



Court of Criminal Appeal

Hon. Mrs. Justice Dr. Consuelo Scerri Herrera LL.D.

Appeal Nr: 154/2018

The Police

Vs

Gervais Cishahayo

Today the, 4th December, 2018.

The Court,

Having seen the charges brought against Gervais Cishahayo holder of ID Card number 218199M, before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having:

For the month of August 2017, in the Maltese Islands:

- 1) Failed to give Melissa Joan Bagely, the sum of 600 euro monthly, fixed by the Court or as laid down in the contract as maintenance for his child(ren) and/or wife, within fifteen days from the day which according to such order or contract, such sum should have been paid.

Having seen the judgment meted by the Court of Magistrates (Malta) as a Court of Criminal Judicature proffered on the 26th March, 2018 whereby the Court: After having seen Article 338(z) of Chapter 9 of the Laws of Malta; After having heard the evidence and the documents exhibited; The Court found the said accused guilty and sentenced him to two weeks detention.

Having seen the acts of the proceedings;

Having seen the updated conduct sheet of the appealed, presented by the prosecution as requested by this Court.

Having seen the appeal application, wherein the appellant requested this court to vary the judgment of the First Hon. Court to that which is inflicted punishment by substituting appropriate penalty and giving more equitable in the circumstances.

Having seen the acts of the proceedings;

Having seen the updated conduct sheet of the appealed, presented by the prosecution as requested by this Court.

Having seen the grievances brought forward by the appellant, translated from Maltese by this Court:

- a) Due consideration was not given to the fact that the appellant has a clear record.
- b) That the appellant had been working for several years in Malta and has spent months seeking other work.
- c) Due consideration was not given to the fact that the appellant has no current income which could pay the estimated amount of maintenance it;
- d) Due consideration was not given to the fact that the moment that the appellant is given a custodial sentence it would naturally be impossible for him to pay maintenance and much more to find work in order to pay maintenance.
- e) The more prolonged the time that the appellant is kept in prison, further decreases the possibility of finding work and thus be in a position to resume paying the maintenance expected of him.
- f) That the appellant has been working in Malta for several years:

- Bighi Trade School, (1997)
- Maria Goretti, Tarxien Girls Secondary School, (1997-1998)
- Guze D'Amato Boys Secondary School (1998-1999)
- Giovanni Curmi Higher Secondary School, (2000-2001)
- Nautical School – Late MCAST Maritime Institute, (2000-2001)
- University of Malta Junior College, (1999-2000)
- MCAST (various) Institutes, (2001-2007)
- St Aloysius Jesuits College, B'Kara, (2008-2009);
- Don Bosco Salesian School, Sliema, (2010-2011);

g) The appellant even went back to his country, Burundi, seeking work but because of the problems in the country he had to return back to Malta where still today seeking employment.

10. Article 338 (z) explains clearly the applicant's fault and that there are no points which can complain about. Indeed the Honorable Court of Appeal in the "Police vs. Alfred Camilleri '[18/09/2002] citing with approval another judgment of the same court presided otherwise (Police Criminal Appeal vs. Anthony Saliba, [07/15/1998] explained clearly: *"...il-fatt li persuna tisfa bla xoghol ma jiskuzahiex mill-obbligu taghha li twettaq id-Digriet tas-Sekond'Awla tal-Qorti Civili, obbligu sancit bir-reat tan-natura kontravenzjonali li tahtu hu akkuzat l-appellant. Ir-rimedju li ghandu u li kellu l-appellant kien li jadixxi tempestivament u fi zmien utili lill-Qorti Civili kompetenti biex din, wara li tiehu konjizzjoni tal-provi, tipprovdli billi se mai timmodifika l-ordni dwar il-manteniment. U biss wara li jottjeni tali modifika, li jkun jista' jhallas inqas jekk ikun il-kaz, Sakemm dan isir, jibqa' marbut bl-obbligu tal-hlas skont l-ewwel digriet. Fi kliem iehor sakemm ikun ghadu vigenti digriet tas-Sekond'Awla jew Digriet jew sentenza tal-Prim'Awla jew tal-Qorti tal-Appell, li jordna l-hlas ta' manteniment, din il-Qorti ma tistax hlief issib u tikkonferma htija, fejn l-appellant ikun naqas li jotttempera ruhu ma' tali digriet jew sentenza, tkun xi tkun ir-raguni, jew pretest biex jaghmel dan. Altrimenti, din il-Qorti minn flok Qorti ta' Appell Kriminali tispicca tirriduci ruha f'wahda ta' revizjoni dwar l-effikacija u r-ragjonevolezza ta' Digriet jew sentenzi tal-Prim'Awla u tal-Qorti tal-Appell u Digriet tas-Sekond'Awla, mansjoni li zgur li ma taqax taht il-kompetenza taghha".*

