzjoni li tivverifika d-dokument originali innifsu.*

[7] Decided 5th July 2002 Sup Criminal Appeal
[8] Decided by the Courts of Magistrates as a court of Criminal Judicature on the 4 th April, 2017

The best evidence that the appellant could have produced was a true legal copy of the decree allegedly given by the family court on the 30th of January 2023. (Vide **Il-Pulizija vs Joseph Friggieri** decided on the 24th of September 1996 and **Il-Pulizija vs Anthony Licari**, both decided by the Criminal Court of Appeal on the 5th July, 2004) delivered on the matter relating to the Best Evidence rule and in particular that a document must be exhibited in its original form.

According to Article 638(1) of Chapter 9 of the laws of Malta " *638. (1) In general, care must be taken to produce the fullest and most satisfactory proof available, and not to omit the production of any important witness…*"

Thus, according to this provision there is no reasonable doubt that the party producing the piece of evidence must do so by producing the best evidence possible to prove its case. In this case the document that the appellant exhibited Dok MM1 should have been authenticated prior to being exhibited in the acts of these proceedings. As a rule, a copy of a document is admissible as evidence and constitutes secondary evidence once it is authenticated according to law. According to the author G.D.Nokes in his book **Criminal Procedure** (Pt iv-page 425) he states:-

> "*During the currency of the best procedure there were degrees of secondary evidence. If the original document was not available, the next best evidence should be adduced…..copies are of considerable variety and include the following.*
>
> *1. An examined copy is one which has been compared with the original and seen to be accurate by the witness who examined and proved it, but it is usually sufficient if the witness has checked the copy with the contents of the original as read out by another person."*

Nokes carries on and states that:

> "*2. A certified copy is one to be a true copy. A copy certified in such manner as the Court may order or approve is admissible generally certified by an officer to whose custody the original is entrusted".*

In this regard the court also makes reference to the case delivered by this court in the names **Il-Pulizija vs John Farrugia** decided on the 16th of January, 1986.

The court is of the opinion that the document exhibited at fol. 28 of the proceeding's does not constitute evidence according to the level required by law especially in the light of the evidence given. For such a document to be considered as admissible evidence it has to be certified according to law by the person who holds its original . The court notices that this constitutes lack of good judgment on behalf of the defence which did not insist on the appellant to produce a true legal copy pf the decree. The appellant should have first taken care of producing the best evidence before taking the stand to give evidence as this piece of evidence weakened her case. In criminal proceedings the court cannot do away with the cardinal principles which provide for the best evidence rule.

Ghandha l-ewwel tissoda il-każ tagħha billi tottjeni kull dokument necessarju għallkaż u tiehu kull stqarrija skond il-ligi, bil-kawteli legali, biex ma jkun hemm l-ebda problemi f'dan ir-rigward. Illi ma hemmx dubbju li f'kawzi kriminali l-Qorti ma tistax tiskarta l-principji kardinali ta' evidenza.

In the judgment in the names **Il-Pulizija (Spettur Saviour Baldacchino) vs Christian Demanuele**[9] the court considered that:-'

> *'Illi jibda biex jinghad li uhud mix-xhieda tal-prosekuzzjoni prezentaw diversi dokumenti waqt id-depozizzjoni taghhom. Hafna minn dawn id-dokumenti, fil-maggoranza atti gudizzarji, huma fotokopja mhux awtentikata u lanqas konfermata b'gurament mirRegistratur tal-Qorti. Illi ai termini ta'l-artikolu 636 tal-Kodiċi tal-Organizazzjoni u Procedura Civili80 (rez applikabbli ghall-proceduri penali permezz ta'l-artikolu 520(1)(e) tal-Kodiċi Kriminali 81) kopja ta' att gudizzjarju titqies bħala awtentika u konsegwentment tista' tingieb bħala prova jekk maghmula fil- forma li trid il-Liġi mill-ufficjal li ghandu huwa merfugh l-original.*

[9] Decided by the Courts of Magistrates as a court of Criminal Judicature on the 10th August 2017

