MALTA

COURT OF CRIMINAL APPEAL

HON. MR. JUSTICE
JOSEPH GALEA DEBONO

Sitting of the 30 th September, 2004

Criminal Appeal Number. 120/2004

The Police.

(Inspector I. Spiteri)

vs.

Raymond Thomas Allen .

The Court,

Having seen the charge brought against the appellant Raymond Thomas Allen before the Court of Magistrates (Malta) as a Court of Criminal Judicature for having in his capacity of director of Gladiator Security Ltd (C27122) of 23 , Duke of Edinburgh Street, Hamrun, on the 17th. October, 2003, terminated the employment of Rennie Mercieca and George Falzon on grounds of redundancy without

giving them four weeks notice or full compensation in lieu thereof , by instead of paying them four weeks' pay , he paid only compensation amounting to two weeks' pay . The Court was requested to order the appellant to pay Rennie Mercieca and George Falzon the sum of LM118.50c each as compensation in lieu of the notice period (Sec. 5, 15,36 and 45 of Chapter 452);

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 24th. May , 2004, whereby the appellant was found guilty as charged and condemned to pay a fine (multa) of LM100 and ordered to pay the sum of LM118.50c to each of his above mentioned employees.

Having seen the application of appeal filed by appellant on the 31st. May, 2004, wherein he requested this Court to revoke the above mentioned judgement by declaring appellant not guilty and by acquitting him, and in case this plea was not accepted, to revise the punishment according to law.

Having seen the records of the case;

Having seen the minute entered in the records of this Court in the course of the sitting of the 24th. July, 2004, whereby appellant declared that he was not conversant with the Maltese language, nonetheless he was raising no objection to the fact that the judgement of the first Court was delivered in Maltese which in any case was also the language in which his appeal was filed.

Having also seen the minute of same date whereby the Court took note of the previous minute and ordered that all further proceedings in this case from this stage onwards be conducted in the English language.

Having heard the evidence for the prosecution and the defence;

Having seen the updated criminal conduct sheet of appellant filed in Court by the Prosecution as duly order to do by this Court;

Having seen that appellant's grounds of appeal are the following :- 1. that from the evidence tendered before the first Court by Prosecution and Defence it emerges clearly that there is a conflict of evidence with regards to the date when notice of termination of employment was given . In fact defence witness Nick Allen had explained that on the 10th. October, 2003, he had talked with various employees including the two employees in question and informed them that their employment was going to be terminated on grounds of redundancy and had proposed to them that they should by employed on a part-time basis. 2. That Nick Allen's evidence is confirmed by the various letters sent to the Labour Department wherein it was stated that the company had effectively given notice of termination of employment verbally about one week before the 17th.October, 2003 , when the weekly roster was issued . This roster is published on the notice board one week in advance, on a Friday. 3.That the first Court ignored this evidence and correspondence or did not give them the importance they merited, particularly in the light of the legal principle *"in dubio pro reo*". 4. Finally, even if this Court were to confirm appellant's guilt , the LM100 fine imposed by the first Court is an excessive one , once the appellant was acting in good faith , that there is no agreement on the date of termination of employment and even if one were to accept that the date of termination of employment was the 17th. October, 2003, this was only exceeded by one day ;

Duly considers as follows :-

That from the evidence tendered before this Court it resulted that Rennie Mercieca had been employed

with the company of which appellant is a Director on the 15th. October, 2001 whilst George Falzon had been employed on the 16th. October, 2001. Furthermore it resulted that the last day that they worked was the 17th.October, 2003. At that time both employees were being paid at a rate of LM118.50 every fortnight. When their employment was terminated, they were only paid the sum of LM118.50c in lieu of notice. However the Prosecution is claiming that a further LM118.50c is due to each of the employees as the notice period in their case was four weeks according to law, once that they had both been in employment for over two years.

The appellant however maintains that both employees had been told by Nick Allen that their employment was being terminated some time around the 10th. October, 2003 , i.e. before the lapse of two full years in employment. When Nick Allen testified before this Court , he stated that the company's employees were aware of the situation that if a film came to an end, the company's contract would be finished. So what happened was that they started to terminate employment on a last in, first out basis. He had informed Rennie Mercieca and George Falzon about the situation but obviously did not terminate their employment there and then . He had offered them the possibility to go "part-time" George Falzon accepted to come on "part-time" . They arranged all the paper-work , but when he issued the roster , as he did every Friday of the week, George Falzon called him and said he did not want to work for them any more. Mercieca did not accept to work on a part-time basis. Mercieca and Falzon were not terminated in August like other employees because of the last in, first out rule. The witness could not remember the exact date when he spoke to Mercieca and Falzon but it was in the beginning of September.

This however is denied by Rennie Mercieca and George Falzon . Mercieca testified that it was only on the 16th. October, 2003, when he was at home, that he

was informed on the phone by Nick Allen that his employment was going to be terminated the following day, i.e. the 17th. October, 2003. In fact he had worked on the 17th, this being his last day in employment .