11. However, in the judgment given by the Honorable Court of Criminal Appeal chaired by Hon. Judge J. Galea Debono at the hearing on 27 July 2006 in Criminal Appeal 84/2006 number vs. Police Joseph Micallef the Court referred to Criminal Appeal "Police vs. Said Publius" [25.9.2003] *"l-ghan ewlieni tal-legislatur meta ntroduca din il-kontravvenzjoni xi ftit tas-snin ilu kien li jgib pressjoni fuq persuni li jkunu riluttanti li jhallsu manteniment lid-dipendenti taghhom biex effettivament ihallsu w mhux biss li jippunixxi ghall-ksur tal-ordnijiet tal-Qrati, li, kif intqal, ghandhom dejjem jigu obduti w osservati skrupolozament. F'dan il-kaz dan il-ghan issa ntlahaq bil-hlas fuq imsemmi"*.

12. The imposition of detention is, in such cases, and always with respect, hateful if it does not lead to maintenance payments due under the contract or order in question. The fact that the Honorable Court condemned the appellant two weeks detention effectively increases on the hardships on Melissa Joan Bagley given the fact that the appellant from prison definitely can not pay the maintenance due for this case.

13. Moreover, it is the factual and absolute truth that if the applicant is given a custodial sentence on charges merits of this appeal, this does not achieve the purpose of the legislation - rather precisely the contrary.

Considers further,

This Court saw the evidence brought forward by the prosecution before the first Court namely the affidavit of **PC 1401**. This witness stated that on the 31st August, 2017 at about 3.00p.m whilst he was at work at the B'Bugia Police station Melissa Joan Bagley reported that her ex partner Marcel Gervais Cishahayo failed to pay her maintenance in the sum of €300 for each of their children Shanon who is 12 years old and David who is 9 years old , having a total amount of €600 together with the cost the rise in the cost of living for the month of July 2017.

He further stated that he had tried to contact the appellant though to no avail

The Court saw the decree Number 109/12RGM issued by the Family Court wherein the accused was ordered to give the sum of €600 per month as maintenance towards his two minor children.

The Court heard the evidence given before her by the complainant **Melissa Joan Bagley** and this during the sitting of the 16th October 2018. The complainant stated that her husband the appellant had failed to give her maintenance that was due for her two minor children for the month of July 2017. In fact she stated that although the appellant was ordered to pay her maintenance by decree of the Family Court dated 30th April 2013, her husband never abided by it. Asked by the Court if her husband ever gave her a reason why he failed to adhere to such decree she stated in the negative. Asked by the Court if the appellant has any relationship with his children the witness stated that he has none.

She said that after the appellant was sent to jail last August, he filed an application before the Family court to have the decree of the Court reviewed by so far there is no other decree altering or amending the decree given on the 30th April 2018. In fact she said that she had her last sitting for mediation too.

Asked if her ex-partner had left the country at any time after the court decrees she stated that he had gone away for some time and still paid no maintenance.

Asked if she knew whether her husband had any employment she said that he had given an interview wherein he stated that he was an officer of the government and as far as she knew was involved in some programme relating to integration of immigrants in the Maltese society.

Asked if her intention for instituting such procedures was only to get paid, she stated that she was only acting to protect the interests of her children and try and obtain what was due to her by court order.

The Court heard the accused **Marcel Gervais Cishahayo** give evidence voluntarily in the same sitting of the 16th October 2018. He stated that he did not know about the decree given by the Family Court until recently particularly in March 2018. He said that he was not notified about it before. He said that he was away from the islands when the proceedings were concluded. Asked by the Court if he had sent an email to his ex-partner before the court appointed sitting before the Family Court telling her that she was going to make a clown of herself before the Court ,at first he said he did

not send such an email. Though once the Court reminded him of his oath the witness said he did not remember sending such email.

He said that he had taken proceedings in Court to alter the decree in question wherein he was ordered to pay maintenance last August. He said that he had asked the legal aid lawyers to do this for him before though no one ever presented any application for him. Asked by the Court if he has a decree altering the decree of the 30th April 2013 he stated that he does not know of the outcome of his application notified in August 2018. He said that he was in prison and could not have access to his proceedings.

