COURT OF CRIMINAL APPEAL

Judge Hon. Dr. Consuelo Scerri Herrera, LL.D., Dip Matr., (Can)

Appeal no: 139 / 2020

The Police

vs

Rade Djinovic

Today the, 10th Novemver 2020

The Court,

Having seen the charges brought against Rade Djinovic, bearer of Identity Card Number: 214407 L, accused before the Court of Magistrates (Malta):

That between January, 2018 and May, 2018 in the Maltese Islands:

By several acts committed by him, even if at different times, which constituted violations of the same provisions of the law, and were committed in pursuance of the same design, are deemed to be a single offence, called a continuous offence (Chapter 9, Article 18).

1. He failed to give Antonia Djinovic, the sum 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 on which according to such order or contract, such sum should have been paid (Chapter 9, Article 338 (z))

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 20th July, 2020, by which, the Court after having seen Articles 7, 18 31g and 338 (z) of the Criminal Code, Chapter IX of the Laws of Malta, found the accused guilty of the charges brought against him and condemns him to three months imprisonment which, by application of Article 28A of the Criminal Code, are being suspended for there years from today.

The Court explained to the defendant in ordinary language the significance of this judgement and of the consequences should he fail to observe the conditions imposed.

Having seen the application of the appellant Rade Djinovic filed on the 4th August, 2020, wherein he humbly requests that this Honourable Court to confirm that part whereby appellant was declaredguilty of the charges brought agaist him and cancelling that part where he was condemned to three months improsonment which by application of Article 28 A of the Criminal Code have been suspended for three years, and instead a far more lenient and just punishment which should fit better the merits of the present case.

That the appellant's grievance is clear and manifest and consists in the following:

That the punishment awarded against appellant is clearly unjust and excessive and makes no justice to the case at hand and this for several reasons which shall all be duly explained and expounded in the course of oral pleadings before this Honourable Court in relation to this present appeal and which included but are not limited to the following:

1. That the first Court little or none consideration to the fact that this was the first occasion where he failed to abide by the family court's order awarding maintenance;

2. That albeit that he was failing to honour the said court order, he was doing so only in part as he has to date never minimally failed to duly abide by that same order in that part that interests the minor children.

And several other reasons which shall be duly put forward as said in the course of the oral pleadings of this appeal.

Having heard the parties make their oral submissions during the sitting of the 27th October 2020.

Considers further,

The Court took note of the evidence given by **WPC 160 Nicolette Grech** in the acts of these proceedings by way of affidavit. She stated that on the 27th June 2018 Antonia Djinovic had gone to the Zejtun Police station to report that her husband the appellant had not passed on to her the maintenance that was due on the 28th of every month. The complainant explained that the last time that he had handled over the maintenance due to her was during the month of December 2017 and thus from 28th January, 2018 till that very day that she made this report her husband had defaulted on his obligation to pay maintenance. The witness explained that according to the decree number 1686/15 given by the Hon Mr Justice Robert Mangion, the appellant was condemned to pay his wife maintenance the complainant the sum of €200 on the 28th of every month.

She further explained that the appellant had told her that he had a problem to honour his obligation since he could not pay the sum of €500 to his kids and €200 to his wife together with effect payment for the education and health of his kids and meeting other expenses such as water and electricity bills. He thus explained

to her that he was honoring his obligation to pay maintenance for his kids but not for his wife.

The Court took note of the verbal dated 10th December, 2019 wherein the complainant assisted by Dr Kris Busietta confirmed that *seduta stante* the accused had passed on to the complainant the sum of five hundred euros (€500). Though in the sitting of 11th February the court was informed that the complainant was still owed the sum of five hundred euros (€500) .

The Court also noted the admission registered by the accused during the sitting of 27th January 2020 in the presence of his lawyer Dr Roberto Montaldo and thus three months after he was arraigned in court.

The Court further noticed that the accused declared in the sitting held before her on the 27th October 2020 and thus a year after being arraigned in court that there was still an amount of money due in relation to maintenance to the complainant.

Considers further.

The accused filed an appeal against the judgment delivered by the Courts of Magistrate on the basis that the punishment awarded by the first court *'was unjust and excessive and makes no justice to the case at hand.'* Likewise, he argues that that the accused should have been considered as a first time offender since he has a clean conduct sheet and thus the punishment awarded should have been a conditional discharge and not a prison sentence

As indicated in the judgment in the **names the Police vs Taofik Garuba Tajudeen Sanusi et**[1] **"***It is the accepted practice of this Court not to modify the*

[1] Decided on the 30th January 2003 by the Criminal Court of Appeal

punishment inflicted by the Court of First Instance unless this goes beyond the parameters of the law or it is manifestly disproportionate."

With regards to the term used by the defense in that the punishment given was 'manifestly excessive' reference is made to the case in the names **Il-Pulizija vs. Owen Ebejer**[2] wherein the court made reference to the judgment in the names **The Republic of Malta vs. Kandemir Meryem Nilgum and Kucuk Melek**[3] with regards to the definition of this term manifestly excessive and explained that:-

"*The phrase 'wrong in principle or manifestly excessive' has traditionally been accepted as encapsulating the Court of Appeal's general approach. It conveys the idea that the Court of Appeal will not interfere merely because the Crown Court sentence is above that which their lordships as individuals would have imposed. The appellant must be able to show that the way he was dealt with was outside the broad range of penalties or other dispositions appropriate to the case. Thus in Nuttall (1908) 1 Cr App R 180, Channell J said, 'This court will...be reluctant to interfere with sentences which do not seem to it to be wrong in principle, though they may appear heavy to individual judges' (emphasis added). Similarly, in Gumbs (1926) 19 Cr App R 74, Lord Hewart CJ stated: '...that this court never interferes with the discretion of the court below merely on the ground that this court might have passed a somewhat different sentence; for this court to revise a sentence there must be some error in principle." Both Channell J in Nuttall and Lord Hewart CJ in Gumbs use the phrase 'wrong in principle'. In more recent cases too numerous to mention, the Court of Appeal has used (either additionally or alternatively to 'wrong in principle') words to the effect that the sentence was 'excessive' or 'manifestly excessive'. This does not, however, cast any doubt on Channell J's dictum that a sentence will not be reduced merely because it was on the severe side – an appeal will succeed only if the sentence was excessive in the sense of being outside the appropriate range for the offence and offender in question, as opposed to being merely more than the Court of*

[2] Decided on the 9th July 2020 by the Criminal Court of Appeal
[3] Decided on the 25th August 2005 by the Criminal Court of Appeal (Superior Jurisdiction)

Appeal itself would have passed."2 This is also the position that has been consistently taken by this Court, both in its superior as well as in its inferior jurisdiction.

In this case the court took into consideration the admission of the accused registered before the courts of Magistrates, and took note of his clean conviction sheet but on the other hand took note of the fact that the accused appellant despite being given a court order to pay was still defiant a year later before this same court and thus persisted in not observing a court order and committing this contravention against the administration of Justice. This court cannot give the impression that its orders can be disregarded especially when in this case we are talking of maintenance. Ores so the court took into consideration the length of time that has passed since the due date when payment should have been affected and thus this does not augur well and certainly cannot be considered as a mitigating factor to reduce the punishment awarded by the first court.

The court took note that the punishment awarded was within the parameters of the law although within the maximum limit but due to the fact that the appellant showed no signs of remorse for this state of being so much so that affected no payment before this court considers the circumstances to be one that induces the court to confirm the judgment awarded by the first court in its entirety

(ft) Consuelo Scerri Herrera
Judge
TRUE COPY

Franklin Calleja
Deputy Registrar