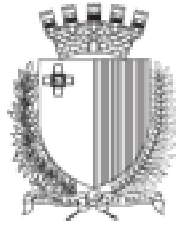

MALTA

COURT OF CRIMINAL APPEAL

HIS HONOUR THE CHIEF JUSTICE

SILVIO CAMILLERI

Sitting of the 10 th April, 2015

Number 319/2014

The Police

[Inspector Bernard Charles Spiteri]

Vs

Helen Katrina Milligan

The Court:

1. Having seen the charges brought against Helen Katrina Milligan, holder of Maltese Identity Card No. 24196A, before the Court of Magistrates (Gozo) as a Court of Criminal Judicature with having:

   On the 12th July, 2013 in Gozo when ordered by a Court or bound by contract to allow access to a child in her custody, refused without just cause to give such access.

2. Having seen the judgment of the Court of Magistrates (Gozo) as a Court of Criminal Judicature delivered on the 24th June, 2014 whereby the Court, after having seen and considered Section 338(ll) of Chapter 9 of the Laws of Malta found the accused Helen Katrina Milligan guilty of the charge brought against her and condemned her to a fine (ammenda) of forty Euros (€40.00).

3. Having seen the appeal application filed by Helen Katrina Milligan in the registry of this Court on the 10th July, 2014 whereby this Court was requested to revoke the judgement appealed from, in the sense that the appellant is acquitted from the charge brought against her.

4. Having seen the acts of the proceedings and the depositions of the witnesses who had testified at first instance but were re-heard by this Court, and having heard the parties make their oral submissions on the case.

5. The facts of the case may be summarised as follows.

6. On the 12th July 2013 Anthony Xuereb called at the police station in Victoria Gozo and reported that on that same day he went to the residence of the accused at 10.00 am and after ringing the door bell he waited for ten minutes but nobody answered. He said that the said time of 10.00 am had been specified in an SMS his lawyer had received from the accused's legal counsel on the evening of the day before. Among other things he added that having failed to acquire access to his son he later, at 10.55 am, phoned the accused demanding to know why he had been denied access as had been stated by her own lawyer in his SMS and she replied that on the day in question access was to be at 8 pm when in the relevant court decision of the 10th October 2011 there was no mention that access should start at 8 pm which was the time when access was supposed to end. When the accused was contacted by the Police she insisted that in Summer the overnight stay was to start at 8 pm till the morrow at 6 pm.

7. According to the relevant parts of the decision of the court of first instance in the civil proceedings, namely that of the Court of Magistrates (Gozo) Court of

Superior Jurisdiction dated 25th June 2010, concerning visitation rights, “the care and custody of Tyrell Xuereb Milligan be granted to the plaintiff (Helen Milligan) and that the defendant’s (Anthony Xuereb’s) approval has to be sought with regards to major decisions concerning health issues” and “visitation rights are to be exercised by the defendant in the manner as stated in paragraph 6.b of the judgment”.

8. The relevant parts of paragraph 6b of the judgment of the court of first instance in the civil proceedings referred to above state the following:

> “the court sees no reason why it should alter the current arrangement to which the child seems to have adapted well....Therefore the defendant is to collect his son from school and return him to the plaintiff at 6.00 pm on alternate days. During the summer months (from the 25th June – 25th September) and school holidays, visitation will be on the same days between 10.00 am – 8 pm.
>
> “ *- omissis* –
>
> “With immediate effect twice a month on a Friday (the second and the last Friday of each month), Tyrell shall sleep at his father’s house for one night. He will return to his mother on Saturday at 6.00 pm”.

9. The judgment of the Court of Appeal in the appeal from the aforesaid judgment “confirms the decision of the Court of First Instance but for the visitation rights which have been varied in paragraph 74; rejects both appeals except as herein stated.”

10. Paragraph 74 of the judgment of the Court of Appeal referred to aforesaid states:

> “However, in the Court’s view, it is not the interest of parent which has to be given prime consideration but the interests of the child which has to take precedence over every other consideration. The Court has to examine whether the arrangements made actually benefit the child. Plaintiff depicts the child as a travelling salesman, never settled in one place, moving back and forth every day from one parent to another. This certainly is not in the best interest of the child and will surely have a negative impact on him. The best interest of the child is for him to have a place which he can call his home and not to be shuttled from one home to another. All this is very confusing

> for the child and gives rise to a situation where instead of having visiting rights of parents we have visiting rights of the child."

