



COURT OF CRIMINAL APPEAL

**THE HON. MR. JUSTICE
LAWRENCE QUINTANO**

Sitting of the 12 th February, 2013

Criminal Appeal Number. 363/2011

**The Police
(Insp. Angelo Gafa`)**

Vs

Abdul Sahid Gafur

**Judgment regarding a Preliminary Submission made
by the Defence**

The Court,

Having seen the charges brought against the defendant Abdul Sahid Gafur before the Court of Magistrates (Malta) as a Court of Criminal Judicature with having in these Islands, on the 23rd November, 2010, by means of several

acts, even if at different times, that constituted violations of the same provision of the Law, and committed in pursuance of the same design :

By means of an unlawful practice, or by the use of any fictitious name, or the assumption of any false designation, or by means of any other deceit, device, or pretence calculated to lead to the belief in the existence of any fictitious enterprise or of any imaginary power, influence or credit, or to create the expectation or apprehension of any chimerical event, made gain in excess of two hundred and thirty-two Euro and ninety four cents (€232.94), but less than two thousand and three hundred and twenty-nine Euro and thirty-seven cents (€2,329.37) to the prejudice of British national Donald Morgan and/or Santander UK plc;

And also of having misapplied, converting to his own benefit or to the benefit of any other person, an ATM card to the prejudice of British national Donald Morgan and/or Santander UK plc, which ATM card had been entrusted or delivered to him under a title which implied an obligation to return such thing or to make use thereof for a specific purpose, and which ATM card had been entrusted or delivered to him by reason of his profession, trade, business, management, office, or service or in consequence of a necessary deposit;

And also of having, without authorisation, used another person's access code, password, user name, electronic mail address, or other means of access or identification information in a computer;

And also of having thus breached the provisions of Article 22 of Chapter 446 of the Laws of Malta by committing a crime during the period of a two-year conditional discharge awarded by the Court of Magistrates, on the 22nd March 2010.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 31st August, 2011, by which, the Court, after having seen articles 18, 308, 309, 310, 18, 293, 294, 337 of Chapter 9 of the Laws of Malta, found the accused guilty as charged and condemned him to a three-year

conditional discharged, and this after having seen Section 22 of Chapter 446 of the Laws of Malta.

Also condemned him to a fine of €1,000 which amount is payable in monthly instalments of €200, after having seen Section 14 of Chapter 9 of the Laws of Malta.

Having seen the application of appellant Attorney General filed on the 20th September, 2011, wherein he requested this Court to reform the judgement in the sense that it confirms the part whereby the accused was found guilty of all the charges brought against him, revokes the part of the judgement concerning the punishment awarded by the Court of Magistrates (Malta), and consequently proceeds to inflict a fresh punishment against the said Abdul Sahid Gafur in accordance with the Law.

Having seen the records of the case.

Having heard Counsels' submissions during the hearing of the

Now therefore duly considers.

That the grounds of appeal of appellant, can be briefly summarised as follows:-

That on the 22nd March 2010 the convicted party was erroneously handed down a two-year conditional discharge according to the Probation Act, Chapter 446 of the Laws of Malta when legally it had to be an effective term of imprisonment.

In accordance to article 22(1), 22(3) and 23(2) of the Probation Act, Chapter 446 of the Laws of Malta;

22. (1) Where a Court by which a person is convicted of an offence (not having an offence punishable only be a fine (multa or ammenda) and not being an offence which apart from an increase of punishment in view of continuity or previous convictions, is punishable with imprisonment for a term exceeding seven years) is of opinion that, having regard to the circumstances of the case, including the nature of the offence and the character of the

offender, it is inexpedient to inflict punishment and that a probation order, a community service order or a combination order are not appropriate, the Court may make an order discharging the offender absolutely, or, if the Court thinks fit, discharging the offender subject to the condition that he commits no offence during such period, not exceeding three years from the date of the order, as may be specified therein. The provisions of the proviso to article 7(2) shall mutatis mutandis apply to this sub article. 22(3) Before making an order for conditional discharge, the Court shall explain to the offender in ordinary language that if the offender commits another offence during the period of conditional discharge, the offender will be liable to be sentenced for the original offence. 23(2) Subject to the provision of sub article (3), where a person is dealt with for the offence for which he was placed on probation on a community service order or a combination order or conditionally discharged, it shall not be lawful for the Court to place the offender under a community sanction or to make an order as provided in article 22(1).