Falzon testified that he could not remember when he had been employed with the company but he had been in employment for about two years. In the course of the last meeting for company employees, he had accepted to work on a part-time basis . When he had gone in to work on a Saturday evening , he realised that the notice on the board showed that he was only to work on three days. The roster was posted on the board during the day so he did not see it before as he was on night duty. He had not liked this and therefore decided not to accept part-time employment. He had then phoned Nick Allen and asked him how it had come about that he was only to work on three days a week as this had not been stated during the meeting. Allen had replied telling him not to worry as in that case the company was prepared to give him notice of termination of employment, pay notice money, and all leave entitlement as well as reference certificates. The meeting with Nick Allen took place some three days before the employment was terminated, but it could also have been a week before. They had to start on a part-time basis after the end of the week. The week ended on Friday. Allen had spoken to all employees including Mercieca and himself. He could not be sure if he had been in employment for a full two years when he was told to turn part-time.

In his letter to the Ministry of Social Policy dated 3rd. November, 2003, the appellant writing in his capacity of Managing Director of Gladiator Security Ltd . (page 5) stated that the two employees in question *"were given notice prior to their termination date. In fact during the last wave of terminations on 23rd. August , 2003 , all personnel were informed of the possibility that their employment could be terminated."* The letter goes on to state that *"When informed of their*

***termination date, the above personnel were offered a part-time employment with the company . At first Mr. George Falzon accepted but two days later he declined the offer*.”**

In a letter to both employees dated 19th. November, 2003 (pages 8 and 9) the appellant wrote “inter alia” that : “*You were given five days notice about your pending termination of employment.”* The letter also stated that a cheque drawn on the Bank of Valletta for LM118.50c was being attached as payment for two weeks in lieu of notice as required by law.

The Department of Labour contested appellant’s position in its letters dated 17th. November , 2003 (pages 6 and 7) and 16th. December, 2003 (page 10) ;

Considered that the whole issue revolves around the exact date when both employees were told that their employment was to be terminated . If the date was the 16th. October, 2003, as stated by Rennie Mercieca , who had been employed on the 15th. October, 2001, then a full four weeks’ notice would have been in order and if the employee was not allowed to work throughout this entire period he was owed compensation for the period he was not allowed to work. If on the other hand said employee was advised of the termination of his employment earlier, as Nick Allen maintains, then two weeks’ notice would have sufficed according to law , as the employee would not have been in service for a period of two full years .

In other words the question centres round the appreciation of the facts of the case made by the first Court. Now according to case law it is established practice in this Court that it will not disturb the evaluation of the facts of the case made by the first Court if it concludes that the first Court could have reasonably and legally arrived at the conclusion reached by that Court. In other words, this Court will not substitute the discretion exercised by the first Court but it will make a deep evaluation to determine

whether the first Court was reasonable in its conclusions. If on the other hand this Court finds that the first Court, on the basis of the evidence tendered before it, could not reasonably have reached the conclusion it arrived at, than this would be a valid if not impellent reason for this Court to disturb that discretion. (vide : *"inter alia*" Criminal Appeal : "The Police vs. Raymond Psaila et." **[12.5.94]; "**The Republic of Malta vs. George Azzopardi " **[14.2.1989]; "**The Police vs. Carmel sive Chalmer Pace**" [31.5.1991] ;** "The Police vs. Anthony Zammit**" [31.5.1991] and others.)**

That in the Criminal Appeal : "The Republic of Malta vs. Ivan Gatt**", decided on 1st. December, 1994 it was held that the function of this Court in all cases, where the appeal is based on an appreciation and evaluation of the evidence, is to examine the evidence , to see , even if there is contradictory evidence – as there normally is – whether any one version could have been freely and safely accepted and believed , without going against the principle that in doubt the Court should decide for the accused , and if such a version was believed , the function of this Court is to respect that discretion and that evaluation of the facts . For this Court to disturb that judgement , it has to be convinced that the first Court could not , under any reasonable circumstance , have given credence to the version it accepted.**

That this Court has in fact evaluated the evidence afresh and has reached the conclusion that the first Court could well have accepted the version tendered by the two employees in question and discarded that given by Nick Allen.

In fact , there was no formal notice in writing given by the employer in this case . Nick Allen's version is rather woolly and he is not precise with regards to the date when he is supposed to have verbally informed the employees in question of the company's intention to terminate their employment. The mere mooting of the POSSIBILITY **of termination way back in August,**

2003, even if this were to result , does not amount to notice of termination of employment according to law . Possible termination of employment is not actual termination. In other words the first Court was fully entitled at law to accept the employee's version and to discard that given by appellant and his son Nick Allen.

As such this Court finds no reason to reverse the discretion exercised by the First Court in its evaluation of the facts of the case and consequently in finding appellant guilty of the charge brought against him.

With regard to the punishment inflicted by the First Court, this is well within the parameters of the law and by no means excessive in the circumstances. The fact that in one case the time limit of two full years in the company's employment was exceeded by one day and in the other by just two days, does not in the Court's opinion warrant any reduction in the punishment. Had appellant heeded the repeated warnings given to him in writing by the Labour Department in the letters filed in the records and paid the balance of the notice money being claimed by the prosecution, he would have avoided being charged in Court and obviously fined for his non-compliance.

Accordingly the appeal is being dismissed and the judgement of the first Court confirmed.

< Final Judgement >

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