11. Paragraph 17 aforesaid quoted, therefore, does not itself vary the visitation rights as determined by the first court in the civil proceedings. Paragraph 76 of the same appeal judgment, however, continues:

> "The Court is therefore of the view that the visiting times fixed by the Court of First Instance are to be confirmed except that, in the interest of the child, during the scholastic year, the father collects the child on Tuesdays and Fridays after school and return him to plaintiff at 6 pm. Access during the weekend is to be enjoyed by the father on alternate days, in the sense that one week the father will have the child on Saturday and the following on Sunday and this from 10.00 am to 6 pm. Access to the child during the holidays and on special days as decided by the First Court will stand.".

12. By a decree dated 25th October 2011 following the above appeal judgement in the civil proceedings the Court of Appeal reaffirmed the visiting rights as finally determined in the said appeal judgment.

13. Essentially the only grievance alleged by the appellant consists in the allegation that the first Court made a completely wrong evaluation of all the evidence produced before it and failed to seek correctly the particular circumstances of the case while failing to take cognizance of what was established by the Court of Appeal which laid down that access was to be on alternate days and that on every second and last Friday of each month there should be an overnight stay.

14. Concerning this kind of grievance invoked by the appellant it is well established in the case law of this court that this court will not disturb the evaluation of the evidence made by the first court if not for grievous reasons in such a way that this court will revise that evaluation in the eventuality that the first court could not reasonably arrive at the conclusions which it arrived at on the basis of the evidence produced before it. It is true that in this particular case this court has had the opportunity of rehearing *viva voce* the witnesses heard by the first court, but the aforesaid legal position in principle remains valid nevertheless although this court is able to itself directly evaluate the conduct of the witnesses on the witness stand.

15. It should be clarfied from the outset that what this Court is called upon to do is to determine the appeal on the basis of the charge proferred against the appellant. Any other agreements or understandings which the accused and Anthony Xuereb or their legal counsel may have reached are totally irrelevant to the exercise which this Court is called upon to carry out in as much as the charge in question is limited to the allegation that the appellant failed to allow access to a child in custody "when ordered by a court or bound by contract". In this case no contract is in issue and the only authority in issue is the order of the court as finally laid down in the aforesaid appeal judgment.

16. Apart from the affidavit sworn by PS 1233 John Attard, which reproduces the contents of the incident report annexed to the same affidavit, and which relates what was reported to the police by Anthony Xuereb and the accused's response, the only witnesses in these proceedings were the same Anthony Xuereb and the accused herself. No other wintess was produced.

17. It is clear from the judgment in question that during the summer months visitation shall be between 10.00 am and 8.00 pm "on the same days" as during the scholastic year viz "on alternate days". To this, however, the Court added that "with immediate effect twice a month on a Friday (the second and the last Friday of each month), Tyrell shall sleep at his father's house for one night. He will return to his mother on Saturday at 6.00 pm." The Court did not specify the time of commencement of the visit on these days. The Court, however, did not need to do so because the Court had already established the time at which visitation rights were to commence viz. after school during the scholastic year, and from 10.00 am during the summer months. In fact 10.00 am is the only time given by the Court for the commencement of any visitation rights during the summer months. Moreover the Court did not impose any condition nor did it qualify in any way its provision that twice a month on the Fridays specified by it Tyrell shall sleep at his father's house for one night to return to his mother on Saturday at 6.00 pm. It is clear, therefore, that the Court meant these days to be visitation days regardless of whether the previous day had been a visiting day or otherwise.

18. Consequently it is also clear that on the 12th July 2013, it being the second Friday of the month, the child was to sleep at his father's house for one night and for the purpose the time of commencement of access according to the Court's judgment was to be at 10.00 am with the child to be returned to his mother on the following day at 6.00 pm. This Court does not see any other possible interpretation to the arrangements ordered by the civil courts. If any of the parties do not find these arrangements satisfactory then that party may resort to any judicial remedy that may be available to the party but in the meantime that party has to comply with the arrangments in place.

19. It has been established beyond reasonable doubt that on the 12th July 2013 the accused failed to give Anthony Xuereb access to the child as ordered by the court as alleged in the charge against her.

20. At one stage the accused testified that Friday 21st July 2013 "was a non-access day" but at the same time conceded that on that day the child was to sleep over at his father's house. This court finds it altogether incongruous to describe a day on which the child is meant to sleep over at his father's house for the night as a "non-access day" for the father.

21. In the light of the above considerations the Court does not find sufficient reasons to revise the evaluation made by the first court and its conclusions thereon which it does not find in any way unreasonable.

Therefore, this Court rejects the appeal filed by appellant Helen Katrina Milligan and confirms the judgment appealed from.

< Final Judgement >

----------------------------------END----------------------------------