



Court of Criminal Appeal

Hon. Mr. Justice Giovanni M. Grixti LL.M., LL.D.

Appeal Nr: 353/2016

The Police

vs

Michael John Rees

Today the 29 of January, 2018.

The Court;

Having seen the charges brought against Michael John Rees, holder of Maltese identification card number 82113A, before the Court of Magistrates (Malta) as a Court of Criminal Judicature, with having on the 7 May 2016 refused to allow access to a child to Maya Dimitrova Rees, as ordered by a Court or bound by contract, without just cause to give such access;

Having seen the judgment of the Court of Magistrates (Malta) as a Court of Criminal Judicature delivered on the 20th June, 2016, whereby the Court found the appellant, then accused, guilty and condemned him a period of detention of one (1) week;

Having seen the application of appeal presented by Michael John Rees in the registry of this Court on the 1st of July, 2016 whereby this Court was requested to: 1) grant *contrario imperio* the production of a minor child as witness; 2) to allow the evidence of witness Mario Genius and consider it as admissible circumstantial evidence together with accompanying police officers; 3) to reverse the decision of the Magistrates' Court and find the accused not guilty as charged and acquitting him of all charges; and 4) in subsidium and in relation to the punishment meted out, to consider the alleged offence as a continuing offence together with other offences of the same nature but alleged committed on different dates namely on the 27th April, 30th April and 11th May 2016 and to inflict one punishment in terms of article 18 of the Criminal Code Chapter 9 of the laws of Malta and to consider that any punishment restrictive of personal liberty is not in the best interest of the child;

Having seen the grounds of appeal; Having seen its preliminary judgment of the 27th April, 2017;

Having heard the witnesses under oath and having seen the exhibited documents;

Having heard submissions by the parties;

Having seen the records of the case;

Considered:

1. That prior to any further consideration and as already stated in the preliminary judgment, this Court deems it necessary to make the following observation, namely that the application of appeal is unnecessarily lengthy and rife with details which could have been avoided and made for a more legible and discernable application. Such length and

unnecessary details, most of which consist of the background to the facts and not the facts themselves, have given rise to complications which further compound the sensitive nature of this case to the extent that applicant prolonged his submissions also in the final demand regarding the penalty meted out when such demand in accordance with article 419(1) of the Criminal Code shall be *sic et simpliciter* for the reversal or variation of the judgement;

2. The facts of this case relate to a complaint made to the police by the mother of a minor child against appellant for having refused to give access to their child as ordered by the Civil Court (Family Section). The first ground of appeal brought forward by appellant is that the First Court had no sufficient basis to decide against the accused;

3. Complainant testified that she was granted the right of visitation to her minor child on a twice weekly two hourly basis under the supervision of Appogg personnel. Appellant only honoured the first meeting and not the subsequent visits which are merits of this case and others pending before this Court. Contacted by Appogg to ask about his failure to do so, appellant informed them that the child does not want to see her mother subsequent to which she filed the relevant report to the police who in turn warned him that criminal action will be taken against him for failing to honour the Court order;

4. Subsequent to his failure, appellant complied with the Court order on two occasions in a space of six months. The Court, however, then reversed her right of access as the child kept insisting that she does not want to see her at any cost and that forcing the child would be traumatic on her;

5. Appellant testified that for the dates merits of this charge, complainant had been granted rights of visitation to their minor child and he honoured the first meeting but the child felt very unhappy and physically sick and she kept insisting that she did

not want to see her mother any more. The Judge presiding over the Family Court and all the experts appointed by the Court were informed of the situation and he was advised that the visitation rights will be enforced through a Marshall of the Court for which he felt relieved and suggested that the visitations take place at his home to make things easier. Appellant tried to convince his 11 year old daughter in many ways to see her mother to the extent of explaining to her that if she keeps refusing he will end up in jail but she still refused;

6. Appellant further explained that the child has serious issues with her mother and he does not want to physically force her into any meeting as that will create rifts in their relationship but still does everything to persuade her to attend the meetings as it is important to have a relationship with her mother. The situation, however, seems to have taken a different turn for the better after the professional help given to them but it will take time until the minor child is fully ready to have a relationship with her mother;

7. Appellant further explained that after the Court decreed that a Marshall will be sent over to make sure that complainant sees her child, he allowed complainant to go upstairs in his apartment, contrary to the advise of the police. There she met the child and appellant left them together but the child physically pushed her mother out of the apartment;

8. Court Marshall Mario Genuis testified that he was instructed by the Family Court to call at appellant's residence and physically take his child to meet complainant at Agenzija Appogg but he did not succeed because the child refused to cooperate. He spoke to the child for two hours, together with another female Court Marshall, two police officers and two social workers, trying to convince her to go and see her mother. Her father, appellant, also asked her to comply and to obey the law but the child kept crying and insisting that she did not want

to see her mother. Throughout this time complainant was downstairs and the Marshall asked her to go upstairs and she spent about fifteen minutes trying to convince the child to comply. This happened on the 18 of May 2016;

From a thorough examination of the facts and the depositions of the witnesses, it is evident that this is a very delicate situation. The Court is aware of judgments which held against a person reluctant to give access to the other party to visit their child albeit ordered by the Court or by contractual arrangement wherein it was stated that it is not the child that dictates the right of visitation and that the child should be forced to keep the visitation appointments (*vide* ”. **Il-Pulizija vs Isabelle Cini – Crim App 17.2.2005; Il-Pulizija vs Natasha Theuma – Crim Appeal 8.6.2007 and Il-Pulizija vs Gertrude Zammit – Crim App 17.6.2015 - 403/14 DS**). Every case, however, presents its own particular facts and must be decided on its merits;

9. The obligations of the parent in this regard emanate from article 338 (II) of Chapter 9 of the laws of Malta which states:

338 (II) when ordered by a court or bound by contract to allow access to a child in his or her custody, refuses without just cause to give such access;

Appellant contends that he did everything in his power to convince the child to attend meetings with her mother. She is 11 years old but has the reasoning of a much older child and she would not be convinced to see her mother under any circumstance. There appears to be an underlying reason for this refusal by the child herself which concerns the previous relationship between them. That which the law aims to

discourage is that visitation rights are not observed due to a capricious reason or a reason attributed to pique which no doubt result in hardship on the other party and all this at the expense of the child;

10. The First Court did not allow the Court Marshall to tender his evidence apparently because the Marshall's intervention took place after the events, that is the refusal of access. That Court, unlike this Court of Appeal, did not have the benefit of hearing the evidence of the Court Marshall and whereas it is true that the Marshall was not present during the date of the alleged offence, he witnessed first hand the attitude of the child merely days later when ordered by the Family Court to assist in the access. This Court does not doubt that the attitude or rather frame of mind of the child as witnessed by the Court Marshall on the 18 of May 2016 was the same on the dates lamented in the charge sheet and that appellant did everything in his power to meet his obligation to allow visitation rights as ordered by the Court. Appellant has successfully proved that the meeting did not take place due to a just cause;

11. Now whereas it is not normal practice for this Court to substitute the discretion of the First Court with its own discretion it must be said that the facts of this case could not legally and reasonably lead to a finding of guilt it having been proved that appellant was not responsible for the non observance of the order of the Civil Court (Family Section);

12. The appeal is therefore being upheld and the appealed judgement is being revoked. Consequently appellant is acquitted from all charges and any punishment meted against him and the Court abstains from taking further cognisance of all the other subsidiary demands of appellant.