MALTA

COURT OF CRIMINAL APPEAL

THE HON. MR. JUSTICE
MICHAEL MALLIA

Sitting of the 25 th October, 2012

Criminal Appeal Number. 243/2010

The Police
(Insp. Ramon Cassar)
(Insp. Kevin Farrugia)

Vs

Dmitriy Makhmoudov
Vladislav sive Lado Mironich

The Court,

Having seen the charge brought against the appellant Dmitriy Makhmoudov and Vladislav sive Lado Mironich before the Court of Magistrates (Malta) as a Court of Criminal Judicature with having on the 13th December 2008 at about 10.00pm in Bahar ic-Caghaq and in other places in the Maltese Islands

1. committed theft of property (laptop and two mobile phones) to the detriment of Nurislav Derbishev, Alexander Shibalyo, Frey Farruh and/or other persons, which theft is aggravated with violence, amount, place and time; and
2. without lawful order from the competent authorities, and saving the cases where the law authorizes private individuals and thus Nurislav Derbishev, Alexander Shibalyo, and Frey Farruh, to apprehend offenders, arrested, detained or confined any person against the will of the same, or provided a place for carrying out such arrest, detention or confinement where the individual arrested, detained or confined, was subjected to any bodily harm, or was threatened with death, or where the crime was committed with the object of extorting money or effects, or of compelling any other person to agree to any transfer of property belonging to such person;
3. with intent to extort money or any other thing, or to make any gain, or with intent to induce Nurislav Derbishev, Alexander Shibalyo, Frey Farruh to execute, destroy, alter, or change any will, or written obligation, title or security, or to do or omit from doing any thing, threatened to accuse or to make a complaint against, or to defame that or an other person;
4. uttered insults or threats to Nurislav Derbishev, Alexander Shibalyo, Frey Farruh not otherwise provided for in Chapter 9 or being provoked carried their insult beyond the limit warranted by the provocation;

Vladislav sive Lado Mironich alone with having:
5. in the same time, place and circumstances been in possession of a sharp pointed weapon (knife) without the license of the Commissioner of Police;
6. on these islands on the 20th December 2008 and on the previous days knowingly received or purchased any property which had been stolen, misapplied or obtained by means of any offence, whether committed in Malta or abroad, or knowingly taken part, in any manner whatsoever, in the sale or disposal of the same which property had been obtained by theft aggravated by violence, amount not exceeding €2329.37 place and time;

Dmitriy Mahkmoudov alone with having:

7. relapsed in terms of sections 49 50 and 280(2) of Chapter 9 of the Laws of Malta in terms of a judgement delivered on the 4th February 2005 by the Court of Appeal which judgement is definitive and cannot be altered.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 24th May 2010, by which, after that Court had seen sections 49, 50, 86, 87(1)(c)(e), 261(a)(c)(d)9e), 262, 267, 268, 270, 289 and 339(1)(e) of Chapter 9 of the Laws of Malta, found Dmitry Mahkmoudov not guilty of the third charge brought against him but found him guilty of all the other charges brought against him and condemned him to fourteen months imprisonment, whilst found Vladislav sive Lado Mironich not guilty of the third and fifth charges brought against him and whilst abstained from taking further cognisance of the sixth charge brought against him, after having seen sections 86, 87(1)(c)(e), 261(a)(c)(d)9e), 262, 267, 268, 270 and 339(1)(e) of Chapter 9 of the Laws of Malta, found him guilty of all the other charges brought against him and condemned him to thirteen months imprisonment.

Having seen the application of appeal filed by appellant on the 2nd June, 2010, wherein they requested this Court to reform the appealed judgement by confirming the judgement with reference to those charges or parts of charges of which they have been acquitted and revokes the judgement on the other charges of which they have been found guilty and in any case reforms the penalty inflicted.

Having seen the records of the case.

Now duly considers.