That in this respect it is clear and absolute that the punishment awarded by the First Court was incorrect and could not have been a conditional discharge but had to in fact be an effective term of imprisonment reflecting the punishment proffered in articles 18, 308, 309, 310, 293, 294, 337C and 337F of the Criminal Code.

That the Honorable Court makes reference to article 337 of Chapter 9 of the Criminal Code which states :

337. (1) In cases of fraud, the prescribed punishment shall be diminished by one or two degrees if, previously to the commencement of any criminal proceedings against the offender, the damage caused by the offence shall have been fully made good.

That however in this case, a conditional discharge does not fall in this scale of punishment since it is eliminated for consideration by the provision of Chapter 446 duly cited above.

That the scale of punishment that had to be referred to in this case is that according to article 31 of the Criminal Code and the term of effective of imprisonment had to be diminished according to this scale of punishment.

That therefore it is clear that the sentence awarded by the First Court was incorrect and could not award a second conditional discharge due to the provision of Chapter 446 which makes it abundantly clear that if there is a breach of a conditional discharge, a second one can not be imposed once again and the correct sentence had to be an effective term of imprisonment.

During the sitting of the 8th November 2012, the defence submitted that the appeal filed by the Attorney General on the 20th September 2011 entitled 'The Police vs Abdul Sahid Gafur' is null because on page 3 of the Appeal (page 29 of the records) in the fourth line the date of the judgment being appealed from is indicated as the '22nd March 2010' whereas in the final paragraph the date given is the 31st August 2011. The defence submitted that the 'motivations that are required ad validatem in the application of appeal refer to a previous judgment.'

The Prosecution submitted that the date on page 3 of the appeal was just a laspus calami as the throughout the appeal the Prosecution was obviously referring to the shortcomings of the judgment of the 31st August 2011.

After hearing the submissions made by both parties, the Court examined the appeal filed by the Attorney General once again.

In the records there are two judgments – one was delivered on the 31st August 2011 where of the charges made is:

'And also of having thus breached the provisions of article 22 of Chapter 446 of the Laws of Malta by committing a crime during the period of a two year conditional

discharge awarded by the Court of Magistrates on the 22nd March 2010.'

The other judgment was delivered on the 22nd March 2010 where the Court had dealt with different charges altogether and had decided as follows:

'Consequently, after having seen sections 182 and 184 of the Criminal Code the Court finds accused guilty as charged. However, in view of the above considerations (an early guilty plea, cooperation with the police officers, and a clean criminal record), and after having seen section 22 of Chapter 446 of the Laws of Malta, discharges the accused on condition that he does not commit another crime within two years from today.'

From the records, Abdul Sahid Gofur pleaded guilty to a set of new charges on the 31st August 2011.

According to section 419 of the Criminal Code, an appeal from the Court of Magistrates as a Court of Criminal Jurisdiction should contain (a) a summary of the facts; (b) the reasons for the appeal; and (c) a plea to revoke or to reform the judgment.

The Court notes that the submissions of the Attorney General are based on one consideration only: that the Court of Magistrates (Malta) as a Court of Criminal Judicature had 'erroneously handed down a two ¹year conditional discharge according to Chapter 446 when legally it had to be an effective term of imprisonment.'

Then the Attorney General referred to section 23(2) of Chapter 446 and then referred to the articles which are applicable to the charges of the 31st August 2011. Furthermore the Attorney General submitted that the First Court could not award a second conditional discharge as there was a breach of a conditional discharge.

¹ Actually, the Court handed down a three year conditional discharge and a fine of €1000

Informal Copy of Judgement

The Court considers that the wording of the appeal is quite clear: it is referring to the judgment of the 31st August 2011. The wrong reference to the judgment of the 22nd March 2010 only crept in because the records have both judgments. The judgment of the 22nd March 2010 had to be filed as well to show that the defendant had breached the conditional discharge within less than two years.

Hence, as the reasons given for the appeal clearly refer to the judgment of the 31st August 2011, the Court is considering the erroneous indication of the date on page 29 line 4 as only a lapsus calami and is rejecting the submission made by the defence that the appeal is null.

Hence the Court is ordering that the case should proceed for the final submissions about the merits of the case.

< Final Judgement >

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