



Court of Criminal Appeal

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

Appeal Nr: 155/2018

The Police

Vs

Gervais Cishahayo

Today the, 14th February, 2019.

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 October 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 of the appellant filed in the Maltese language despite the judgment of the first court being given in the English language wherein the appellant stated the following:-

- a) Due consideration was not given to the fact that the appellant has a clean conduct sheet.
- b) That the appellant has been working in Malta for a number of years and has been looking for another job for the past months.
- c) Due consideration was not given to the fact that the appellant has no income from which he can pay the maintenance due.
- d) Due consideration was not given to the fact that if he is given a prison judgement, it will be impossible for him to pay maintenance.
- e) The longer he is kept under arrest, the less he will be able to find a job and pay the maintenance due by him.
- f) Appellant has been working in Malta for a long number of 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) Appellant went back to his country, Burundi, to find a job, but due to the problems in that country, he had to return to Malta, where he has been looking for a job ever since.

h) Article 338(z) explains that the appellant cannot bring forward any grievance with regards to his guilt. In fact, in the judgement of the Criminal Court of Appeal, “Il-Pulizija vs. Alfred Camilleri” [18.9.2002] wherein it referred to another judgement of that same court, (Appell Kriminal Pulizija vs. Anthony Saliba; [15.7.1998] it was clearly explained “...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 kontravvenzjoni 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, tipprodi 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 jottempera 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’ revizzjoni 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”.

i) In the decision given by the Court of Appeal, per Mr. Justice J. Galea Debono on the 27th July, 2006 in the Criminal Appeal nr. 84/2006 Il-Pulizija vs. Joseph Micallef reference was made to the criminal appeal judgement, “Il-Pulizija vs. Publius Said” [25.9.2003], “l-ghan ewlieni tal-legislatur meta ntroduca din il-kontravvenzjoni xi ffit tas-snin ilu kien li jgib pressjoni fuq persuni li jkunu riluttanti li

jhallsu manteniment lid-dipendenti tagghom 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".

j) The imposition of detention, in these cases is odious, if it does not give way to the payment of the maintenance due in terms of the contract or decision concerned. The fact that the first court condemned the appellant to two weeks detention, is effectively inflicting further hardships to Melissa Joan Bagley since the appellant, from prison, would not be able to pay the maintenance due.

k) Moreover, it has to be said that it is a fact that if the appellant is given a judgement of detention with regards to this appeal, he would not be able to pay the maintenance due.

Considers further .

This Court saw the evidence brought forward by the prosecution before the first Court namely the affidavit of **PC 995 Christian Magro**. This witness stated that on the 21st November 2017 at about 8.20p.m whilst he was at work at the B'Bugia Police station Melissa Joan Bagley reported that her ex husband Marcel Gervais Cishahayo failed to pay her maintenance in the sum of €300 for each of their children Shanon and David , having a total amount of €600 for the month of October 2017 from 1st October 2017 to 31st October 2017). He stated that the complainant Bagley presented a decree issued by the Family Court dated 30th April 2013 issued by Mr. Justice Robert Mangion. Wherein he confirmed that the Judged ordered Cishahayo to pay the sum of €600 per month to the complainant.

He further stated that he had contacted the appellant who said that he was given advice by his lawyer Dr Mark Sant so as not to reply to any questions put forward to him. Gervais was informed that charges would be issued against him.

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 October, 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 husband 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 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 October 2017 he answered in the negative.

The Court heard the parties make their final oral submissions during the sitting of the 16th October 2018.

Considered further,

The appellant contends that he should not be found guilty of the offence because he is in the physical impossibility to pay maintenance and honour the court decree since he is incarcerated. Appellant said that he knew that he had to make an application not alter the decree of the Family court and could not be exempt from paying such maintenance until the decree is altered though whilst admitting that he had not paid maintenance for the month of August 2017 said that he was doing his utmost to have the court decree changed. He also stated that the intention of the legislator for this law is so that pressure is put on the person ordered to pay maintenance to pay up and not cause delay in his payment however he said that this was a genuine case wherein the applicant is 63 years old and is jobless and thus not in apposition to honour his commitment. The appellant asked the Court to alter the judgment of the first court in the sense of the punishment imposed so as to give him the opportunity to find work and thus honour his commitments and obligations.