That the grounds of appeal of appellant consist as follows:-

The First Honorable Court made it clear that it was not believing in any way Frey Farruh and consequently acquitted the defendants from any charge relating to Frey

Farruh. The reason was that he had contradicted himself on so many occasions that his credibility was nil. Regarding the other two, the Court stated that although there were conflicts in their evidence, yet it was up to the Court to decide what to believe or not what to believe.

It is rather strange that in the examination of facts the Court did not in any way refer to the statement given by both accused individually to the Police at the early stage of proceedings, or to their evidence in Court which is also part of the whole case. It is against all principals that the Court disregards the evidence of the accused without giving any reason why. It must be remembered that according to our system of law, it is enough for the person charged to prove "on a balance of probability" and certainly to remove the evidence of the persons charged from the appreciation of the Court shows a one sided examination of the facts. In this particular case it tried to establish credibility for Sasha and Ruslan. Particularly significant is the fact that both Sasha and Ruslan, in agreement between them, had concocted a story against Lado Mironich that he threatened them with a knife. The Court acquitted of this charge because it was completely unfounded. It is true that Sasha and Ruslan retracted such a charge but it was absolutely evident that no knives were involved. Furthermore, both Sasha and Ruslan stated that they had been instigated by Frey Farruh to make such a statement. The credibility of both witnesses is heavily tarnished. On the other hand, there is no reason given why the Court rejected the evidence both of Lado Mironich and of Dimitry Makhmoudov.

The charge persistently mentions the date of the 13th December, 2008. The Police were informed by Sasha, Ruslan and Frey some nine days later when both appellants were arrested and interrogated and their possessions searched.

The First Honorable Court even made a mix up regarding the mobile phone. No mobile phone was seized from Dimitry Makhmoudov. The mobile phone seized from Lado Mironich was not a Nokia but a Samsung mobile

belonging to Frey. Appellant Lado Mironich insists that that Samsung mobile was given voluntarily by Frey (this is now not an issue because Lado Mironich has been acquitted of anything connected with Frey Farruh). This is borne out by the evidence and also by the evidence of Sasha who, when shown a photograph of a mobile phone, stated that that was not his. The Court also satated that Lado Mironich and Dimitry Makhmoudov were together with another person. Certainly this was not Keith Balzan who was with them and who actually handled the laptop as result from the fingerprints thereon. Keith Balzan was actually in the company of Yachob who was his friend. It is strange that Keith Balzan was completely out of the picture but as the two appellants and Yachob belonged to different countries of the former USSR, they were considered as being accomplices together. On what facts is this based?

The Court also says in the judgement that it has no doubt whatsoever that the laptop belonged to Ruslan. It makes a generic reference to evidence brought before it without specifying which testimony. The defence proved that the laptop belonged to Frey first by cross-examining Frey who said that the laptop was his and more importantly by the Maltese witness, Mr. Buttigieg, manager of the San Gorg Guest house in Paceville, who specifically stated that he sold the laptop to Frey Farruh with all the necessary documents. Incidentally, there is no evidence whatsoever that the laptop belonged to Ruslan.

The Court was also mistaken where the interested parties met in Bahar ic-Caghaq. She mentions behind the Splash and Fun. The parties parked their car near the ice-cream kiosk on the highway leading from St. Julians to Bahar ic-Caghaq and this is an area which faces the inhabited area of Bahar ic-Caghaq. Regarding the question of Ruslan and Sasha not being able to have free movement as they wished, this is absolutely unfounded. Keith Balzan, who was not even charged in any way, was with Ruslan and Sasha all the time and he did not allege for one single incident that there was any pressure on Sasha or Ruslan not to leave. It could have been very easy for them to

seek assistance from the bar which is open near the kiosk and even to call for help to traffic passing by. This is not a hidden country lane but one of the most important tarafers round the coast of Malta.

