



**COURT OF CRIMINAL APPEAL**

**JUDGE**

**H.H CHIEF JUSTICE SILVIO CAMILLERI LL.D.**

**Sitting of 13<sup>th</sup> May 2016**

**Appeal No: 436/2015**

**The Police**

**(Inspector Frank Anthony Tabone)**

**vs**

**David Anthony Pollina**

**The Court:**

1. Having seen the charges brought against David Anthony Pollina, holder of Maltese Identity Card Number 31801A, in the Court of Magistrates (Gozo) for having:

During the months of September, 2014, when so ordered by the Court of Magistrates (Gozo) Superior Jurisdiction, Family Section (6th June, 2014) before Magistrate Dr. Joanne Vella Cuschieri LL.D., failed to give Faith Pollina the sum of €500 as maintenance for the needs of his son Caleb and also the sum of €400 as maintenance for herself.

2. Having seen the judgement of the Court of Magistrates (Gozo) as a Court of Criminal Judicature of the 22nd September, 2015, whereby the Court, after having seen articles 338(z) of Chapter 9 of the Laws of Malta, found the accused guilty as charged but discharged him from any punishment on conditions that he does not commit another offence within the period of three (3) months from the date of the judgement, in accordance with the provisions of Article 22 Chapter 446 of the Laws of Malta.

Furthermore, the Court ordered the accused to effect payment in the amount of nine hundred Euros (€900.00) within one (1) month from the date of the judgement, in accordance with the provisions of Article 24, Chapter 446 of the Laws of Malta.

3. Having seen the appeal application of David Anthony Pollina, presented in the registry of this Court on the 8th October, 2015, whereby this Court was requested to:

- (a) cancel and revoke in its entirety the judgement pronounced on Tuesday, the 22nd September, 2015 by the Court of Magistrates (Gozo) as a Court of Criminal Judicature and to order the stay of proceedings until the constitutional case 63/2015 JRM in the names David Anthony Pollina vs Attorney General et is definitively decided;

- (b) alternatively and in case the first request is rejected, to cancel and revoke in its entirety the judgement pronounced on Tuesday, the 22nd September, 2015 by the Court of Magistrates (Gozo) as a Court of Criminal Judicature whereby it found appellant guilty of the charge brought against him consequently to acquit him from the same charge;

(c) or, in case that this Appeals Court decides to confirm the declaration of guilt made by the First Court, to modify the judgement given in so far as the punishment imposed is concerned by either reducing the term of the conditional discharge or by imposing a fine (ammenda) or by giving a reprimand and admonition as well as by waiving the order to pay the amount of five hundred euros (€500) maintenance intended for the needs of appellant's son Caleb and this in view of the peculiar circumstances of the case.

4. Having seen the acts of the proceedings, including the affidavit and documents produced before the first court, and heard the testimony of the witnesses produced before it including that of the appellant who freely chose to offer his testimony; having heard the submissions of the parties through legal counsel.
5. Having noted the minute entered in the record during the sitting of this court of the 15th January 2016 whereby the parties agreed that there was an agreement before the first court that all the witnesses heard in all the cases at first instance will be taken into account as evidence in all the individual cases heard at first instance which in effect means that the evidence of the witness Anthony Mizzi will be taken into account in all the cases appealed before this Court.
6. Having noted that during the same sitting counsel for the appellant declared that the appellant was withdrawing the first ground of appeal entitled "The Interlocutory Decree" because the relevant constitutional proceedings have been decided.
7. Having noted that during the same sitting defence counsel declared that the fact which the appellant wanted to prove by means of the witness

Alice Mary Reagan was that Caleb Pollina has been living with the appellant since the end of June 2014 and counsel for the prosecution and counsel for the injured party both agreed with this declaration and added that this had already been confirmed by Faith Pollina's solemn declaration. Having noted that in consequence defence counsel for the appellant renounced to the witness Alice Mary Reagan.