He said that he had an employment before being sent to prison and today he is unemployed and thus not able to pay any maintenance. Asked if he paid maintenance before going to prison he said that he did not honour the court order though did pay maintenance every now and again in a haphazard manner.

He said that he did not have any active employment and was living with assistance that was given to him by his elder children, help from the African community in Malta as well as help from his family. He also stated that he was sub letting a room in the place where he was renting.

He also said that on the day he was incarcerated he had informed the Court that he was going to be given an employment and in fact he begged the court to give him a chance though he was not given this opportunity and thus lost the chance to take up this employment. He said that he has no contact with his kids and that his ex partner is doing all this to keep him in prison. He said that he has no wish to renounce to his rights over his children.

Asked by the Court if he paid the €600 maintenance to his ex partner the complainant for his children for the month of July 2017 he answered in the negative.

Considers

The Court saw the application presented by the applicant on the 23rd November 2018 wherein he asked for the suspension of the delivery of judgment which was meant to

be pronounced on the 27th of November 2018, since there were new circumstances he wanted to bring forward before the court.

The Court took note of its decree where in it ordered notification of the application of the applicant to the office of the Attorney General.

The Court noticed that the Attorney General wanted to reply to the application orally during the appointed sitting.

The Court heard the appellant declare orally that he had found employment on a part time consultancy basis with the ministry of European Affairs and Equality and thus ever since he was released from prison on the 26th October, 2018 he has made some payments to his ex partner mother of his two children, the complainant representing some of his arrears due as maintenance.

Having heard the complainant declare that she has received the sum under contestation namely the six hundred euros (€600) she was owed as maintenance for the July 2018 and declare further that she has no further claims against the appellant with regards to the case under review.

The Court heard the parties make their final oral submissions during the sitting of the 27th November 2018.

Considered further.

It is not contested between the parties that the Family Court had given a decree number 109/12 RGM) wherein the appellant is obliged to pay the sum of six hundred (€600) per month to his ex-partner as maintenance for their two minor children. It is not contested either that in fact the appellant had failed to pay maintenance to the complainant for the month of July 2017. That the appellant however during the last adjournment of this case honored his obligation and paid the maintenance due by him. That subsequently, the complainant stated pendente lite that she has no further grievances against the appellant with regards to this case.

Considers further

The Court underlines as pointed out by the lawyer of the appellant himself that the intention of the legislator when introducing this contravention was out lined in the

case delivered by this Court on the 27th July, 2006 in the Criminal Appeal number 84/2006 in the names "Il-Pulizija vs Joseph Micallef¹" where reference was made to another case delivered by this same court in the names "Il-Pulizija vs Publius Said²" wherein the Court held that :-

"... l-ghan ewlieni tal-legislatur meta ntroduca din il-kontravvenzjoni xi ftit tas-snin ilu kien li jgib pressjoni fuq persuni li jkunu riluttanti li jhallsu manteniment lid-dipendenti taghhom biex effettivament ihallsu w mhux biss li jippunixxi ghall-ksur tal-ordnijiet tal-Qrati, li, kif intqal, ghandhom dejjem jigu obduti w osservati skrupolozament."

However, in the particular circumstance of this case the Court took note of the fact that the appellant understood the seriousness of his obligation, so much so that he honored it the moment he was released from prison and thus in view of this circumstance only³ the Court although finding the accused guilty of the contravention will not go on to condemn him to detention or to the payment of a fine and thus increase his financial burden. Though it is making itself clear that it does not expect to have any of these further cases brought forward before her and that the appellant must take action so as to address this obligation,

In view of this jurisprudence the Court cannot but condone the appellant for having unilaterally decided not to affect payment on time and thus the court is rejecting the appeal and confirming the merits of the judgment delivered by the Courts of Magistrates as a Court of Criminal Judicature in the above names on the 26th March, 2018 however it is altering the punishment delivered in that instead on the one month detention ordered by the first Court it is discharging the appellant unconditionally in terms of section 22(1) of Chapter 446 of the laws of Malta.

(ft) Consuelo Scerri Herrera

Judge

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¹ Quoted by the appellant in his oral submissions and referred to in the judgment of this same court between these same parties delivered on the 31st July 2018

² Delivered on the 25th September 2003

³ Emphasis by this Court

Franklin Calleja

Deputy Registrar