What is relevant is that after the parties or the involved persons together with Ruslan, Sasha and Frey went back to the Luxol grounds while listening to music which was at a high pitch, a mobile car of the Police was circling and patrolling the area and actually stopped and talked to all the persons by even asking for identification. Neither Ruslan nor Sasha claimed any protection from the Police who were in their uniforms. They wanted to wait a few days before they make up their mind how to lay false reports against the appellants. These are not invented facts. They result from the evidence of the prosecution itself. The appellants also draw attention to the relevant time. The mobile squad from the evidence of the police officers talked to appellants and the other persons after eleven at night of that particular day. Even though not exactly correct, the charge mentioned that it was at 10 p.m. at Bahar ic-Caghaq. This proves that both Sasha and Ruslan were with the appellants and with other persons after being at Bahar ic-Caghaq and there were no complaints whatsoever.

It has to be stated that First Court had not even mentioned the evidence and statement by the accused. In a trial by jury it is fundamental that the trial judge places before the jury a summary of the evidence and legal points of the defense. In this particular case, it was incumbent on the Magistrate to examine whether on the balance of probability the accused have raised serious doubts about the veracity of the other witnesses. The appellants had made their statement unassisted at a very early stage to the Police and confirmed and expanded without any changes in their statement before the trial Court. It is not enough that the prosecution builds a credible case. There is the important principal of audi alteram partem which simply means that the evidence of the party charged have to be taken into consideration. As this is a Court which has to give a reason judgement, it is

strange that no reference was made to the evidence of the appellants and why the Court discarded them. It is not enough that the Court states "these were the main witnesses together with Keith Balzan and the two defendants. Each of these last three mentioned persons also gave a version of events which defers (in varying degrees) from that given by Sasha and Ruslan. But the Court after having considered all the relevant factors feels that it can give credibility to the version of facts given by Sasha and Ruslan". The question is "why?. What made the Court reach this decision? Why was it discarding the evidence of Keith Balzan? Why was the evidence of Mr. Buttigieg who sold the laptop to Farruh not considered?"

The events did not take place where the Court is saying behind the Splash and Fun complex (and uninhibited area) but at about 10 p.m. but on the main road facing the inhabited area of Bahar ic-Caghaq. In this the Court was not correct.

The Court is not correct when it says that Dimitry physically took the laptop from Ruslan and Yachob took Sash's mobile phone. Besides being factually incorrect, it is also legally incorrect because it has to be proved that, if existed, the three were working together. The evidence of Keith Balzan against whom nothing is alleged is as an independent witness on the scene proves otherwise.

It has already been stated that this is not true. From the judgement it is clearly stated that the alleged fact occurred at 10 p.m. At 11 p.m. all the persons concerned were near the Luxol Ground where Farruh had his car and the Police asked for identity cards and there was no allegation that Ruslan and Sasha were being detained against their will. Furthermore, even the facts stated, which are not true, do not amount to an illegal arrest with reference to Alexander Shibalyo, on legal grounds. Illegal arrests requires more than disagreement between parties who are in the same car and driving voluntarily to distant area and then having change of heart.

The allegations embraced by the Court would have been more consonant with a conviction under Article 85 of the Criminal Code. This is the crime of pretended rights. It has been proven beyond reasonable doubt (and this is not the duty of the defence) that the laptop belonged to Frey Farruh as sold to him by an independent witness. The question was between Lado and Frey Farruh regarding the repayment of money owed. If, and this only for the sake of argument, the laptop was forcibly taken as a pawn, then this is the arbitrary exercise of a pretended right.

One should not forget that the laptop was with Ruslan, who originally was not with the others at Luxol Grounds. Why did Ruslan accept to take it to Luxol Grounds? Was it his in reality? Keith Balzan an independent prosecution witness confirms this. Did Ruslan accept to take it to show off that he has a laptop??

Regarding the mobile phone it has already been shown that the one belonging to Ruslan or Sasha was not the one found with Dimitry Makhmoudov.

This is unfortunately a typical case where a person is detained under preventive arrest and when it comes to punishment, there is always the difficulty both of acquitting and if there is a conviction to mete out a lesser punishment. The delay was attributable completely to the prosecution. In the meantime, Lado Mironich was in jail and continued to be so detained until he had to take Habeas Corpus proceedings for having served double the punishment.