The Attorney General on the other hand stated that the Court is faced with a decree issued by the Family Court wherein the appellant was ordered to pay the sum of €600 maintenance to his ex partner the complainant per months for their two minor children and the appellant

was failing to honour such a decree. She also stated that until such order is altered or revoked the appellant has no alternative but to abide by the decree.

Considered further.

It is not contested 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 failed to pay maintenance for the month of October 2017. That although all this time has passed the appellant still has not met up with his obligation and this is why the complainant is insisting on these proceedings.

The Court underlines as pointed out by the lawyer of the appellant himself that the intention of the legislator when introducing this contravention was outlined 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 Micallef**¹" where reference was made to another case delivered by this same court in the names "**Il-Pulizija vs Publius Said**²" wherein the Court held that :-

"... l-ghan ewlieni tal-legislatur meta introduca 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."

The Court makes reference to the case delivered by this same court in the names "**Il-Pulizija vs. Jacqueline Zammit**³" whereby the Court insisted that "*l-ordnijiet tal-Qrati jridu jigu osservati skrupolozament u minghajr tfettieg u kavillar zejjed*"

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

² Delivered on the 25th September 2003

³ Delivered on the 15th March, 2003

In addition this Court makes reference to another judgement delivered by this same court in the names "**Il-Pulizija vs. Raymond Cutajar**"⁴ whereby the Court explained the following:-

".....Din il-Qorti wara li rat is-sentenzi (Pol. vs. Lawrence Cutajar² u Pul. vs. Carmelo Farrugia³) u wara li rat l-argumenti kollha migjuba mill-appellant fir-rikors tieghu hi tal-fehma li ma tistax taqbel mall-appellant . Ordni ghall-hlas ta' manteniment kontenut f'Digriet moghti mis-Sekond' Awla jibqa' validu ghall-fini w effetti kollha tal-art. 338(z) kemm il-darba ma jkunx irrizulta li dak id-Digriet gie espressament revokat jew altrimenti mibdul mill-istess Sekond' Awla u salv il-prova tar-rikonciljazzjoni jew ta' dikjarazzjoni ta' Qorti ohra kompetenti li dak id-Digriet jew dak l-ordni kien null."

For this contravention mentioned in article 338(z) of Chapter 9 of the Laws of Malta to subsist it is enough if the prosecution proves the following two elements namely:-

1. That there was a Court Order or a Court judgment (by producing a copy of this order unless there is agreement to it) where in the accused is bound to pay maintenance and this is found in page 20 et seq.
2. And that such maintenance was not paid within a period of fifteen days from when it is due according to that same order⁵.

The Court heard the defense lawyer state that the appellant has honored his obligation and paid Joan Bagley the amount due to her in lieu of maintenance for two children for the month of October 2017. The Court heard Joan Bagley confirm that she has no more pretensions against the appellant with regards to the case under review since he has been paid in full with regards to the sum due for the month of October 2017

In view of the above namely that the appellant has paid the maintenance due by him and having heard Joan Bagley state that she has no more pretensions left against the appellant

⁴ Delivered on the 2nd of September 1999

⁵ vide evidence of the same appellant given in the sitting of the 16th October 2018

state that such a contravention cannot be dropped by the *parte civile* since this offence is against the administration of Justice.

The Court is thus confirming that part of the judgment given by the first court with regards to guilt but revokes it with regards to that part of the judgment, wherein it condemned the appellant to a period of two weeks detention and instead discharges him on condition that he does not commit another offence for a period of one year from today in terms of section 22 of chapter 446 of the Laws of Malta.

(sg.) Consuelo Scerri Herrera

Judge

Franklin Calleja

Deputy Registrar