**8.** The facts of the case may be summed up as follows:

On the 25th September 2014 Faith Ellen Pollina made a report to the Victoria Police Station in Gozo to the effect that the appellant had failed to pay her the monthly maintenance for the month of September 2014 for her son and for herself as ordered by the Court by a decree of of the Court of Magistrates Superior Jurisdiction Family Section dated 6th June 2014. The Police tried to contact the appellant but to no avail. By the said decree the appellant was ordered to pay to Faith Ellen Pollina by way of maintenance for the needs of their son Caleb the sum of €500 monthly with the first payment being due on the day of the decree and then every month thereafter. The Court also ordered the appellant to pay the same Faith Ellen Pollina the sum of €400 monthly by way of maintenance for herself with the first payment being due on the day of the decree and then every month thereafter.

**9.** The grievances which constitute the grounds of the appeal are as follows:

(1) that there exist sufficient grounds justifying the suspension of these proceedings until the constitutionality or otherwise of the decrees of the 6th June, 2014 and the 28th July, 2014 is examined and determined by the Civil Court First Hall (Constitutional Jurisdiction) – and if necessary the Constitutional Court – in the pending case bearing

reference numbers 63/2015 JRM in the names David Anthony Pollina vs Attorney General et;

(2) that the decree of the 6th June, 2014 is no longer enforceable since the separation case was not instituted by Faith Pollina within the period of two months from the date of the decree or within such longer period as the Court had in a subsequent decree allowed as laid down in article 37(5) of the Civil Code;

(3) without prejudice to the above, the Court in delivering judgement and awarding punishment should have taken cognizance of the important fact which emerged during the hearing of the case that Caleb is no longer residing with Faith Pollina and has been residing with his father since shortly after the decree of the 6th June, 2014. The appellant had requested the Family Court to reconsider the said decree but that Court refrained from pronouncing itself on the request until the appellant honoured all the payments as imposed by the same decree.

**Considers that:**

10. As noted above, **the first grievance** was withdrawn by the appellant and therefore this Court will not take further cognizance of it.
11. In his **second grievance** the appellant submits that the relevant decree of the 6th June 2014 is no longer enforceable because no separation proceedings were instituted within the time allowed by law in terms of article 37(5) of the Civil Code.
12. The said article 37(5) of the Civil Code was inserted in that Code by Act XXI of 2002 and is identical to former article 480(4) of the Code of

Organization and Civil Procedure Cap. 12<sup>1</sup> which was deleted by the same Act. Therefore, the decisions of this Court on the meaning and scope of former article 480(4) of Cap 12 extend also to the meaning and scope of the current article 37(5) of the Civil Code. In respect of the said article 480(4) of Cap 12 this Court has held that the time limit of two months referred to in that article has nothing to do with the validity of the court decree or order for the payment of maintenance since that time limit concerns the enforceability of that decree or order by means of any of the acts of execution referred to in article 273 of Cap 12. The fact that the decree in question is no longer enforceable by one of the means mentioned does not mean that the decree and order contained therein for the payment of maintenance would have lapsed for the purpose of article 338(z) of the Criminal Code<sup>2</sup>. This Court, consequently, has also held that for the purpose of the aforesaid article 338(z) the date of filing of a judicial separation suit or the extension or otherwise of the relevant original decree is irrelevant once the order contained in the decree has not been expressly revoked or otherwise amended by the Court, saving proof of reconciliation or of a declaration by a competent court that the decree or order was null. Otherwise the order for the payment of maintenance remains valid for all purposes and effects of article 338(z) of the Criminal Code<sup>3</sup>. The same reasoning, as has been pointed out, applies also to article 37(5) of the Civil Code on which the appellant relies and which reproduced the content of former article 480(4) of Cap 12.

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<sup>1</sup> Except that while article 37(5) of the Civil Code refers back to subarticle (3) of the same article, former article 480(4) of Cap. 12 referred back to the corresponding subarticle (2) of the same article; however, the content of the said subarticles (3) and (4) is identical.

