MALTA

COURT OF CRIMINAL APPEAL

THE HON. MR. JUSTICE
DAVID SCICLUNA

Sitting of the 30 th July, 2010

Criminal Appeal Number. 225/2010

The Police

v.

Henry Destiny Ehorobo

The Court,

Having seen the charge brought against the said Henry Destiny Ehorobo before the Court of Magistrates (Malta) as a Court of Criminal Inquiry with having on the 13th may 2010 and in the previous days in Malta associated himself together with other persons in Malta or outside Malta with the intention of committing a crime in Malta (article 337A of Chapter 9 of the Laws of Malta) which is punishable by imprisonment, and this in violation of article 48A of Chapter 9 of the Laws of Malta;

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 14th May 2010 whereby that Court, having seen sections 48A and 337A of Chapter 9 of the Laws of Malta, and following the said Henry Destiny Ehorobo's admission, found him guilty as charged and condemned him to one year's imprisonment;

Having seen the application of appeal filed by the said Henry Destiny Ehorobo on the 24th May 2010 whereby he requested that this Court reverse the said judgement and order his acquittal or order that the inquiry be proceeded with to establish his innocence or, alternatively, vary the same judgement by awarding a lesser judgement;

Having seen the records of the case and the documents exhibited;

Having heard submissions made by the prosecution and the defence;

Having viewed the judgements referred to by the parties;

Having considered:

Appellant's grievances are in synthesis the following: (1) that the first Court should have, notwithstanding appellant's guilty plea, applied subsection (3) of section 392A of the Criminal Code and ordered that the inquiry be proceeded with. According to appellant, there was good reason to doubt whether the offence had really taken place, and this for the following reasons: (i) He says that the intention "to make any gain whatsoever" required by section 337A of the said Code is manifestly missing. He stated that his action had the sole purpose of "trying to help a friend". Moreover he denied having received any payment for his efforts. (ii) No mode of action exists in this case; (2) that, without prejudice to the first grievance, in the circumstances the minimum punishment should have been awarded.

The facts of the case are straightforward. On the 14th May 2010 appellant was arraigned under arrest before the Court of Magistrates (Malta) as a Court of Criminal Inquiry and charged with having, in breach of section 48A of Chapter 9 of the Laws of Malta) conspired to commit the crime contemplated in section 337A of the said Chapter 9. During that sitting, Doctor Yana Micallef Stafrace was appointed as counsel for legal aid. The prosecuting officer read out and confirmed the charge and presented a photocopy of appellant's passport (actually a photocopy of the page containing appellant's photograph and other relative information), and appellant's statement. The appellant was examined in terms of law and on being asked if and what he wished to reply to the charge, he replied that he was guilty. Appellant was given time to reconsider his guilty plea but he persisted in such plea. Accordingly the first Court proceeded to pass judgement.

Now, in terms of subsection (3) of section 392A of the Criminal Code, "if there is good reason to doubt whether the offence has really taken place at all, or whether the accused is guilty of the offence, the court shall, notwithstanding the confession of the accused, order that the inquiry be proceeded with as if the accused had not pleaded guilty." Appellant contends that there was good reason to doubt whether the offence had really taken place at all on the basis of the evidence available, namely appellant's statement. In other words, appellant's contention is solely based on the assumption that said statement was the only evidence available. It must be pointed out, however, that the prosecution did not produce any witnesses, and that the photocopy of a page of appellant's passport and his statement were simply exhibited by the prosecuting officer during the first and only hearing before the first Court without his even giving evidence about the circumstances of the case. Obviously, the reason for this was that appellant immediately pleaded guilty. Nor can it be said that such plea was lodged blindly as appellant was duly assisted by counsel for legal aid.

In its judgement in the names **Il-Pulizija v. Rainer Grima** delivered on the 12th May 2004, this Court as presided

referred to another judgement delivered by the same Court in the names **Il-Pulizija v. Martin J. Camilleri** on the 20th January 1995 (Vol. LXXIX.v.1538) where it was stated:

"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 tagha 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 Imhallef William Harding, fuq l-iskorta ta' gurisprudenza kemm Ingliza kif ukoll lokali, li fuq ammissjoni ta' l-imputat Qorti ma tistax hlief tghaddi ghall-kundanna tieghu ammenokke` 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, cjoe` ssibu hati ta' reat. Aktar 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."

It cannot be said, and in fact it is not being alleged, that appellant did not understand the nature of the charge brought against him or that it was not his intention to admit. What appellant is alleging is that on the basis of the facts he admitted to, the first Court could not have found him guilty of an offence. However, the facts of the offence were those outlined in the charge brought against him and

it is to those facts that he admitted. This Court cannot therefore understand how appellant's statement could have prevented the first Court from proceeding to judgement, given the circumstances in which a guilty plea was lodged. Even so, this Court disagrees with appellant's interpretation of his statement. Consequently appellant's first grievance is dismissed.

Appellant's second grievance refers to the punishment meted out which he believes should have been awarded in its minimum. He refers to his unconditional cooperation with the Police and his guilty plea, as well as to the fact that this case excludes any potential danger for persons to leave Malta illegally.

In its judgement of the 9th June 2009 in the names **The Police v. David Abekunle et** this Court stated:

"This Court must make it absolutely clear at the outset that it considers border security to be a very important and a very serious matter, and that any attempt to bypass, breach or otherwise circumvent such security by means which are illegal must consequently be regarded as a very serious offence…. This Court is of the view that, as a general rule, such cases should be met with a prison sentence with immediate effect, and that, always as a general rule, anything short of an immediate prison sentence amounts to taking a very myopic view of the whole issue of border security."

This Court agrees. However, it does not appear that the first Court took in consideration the fact that the punishment in respect of the offence under section 48A of the Criminal Code is the punishment for the completed offence object of the conspiracy with a decrease of two or three degrees in terms of subsection (3) thereof. Consequently, and in view of the circumstances outlined above, this Court is to reduce the punishment awarded by the first Court by two degrees.

For these reasons:

The Court disposes of the appeal by revoking it inasmuch as it imposed upon appellant a term of imprisonment of one year and instead condemns him to a term of imprisonment of six months, and furthermore confirms the judgement of the first Court as to the remainder.

< Final Judgement >

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