



COURT OF CRIMINAL APPEAL

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

Sitting of the 4 th October, 2013

Criminal Appeal Number. 363/2011

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

Vs

Abdul Sahid Gafur

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 discharge, and this after having seen Section 22 of Chapter 446 of the Laws of Malta;

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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 seen its preliminary judgement delivered on the 12th day of February 2013.

Having heard the submissions of the Prosecution and the Defence.

Now therefore duly considers.

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

That on the 22nd March 2010 ¹the 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;

¹ The Attorney General was actually referring to two different judgements. The appeal lies from a judgement delivered on the 31st August 2011 where the defendant was found guilty but instead of being condemned he was discharged for three years on condition that he would not commit another crime. Besides he was also condemned to pay a (fine) multa of 1000 Euros. The other judgement was the one delivered on the 22nd March 2010 where the defendant had been found guilty but instead of being condemned, he was discharged on condition that he would not commit another crime within two years. (The sections involved were sections 183 and 184 of the Criminal Code).

'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 that the punishment awarded by the First Court was incorrect and could not have been a conditional discharge but had to be in fact an effective term of imprisonment reflecting the punishment preferred 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 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 cannot be imposed once again and the correct sentence had to be an effective term of imprisonment.

Considers

Submissions by the Defence

During the hearing the defence submitted that it is true that when a person has been conditionally discharged and he commits an offence during this period, then he cannot be conditionally discharged again for the same offence. However, the defence went on, it is possible to give a conditional discharge or an order of probation on particular offences and also to proceed to give a sentence according to law on another offence preferred in the same summons.

The defence referred to the following paragraph from a judgment delivered on the 31st January, 2003, criminal appeal number 242/2002 per Judge Vincent Degaetano:

‘5. Jista’ jagħti l-każ – pero` din hija sempliċi konġettura da parti ta’ din il-Qorti – li l-ewwel qorti riedet tipprovdi mod in kwantu għall-ksur tal-*conditional discharge* u mod ieħor għar-reati l-oħra ipotizzati fl-ewwel, it-tieni, it-tielet, il-ħames, is-sitt, is-seba’ u d-disa’ imputazzjoni. In fatti huwa possibbli li għal ċerti reati jingħata, per eżempju, *conditional discharge*, jew isir Ordni ta’ *Probation* u għal reati oħra miġjuba fl-istess kawża tingħata l-piena skont il-liġi (salv dejjem id-diversi limitazzjonijiet li hemm fil-Kap. 152). Huwa veru li ma tantx huwa konsiljabbli li qorti timxi b’dan il-mod, imma xorta waħda huwa legalment possibbli.’

Freely translated, this reads as follows:

‘Perhaps – but this is only what the Court is thinking – the First Court may have decided to provide in one way with regards the charge that the accused had not obeyed a conditional discharge and in another way for the other chargesIn fact, it is possible to discharge the accused conditionally on certain charges whereas for other charges appearing on the same summons, the Court awards the penalty in accordance with the law. While it is not advisable that a Court delivers a judgment in this manner, yet this style of sentencing is still legally acceptable.’²

Interpretation of the final part of the judgment

This Court notes that the judgment delivered by the Court of Magistrates on the 31st August 2011 is divided into two paragraphs. It reads as follows:

‘That as the defendant has filed a guilty plea, the Courts finds the accused guilty as charged, and this after having seen articles 18, 308, 309, 310, 18, 293, 294 and 337 of

² The Court, however, quashed the judgment and condemned the defendant to a term of imprisonment.

Chapter 9 of the Laws of Malta, and condemns him to a three year conditional discharge, and this after having seen section 22 of Chapter 446 of the Laws of Malta;

Also condemns 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.'

This Court notes that in the first part of its judgment, the Court of Magistrates concentrated on the articles which are connected with the first three charges of the writ (fraud, misappropriation and computer misuse).

This means that it provided a different punishment (a multa of €1000)for the last charge (charge number 4) – which deals with the breach of the conditional discharge resulting from the judgment delivered on the 22nd March, 2010.

The Court can only interpret this judgment in the way just described. Of the first three charges only charge number three carries a penalty of a fine (multa) as an alternative to a term of imprisonment but it also carries a maximum term of imprisonment of four years. The pecuniary penalty and the term of imprisonment can be applied cumulatively.

The wording of the judgment seems to indicate that the Court wanted to impose a conditional discharge for the first three charges because it considered that the accused had filed an early guilty plea and that he had reimbursed the full amount to the victim.

The Court is interpreting the second paragraph of the last part of the judgment as referring to charge number 4 which deals the defendant's failure to follow the conditional discharge imposed on the 22nd March, 2010.

Final Considerations

The Court fully concurs with the judgment delivered on the 31st January 2003 2010 where that judgment states that it is better to deal with all the offences in the writ at one go.

However, once according to the same judgment, it is possible to deal with the charges on a two part basis, the Court, after taking into consideration all the circumstances of the case,³ is going to vary the last paragraph only.

In so far as this part of the penalty is concerned, the Court has examined the judgment delivered on the 22nd March 2010. The accused had been found guilty of breaching sections 183 and 184 of the Criminal Code after the accused had filed an early guilty plea. Now these two sections 183 and 184 both carry the same penalty - a term of imprisonment and not penalty of a fine (multa) and the second one cannot be absorbed in the first one⁴. Hence, unless section 21 is specifically mentioned by the Court and a reason is given, the appropriate punishment should be a term of imprisonment. In this case, the Court thinks that section 21 is inapplicable given that the crime was committed during a term of a conditional discharge.

Nor can the Court apply any order under the Probation of Offenders Act for a charge where the defendant has already been given a conditional discharge.

And, in accordance with section 28A(3) of Chapter 9, the Court cannot, **in the same judgment**, award a suspended sentence for a particular crime and apply the Probation Act for other crimes of which a person has been found guilty.

The Court is, however, considering that the defendant had filed an early guilty plea when the two year conditional discharge had been imposed on the 22nd March 2010.

³ In particular, on tragic circumstance which appears in the statement. This, however, does not excuse or justify the actions of the defendant in accordance with the law.

⁴ See Part 1 of the Notes by Professor Mamo page 159.

Conclusion

The Court is partially upholding the appeal filed by the Attorney General and it is varying the judgment delivered on the 31st August 2011 in the names 'The Police vs Abdul Sahid Gafur' by confirming the first paragraph of the concluding part of the judgment where the Court of Magistrates, instead of condemning the defendant, imposed a three year conditional discharge but the Court is varying the last paragraph of the judgment by revoking that part where the Court condemned the defendant to pay a fine (multa) of one thousand Euros and is instead condemning the defendant to a term of imprisonment of nine months.

< Final Judgement >

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