<sup>2</sup> Inf. Crim. App., P v Lawrence Cilia, 10/3/1995. See also Inf. Crim. App. P v Noel Borg, 11/3/2003; Inf. Crim. App. P v Mario Mallia, 8/5/1998;

<sup>3</sup> Inf. Crim. App., P v Carmelo Farrugia, 23/1/1998; Inf. Crim. App. P v Raymond Cutajar, 2/9/1999; Inf. Crim. App. P v Loreto Borg, 9/6/2004

13. The fact that an order of the court is no longer enforceable as an executive title by one of the means of enforcement foreseen in article 273 of Cap. 12 does not mean that that order has ceased to be an order of the court; nor does it mean that that order is not enforceable by other means, such as precisely in adversarial criminal proceedings, unless the decree or order, as already pointed out, has been expressly revoked or otherwise amended by the Court and saving proof of reconciliation or of a declaration by a competent court that the decree or order was null.
14. This second grievance of the appellant is therefore being rejected also.
15. In so far as **the third grievance** is concerned, the appellant complains that the punishment awarded by the court at first instance was excessive taking into account the fact that he had applied to the competent court for a reconsideration of its court decree which it refused to grant before the appellant honoured the entire payments as imposed in the decree. He also complains of the fact the he was ordered to pay Faith Pollina the maintenance ordered by the court on behalf of Caleb Pollina when the latter was no longer residing with Faith Pollina.
16. Taking into account the fact that the sanction imposed by the first court on the appellant is a discharge subject to the condition that he does not commit another offence within the period of three months, the Court does not consider the punishment at all excessive and in fact considers this part of this grievance totally frivolous.
17. However, it clearly results from the terms of the relevant court's decree of the 6th June 2014 that as regards the maintenance payable to Faith Pollina on behalf of her son Caleb the fundamental premise on the

basis of which such maintenance was to be so payable directly to Faith Pollina was that “Caleb is presently residing with her [Faith Pollina]”<sup>4</sup>. In the course of these proceedings, during the sitting of the 15th January 2016 , a minute was entered into the record by counsel for the appellant to the effect that the fact which he wanted to prove by the evidence of Alice Mary Reagan was that Caleb Pollina has been living with the appellant since the end of June 2014 and this was agreed to by both the prosecution and the injured party and consequently counsel for the appellant renounced to the said witness. Moreover, Faith Pollina herself confirmed on oath that since the end of June 2014 and currently Caleb Pollina was not residing with her but with the appellant. Since the order of the court for the payment of maintenance to Faith Pollina on behalf of Caleb Pollina was clearly founded on the premise that the latter lived with Faith Pollina it cannot reasonably be held that the court’s order required the appellant to continue to pay Faith Pollina maintenance on behalf of Caleb Pollina even when Caleb Pollina no longer lived with his mother and was effectively being maintained by the appellant himself. Therefore, the Court has to take note of this important change of circumstances when it comes to determine the amount of maintenance which is payable to Faith Pollina under the court order in question for the purposes of article 24 of Cap 446.

- 18.** The present charges against the appellant concern the month of September 2014, when Caleb Pollina was no longer living with his mother but was living with the appellant, and therefore no maintenance is due to Faith Pollina on behalf of Caleb Pollina for the month in question. The amount of maintenance payable to Faith Pollina for the month in question is that of four hundred euro (€400) since the amount of maintenance payable to her on her own behalf according to the relevant court order is that of €400 monthly.

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<sup>4</sup> Court’s decree of 6<sup>th</sup> June 2014

The Court, therefore, allows the appeal in part and accordingly varies the judgment of the first court by ordering the appellant to effect payment to Faith Pollina of the amount of four hundred euro (€400) instead of the amount ordered by the first court and confirms the said judgement as for the remainder, so however that the period of three (3) months mentioned in the judgement of first instance within which the appellant is not to commit another offence is to run from the date of this judgment and the period of one month for the payment of the above amount is also to run from the date of this judgment.

(ft) Silvio Camilleri  
Chief Justice

(ft) Silvana Grech  
D/Registrar

True copy

f/Registrar