



COURT OF CRIMINAL APPEAL

**THE HON. MR. JUSTICE
DAVID SCICLUNA**

Sitting of the 22 nd June, 2011

Criminal Appeal Number. 52/2011

The Police

v.

Kenneth Godwin

The Court,

Having seen the charge brought by the Executive Police against the said Kenneth Godwin before the Court of Magistrates (Malta) as a Court of Criminal Judicature that between the 10/01/2011 and the 22/01/2011 some time in Qawra St. Paul's Bay Malta by several acts committed by him, even if at different times, which constitute violations of the same provision of the law, committed in pursuance of the same design, he defiled a minor, that is Amina Abdel Rahman who is seventeen years of age, who is below the age of eighteen years;

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 23rd January 2011 whereby that Court, having heard the said Kenneth Godwin's guilty plea and having seen article 203(1) of Chapter 9 of the Laws of Malta, found him guilty as charged and condemned him to a period of one (1) year imprisonment, which term of imprisonment, after having seen article 28A of Chapter 9 of the Laws of Malta and after having taken into consideration the circumstances of the case, was suspended for a period of two years from the date of said judgement;

Having seen the application of appeal filed by the Attorney General on the 7th February 2011 whereby he requested this Court to revoke and annul the said judgement, and after considering all the evidence, and all the arguments already put forth and also the arguments that will be brought up during the appeal proceedings, to find the defendant guilty of the crime mentioned in the charges proffered against him and to inflict punishment according to law;

Having seen the record of the case;

Having heard submissions with regard to the appeal;

Having considered:

Appellant Attorney General's grievance is that the first Court wrongly applied article 392A of the Criminal Code. He contends that, since during the examination stage, and in answer to the question in terms of article 392(1)(b) of the Criminal Code, respondent (at that stage the person charged) pleaded not guilty, the Court of Magistrates could no longer avail itself of the provisions of said article 392A. For this article to be applicable, the person charged must plead guilty at the examination stage and in answer to the question contemplated in article 392(1)(b) of the Criminal Code. If the person charged does not plead guilty, the Court of Magistrates will have to proceed with the criminal inquiry in terms of article 401 of the Criminal

Code, unless the provisions of article 370(4) of the Criminal Code would have been observed. In this case the first Court could not convert itself into a Court of Criminal Judicature and therefore the procedure it followed is, in appellant's opinion, null and void.

On his part respondent pleads that these proceedings have been instituted, by virtue of article 203(3) of Chapter 9 of the Laws of Malta, on the instance of the injured parties. Consequently the "occhio" of the case is wrong, should be corrected and, by virtue of articles 373 and 413(1)(b) of Chapter 9, the appeal should have been filed by complainants and not by the Attorney-General. Respondent thus argues that the Attorney-General's appeal should be declared null and void. He also refers to a judgment delivered by the Court of Magistrates (Gozo) as a Court of Criminal Judicature on the 2nd June 2005 in the names **The Police v. Akiko Taratani Zeitlin**.

This Court must point out at the outset that article 373 applies to "offences referred to in article 370(1)" of Chapter 9 of the Laws of Malta, i.e. such offences as lie within the original competence of the Court of Magistrates, namely:

“(a) all contraventions referred to in this Code;

(b) all crimes referred to in this Code which are liable to the punishments established for contraventions, to a fine (*multa*) or to imprisonment for a term not exceeding six months with or without the addition of a fine (*multa*) or interdiction;

(c) all offences referred to in any other law which are liable to the punishments established in the preceding paragraph, unless the law provides otherwise.”

The punishment in respect of the offence with which respondent has been charged carries with it an original punishment of imprisonment of not more than three years imprisonment. Such punishment clearly does not fall

within the original competence of the Court of Magistrates, and consequently article 373 of Chapter 9 is not applicable. The judgment referred to by respondent is not relevant as the charges brought there against the accused carried with them punishments that fell within the Court of Magistrates' original jurisdiction. Accordingly, respondent's first plea and therefore also his second plea that complainants have no grounds of appeal according to law are dismissed.

Respondent's third plea is that, contrary to what is being alleged by the Attorney-General, the first Court decided to convert itself into a Court of Criminal Judicature after having examined the accused under article 392 of Chapter 9 but before he was examined under subarticle (1)(b) of said article, and this by virtue of article 370(4) of Chapter 9. Thus, continues respondent, the first Court decided to convert itself into a Court of Criminal Judicature prior to the registration of a not guilty plea and the Court of Magistrates (Malta) was no longer a Court of Criminal Inquiry when the accused first pleaded not guilty and then, a short time later, he decided to change his plea to a guilty plea. According to respondent, the first Court acted correctly, and this in virtue of article 370(6) of Chapter 9 which applies article 392A of Chapter 9 to proceedings before the Court of Magistrates as a Court of Criminal Judicature.