In both cases the punishment should have been a lesser one even if convicted of theft. When the true scale of punishment according to law is worked out, then it is absolutely clear that the punishment was even legally excessive.

Considers.

That according to the evidence this case concerns an incident that took place on the 13th December, 2008, between the defendants on one side and two (2) other foreigners Frey Furruh and a certain Vahob and a Maltese person Keith Balzan. The incident took place at Bahar ic-Caghaq and the purpose of the meeting was for Frey Furruh to settle a debt he had with defendant Lado Mironich. But before that, Frey Furruh, Vahob and Keith Balzan met near the Luxol Grounds in Pembroke. After sometime Keith Balzan and defendant Dimitry Mahkmaudov, who had joined them in the Luxol grounds, left Pembroke to go and meet Nurislav known as Ruslan Derbishev at St. Julians. Makkmaudov and Balzan met Ruslan and eventually also Alexander (known as Sasha) Shibalyo and these four (4) persons went together to the Luxol grounds where the three (3) others were waiting. After a short time all seven (7) went to Bahar ic-Caghaq were it is claimed that Ruslan's laptop and Sasha's mobile were taken from them. Ruslan and Sasha claim that the laptop and the mobile phone were taken forcibly and that through this incident not only were they intimidated but physical force was used against them. Further more, they claim that while they initially went with Dimitry and Keith voluntarily they were afterwards kept against their will and that Sasha in particular asked to leave before they proceed to Bahar ic-Caghaq from the Luxol grounds but he was not allowed. Through a judgement given on 24th May, 2010 (fol 249) the Magistrate's Courts found both accused guilty of some charges and proceeded to condemn Dimitry Mahkmaudov to fourteen (14) months imprisonment and defendant Vladislav sive Lado Mironich to thirteen (13) months imprisonment. Both accused appealed from this judgement saying that the first Court did not interpret the facts correctly and that this Court as a Court of Appeal should examine the facts of the case and see whether they do lead to the convictions above mentioned.

Considers :

That the appellants argued that the Court of Appeal is not just a Court of review but should delve more deeply into the facts of the case, the reasons of the Court and see if the first Court could have arrived to that conclusion. Appellants were quick to point out that the main witness of the Prosecution, Frey Furruh was unreliable and was declared so by the Court. The other two Russian witnesses are also not much better than Frey, first they accuse the appellants of threatening them with knives but in Court they retracted this allegation claiming that it was Frey who told them to make that allegation in the first place. The appellants are inviting this Court to be careful when conceding credibility to the Russian witnesses and to be selective what witnesses may be believed and whether they are to believed in whole or in part. This Court is also being invited to consider the difference between credibility and unreliability because the former is a question of character whilst the latter maybe just a mistaken statement which leads to the unreliability of other statements made by the person concerned. In this case we have a born liar in the person of Frey Furruh, so his evidence lacks credibility, but if it results that other evidence produced by the Prosecution was unreliable then the appellants should have been acquitted. Appellants are claiming that no mobile phone was found in the possession of the accused Mahkmoudov. The Court for example did not place any weights on the fact that Mr. Buttigieg the Manager of St' George Guest House in Paceville claimed that the laptop was originally his and was sold to Frey. Frey and the two other Russians had a business together which did not seem to work well. However, if the facts as charged were really true appellants are questioning the logic behind the report being lodged nine (9) days after the incident. In reality, once Frey did not come up with the money he owned Mironich, the laptop and phones were given to Mironich as pawns at Bahar ic-Caghaq but not in the place indicated by the Court that said that the parties had met behind the Splash and Fun Park in area that was not readily inhabited. In fact the meeting took place near the Ice Cream kiosks on the main road at Bahar ic-Caghaq that is a very busy road and just opposite the small hamlet

of Bahar ic-Caghaq. Had there been something illegal going on they would easily have been noticed. What's more, the parties were stopped by the police at around eleven (11:00) pm who requested documents and both accused who at the time were alleging to being kidnapped and having their possessions forcibly taken did not inform the police of their plights. The appellants are arguing that if the first Court threw out the evidence of Frey, it should have also threw out the evidence of the other two Russians. What is more, even if believed, this was not theft but if at all, an exercise of pretended right. Frey owned money to Lado Mironich, they met for this specific purpose of settling this debt, Frey did not come up with the money and the laptop and mobile phones were taken as pawns for the protection of the debts due to Mironich because the latter believed that it was his right to take these objects as pawn in order to protect his interests. And this is the real reason why appellant Mironich appealed this judgement as a matter of principle, to clear his name even though he has already served his term.