Also, in **Il-Pulizija vs Concetta Charles** [10] the court '*skartat fotokopji bħala prova propju għaliex mhux awtentikati; dik il-Qorti qalet hekk: Ma hemmx dubju illi d-dokumenti mhux awtentikati provduti mill- appellanta, ghal dak li jirrigwarda fotokopji, ma jistghux jigu accettati bħala prova minn din il-Qorti.*'

The same principle was annunciated in the case **Il-Pulizija vs Justin Chetcuti** [11]and **Pulizija vs Charlton Caruana** [12] where it was held that:

> '*Huwa principju ben stabbilit li fil-kamp penali ghandha titressaq l-ahjar prova, għalhekk kull dokument, mhux fil-forma originali, irid ikun awtentikat minn persuna kompetenti, altrimenti ma jissodisfax il-kriterju ta' l-ahjar prova. Illi dan il-principju huwa ben assodat fil-gurisprudenza taghna.*

Similarly in Il-**Pulizija vs Concetta Charles** [13] the court disregarded photcopies as evidence since they were not authenticated and held that: -

> *"Ma hemmx dubbju illi d-dokumenti mhux awtentikati provduti mill-apellant, ghal dak li jirrigwarda fotokopji, ma jistghux jigu accettati bħala prova minn din il-Qorti."*

Therefore, this document marked as Dok MM1 is being disregarded as was done by the first court.

The court in this case is faced with the evidence of the complainant given n oath in that the appellant failed to give him access of their son notwithstanding the decree of the court. The court has no reason why not to believe him especially since the appellant who chose to give testimony did not contradict him. The appellant failed to produce other evidence to try and justify the *just cause* she had in not giving access of her son to his father the appellant. It is important to emphasise at this juncture that

[10] Decided by the Criminal Court of Appeal on the 27th February 2012
[11] Decided by the Criminal Court of Appeal on the 28th July 2020
[12] Decided by the Courts of Magistrates as a court of Criminal Judicature on the8th July 2019
[13] Decided by the Criminal Court of Appeal on the 27th February 2012

once ther is a court decree this must be adhered to and once can only depart from following it if there is another decree of court judgment reversing such decree.

In this case the court has no evidence brought forward by the defence to try and justify her actions of non-observance to the court decree. This is unacceptable in this case.

The court does reject the appeal application of the appellant and confirms the judgment delivered by the first court in with regards to its merits.

The appellant also appealed from the judgment given by the first court in that it claimed that it was not proportionate reasonable and fair. As was held in **Il-Pulizija vs Charles Victor Edward Cassar**[14]:-

> *Issa kif gie ritenut ripetutament minn din il-Qorti diversament preseduta w anki kif illum preseduta, principju fundamentali applikabbli fl-appelli kriminali huwa li l-Qorti ta' l-Appell ma tiddisturbax facilment l-apprezzament tal-provi maghmul mill-Ewwel Qorti, izda taghmel apprezzament approfondit ta' l-istess biex tara jekk l-Ewwel Qorti setghetx, legalment u ragonevolment, tasal ghall-konkluzzjoni li tkun waslet ghaliha." (App. Krim. "Il-Pulizija vs. Joseph Zahra" 10.5.02 u ohrajn.) Il-Qorti tvarja tali apprezzament jekk tqis li fuq il-provi prodotti quddiem l-Ewwel Qorti u minnha traskritti ma jkunx "safe and satisfactory" li tinstab il-htija addebitata lill-appellanti" .*

In this case the defence brought forward no particular reason why in it believes the punishment delivered was excessive. This court is not faced with any new evidence which could induce her to change the punishment that was given within the parameters of the law.

[14] Decided by the Criminal Court of Appeal on the 29th May 2003

Thus, in view of the above the court is confirming the judgment given both with regards to merit as well as with regard to the punishment that was awarded and thus is confirming the punishment of two weeks of detention.

Dr Consuelo Scerri Herrera

Hon Madame Justice