This Court, having examined the record of the proceedings, finds that the first Court did not act as respondent is suggesting. First of all it must be pointed out that since the original punishment applicable for the charge brought against respondent is of not more than three years' imprisonment, the first Court should have – but did not – apply article 370(4) of Chapter 9. The relevant parts of said subarticle (4) provide:

“(a) Notwithstanding the provisions of subarticle (1)(b), if the crime with which the accused is charged is punishable with imprisonment for a term exceeding six months but not exceeding four years, the court shall, during the examination of the accused under

article 392 but before he is examined under subarticle (1)(b) of that article, ask the accused whether he objects to his case being dealt with summarily; and shall give him a reasonable time to reply to this question.

(b) If, within the said time, the accused replies that there is no objection on his part to the case being dealt with summarily, the court shall ask the prosecuting officer whether the Attorney General has given his consent in writing to the case being dealt with summarily, and if no objection is raised, the court shall note this fact in the records of the proceedings and thereupon the court shall become competent to try the accused and shall proceed accordingly”.

What the Court erroneously applied was articles 390(1) and 392 of Chapter 9 of the Laws of Malta. Having said that it is clear that respondent's first reply to the question if and what he wished to reply to the charge was: “Not guilty” (see folio 6). It would be useful to trace exactly what happened before the Court of Magistrates as results from the record.

Respondent Kenneth Godwin was arraigned under arrest on the 23rd January 2011 before the Court of Magistrates (Malta) as a Court of Criminal Inquiry. During the examination in terms of articles 390(1) and 392 of the Criminal Code, when respondent was asked if and what he wishes to reply to the charge, he replied “not guilty”. The defence then declared that it was not contesting the validity of arrest, the prosecuting officer exhibited a number of documents and the injured parties declared that they wished the criminal proceedings to continue. At this point respondent changed his not guilty plea to one of guilty, submissions were made regarding punishment, and the case was postponed for respondent to have adequate time to reconsider his plea. When the case was called again, since respondent persisted in his guilty plea, judgment was delivered.

In passing judgment the first Court did not refer to article 392A of the Criminal Code nor, for that matter, did it refer to any other article of the Criminal Code which could have allowed it to pass judgment. There is no doubt, however, that it had article 392A in mind. This article specifically lays out the circumstances when judgment may be delivered, that is to say when during the examination, the accused, in reply to the question in article 392(1)(b) of the Criminal Code, pleads guilty. From the record it is clear that in this case respondent did not plead guilty during such examination but at a later point in time – be it during the same sitting. What the first Court should have done was, having examined the accused in terms of article 370(4) of Chapter 9, and having heard his “not guilty” plea, to proceed in terms of article 401(2) of the Criminal Code. A change of heart once a “not guilty” plea has been registered, even though during the first sitting, does not suffice for the Court of Magistrates to proceed in terms of article 370(6) with reference to article 392A.

Respondent pleads further that the request by the Attorney-General for the annulment and revocation of the first Court’s judgment so that respondent can be found guilty and inflicted with a punishment is a *non sequitur*, as respondent has already pleaded guilty and a punishment awarded. Furthermore, argues respondent, if the Attorney-General were not satisfied with the judgment, he should have sought its reform.

Now, in his application of appeal, the Attorney-General has requested this Court “to revoke and annul the said judgment ... and ... to find Kenneth Godwin guilty of the crime mentioned in the charges proffered against him and to inflict punishment according to law.” Respondent is right in stating that the second request, i.e. for this Court to find respondent guilty and inflict punishment according to law, is a *non-sequitur* to the first request, and this for the simple reason that once the Attorney-General is seeking the annulment of the first Court’s judgment because of a procedural defect which renders the judgment null and void, this Court finds that it cannot substitute its discretion for procedures which the first

Court was bound to follow, particularly in respect of the applicability of article 392A of Chapter 9. Apart from this, the Attorney-General's request seeking the annulment and revocation of the judgment is correct.

Respondent also states that if the Attorney-General's argument were to be upheld, then the Court of Magistrates (Malta) would have to resume its role as a Court of Criminal Inquiry and this Court would not have the competence to find respondent guilty and inflict a punishment on him. There is nothing illogical in this. As pointed out, here the first Court erred both in respect of the manner in which the examination was carried out and in its interpretation as to the applicability of article 392A of Chapter 9 of the Laws of Malta.

Consequently, this Court will remit the record of the proceedings to the first Court so that that Court proceeds according to law by first re-examining respondent in terms of articles 370(4) and 392 of Chapter 9 of the Laws of Malta.

For these reasons:

The Court declares the appealed judgment null and void and consequently revokes said judgment, and orders that the Registrar forthwith sends the record of the case to the Court of Magistrates (Malta) as a Court of Criminal Inquiry so that said Court proceeds with the hearing of the case according to law by first re-examining the said Kenneth Godwin in terms of articles 370(4) and 392 of Chapter 9 of the Laws of Malta.

< Final Judgement >

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