Considers :

That as regards the function of the Court of Appeal as raised by the appellant, it is now established by various Court rulings that the Court of Appeal will not disturb the appraisal regarding the evidence made by the first Court if the Court of Appeal arrives to the conclusion that on the basis of evidence supplied the first Court could reasonably and legally arrive to the conclusion that it did. In other words, the Court of Appeal will not take over the discretion in the appraisal of the evidence exercised by the first Court but will examine the same evidence to see whether the first Court was reasonable in it's conclusion. It is only when the Court of a Criminal Appeal after such an exercise comes to the conclusion that the first Court could not have reasonably and legally arrived to that conclusion that the first Court's discretion would be disturbed. The reasoning behind this concept can easily be traced to the English case R vs Cooper (1969) per Lord Chief Justice Widgry in connection with Article 2(1) (a) of the UK Criminal Appeals 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 Juries verdict (in this case with the conclusions of the learned Magistrate), because the Jury would 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." (see also Blackstone's Criminal Practice 1991 page 1392).

Considers.

That in view of the above teaching the Court will not for example disturb the decision of the first Court to consider the evidence given by Frey Furruh as lacking credibility and neither it's decision of believing the evidence of the injured parties Sasha and Ruslan. In fact the Court decided these (Sasha and Ruslan) were the main witnesses together with Keith Balzan and the two defendants. Each of these last three (3) mentioned persons also gave a version of events different (in varying degrees) to that given by Sasha and Ruslan. But the "Court after having considered all the relevant factors feels that it can give credibility to the version of the facts as given by Sasha and Ruslan." On coming to this conclusion the Magistrate had the advantage of seeing and hearing the witnesses and evidence which puts her in a much better situation then this Court who has to determine the appeal on the basis of the documents alone. The first Court then goes on to give it's reasons as to why it was believing some parts of evidence and not others, something that it is perfectly entitled to do according to Section 638(2) of Chapter 9. What is more, this Court does not concede the argument put forward by appellants that if Frey is not to be believed then the first Court should have thrown out the evidence of the other two Russians. This does not make legal sense and the first Court maybe selective in the types of evidence it

wants to believe and what evidence it wants to discard. Neither is the fact that the first Court may have misplaced the place of the incident to have any bearing on the final outcome. The first Court said that the incident took place in an unhabited area behind the Splash and Fun Park, whilst the appellant are claiming that the incident took place on a main road just opposite a very populated hamlet. This Court considers that there was not much physical activity going on regarding this incident which would perhaps attracted the eye of a passing policeman, so that it is not at all surprising that when the policemen actually intercepted the accused and Sasha and Ruslan in the same car the last two (2) did not say anything to the police. Finally appellants are claiming that if this incident actually took place it was really a question of an exercise of pretended rights according to Section 85 of the Criminal Code. This Court does not think that this is the case, because one of it's constituent elements, that of there not being in it's commission the existence of a more serious crime, is lacking. The injured parties are claiming that they were abused and that their laptop and mobile phones were actually stolen by the accused which means that this act would definitely negate the possibility of there being an exercise of pretended rights.

Considers.

This Court therefore after going through the evidence and the arguments brought forward by the Magistrate in it's learned judgement is not left with a lurking doubt as to whether an injustice may have been done and feels that the first Court n the basis of the evidence before it could have reasonably and legally arrived to the conclusion that it did. Under such circumstances the Court of Appeal will not disturb the discretion of the first Court. For these reasons the Court dismisses the appeal and confirms the first judgment.

< Final Judgement >

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