



COURT OF CRIMINAL APPEAL

**HON. MR. JUSTICE
DAVID SCICLUNA**

Sitting of the 7th December, 2007

Criminal Appeal Number. 298/2006

The Police

v.

Freddy Van Oevelen

The Court,

Having seen the charge brought against the said Freddy Van Oevelen before the Court of Magistrates (Malta) as a Court of Criminal Judicature that on the 28th August 2006 and the preceding weeks, in St. Paul's Bay and in other parts of these Islands, by means of several acts committed at different times, which constitute violations of the same provision of the law and which were committed in pursuance of the same design, by means of any unlawful practice, or by the use of any fictitious name, or the assumption of any false designation, or by means of any other deceit, device or pretence calculated to lead to

the belief in the existence of any fictitious enterprise or of any imaginary power, influence or credit, or to create the expectation or apprehension of any chimerical event, made gain of Lm388.45 to the detriment of Maltapost plc, Alfred Caruana, Paul Gauci, Paul Pace and Joseph Camilleri;

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 12th September 2006, whereby the said Freddy Van Oevelen was declared guilty of the charge brought against him and, after seeing sections 18, 308 and 309 of the Criminal Code, condemned him to the payment of a fine of one hundred and fifty Maltese liri (Lm150) to be paid within a month from said judgement;

Having seen the application of appeal filed by the Attorney General on the 25th September 2006 wherein he requested that this Court vary the decision of the Court of Magistrates in the sense that it confirms the finding of guilt but revokes the imposition of a fine and substitutes it with that of imprisonment in terms of law;

Having seen the records of the case and the documents exhibited;

Having heard submissions made by the prosecution and the defence;

Having considered:

Appellant's ground of appeal lies in the fact that the Court, on admission by the accused, found him guilty and imposed a fine instead of a prison sentence. Appellant says that while it is appreciated that the circumstances might have indicated a lenient approach, the first Court could not have just imposed a fine in the decision as formulated. In fact, no mention is made of the application of section 21 of the Criminal Code.

Insofar as punishment is concerned, the principle followed by this Court is that it would not normally disturb the

discretion used by the first Court in awarding punishment unless the punishment awarded is outside the parameters prescribed by law and there is nothing to indicate that it should be less than the punishment actually awarded. This principle applies equally both in the case of appeals by the person found guilty and in the case of appeals by the Attorney General.

Now the punishment applicable in respect of the charge brought against the accused and in terms of section 308 of the Criminal Code is that of imprisonment from seven months to two years. Furthermore, since respondent was charged with having committed a continuous offence in terms of section 18 of the Criminal Code, the Court may, in its discretion increase the punishment by one or two degrees, i.e. to say the terms of imprisonment prescribed in section 308 may be increased by one degree to a minimum of nine months and a maximum of three years, or by two degrees to a minimum of nine months and a maximum of four years. In other words, in condemning respondent to the payment of a fine, the first Court did not apply the punishment prescribed by section 308, that of imprisonment. Naturally, the first Court could have awarded a different punishment by reference to section 21 of the Criminal Code which makes it possible for a Court to award a punishment below the prescribed minimum “for special and exceptional reasons to be expressly stated in detail in the decision”.

Now, when respondent appeared before the first Court on the 12th September 2006, he pleaded guilty and bound himself to pay the victims within six months from that date. The first Court subsequently passed on to deliver judgement and, without making reference to section 21 of the Criminal Code, gave the following reasons for which it deemed it inappropriate to award the punishment of imprisonment:

“1. the fact that the accused co-operated with the prosecution from an early stage right from the beginning of the investigation;

2. the early plea of guilt registered in these proceedings during the first sitting;
3. the fact that the amount involved was minimal;
4. his relatively clean conviction sheet.”

In this Court’s opinion, if the first Court may have had in mind section 21 of the Criminal Code when it passed judgement, the reasons given were neither “special” nor “exceptional” and therefore did not warrant the application of the said section 21. On the other hand, the first Court could have awarded a prison sentence and suspended its execution or applied one of the means provided for by Chapter 446 of the Laws of Malta and, in either case, made an order for restitution (section 28H of the Criminal Code or section 24 of Chapter 446 respectively).

This Court must also further note that, although respondent bound himself to pay the victims within six months from the 12th September 2006, respondent was unable to do so as he was out of a job and it was only on the 25th May 2007 that he found full time employment with Hera Cruises as evidenced by the letter exhibited before this Court by respondent’s lawyer Dr. Leslie Cuschieri on the 22nd June 2007. Since then respondent lost that job for medical reasons but has now started a new job with the intention of earning sufficiently to pay off his debts. Indeed respondent has now passed on to his lawyer the full amount of Lm388.45 indicated in the charge for the purpose of it being distributed to respondent’s various creditors. Consequently the punishment imposed on respondent by the first Court is to be reformed to take into consideration, on the one hand the fact that it was not a legally correct punishment and, on the other hand the fact that respondent has now paid in full.

For these reasons:

The Court reforms the appealed judgement by revoking it insofar as it condemned the said Freddy Van Oevelen to the payment of a fine of one hundred and fifty Maltese liri

Informal Copy of Judgement

(Lm150) and instead, in terms of section 22 of Chapter 446 of the Laws of Malta, discharges him for a period of twelve months from today subject to the condition that he commits no offence during such period. This Court has explained to the said Freddy Van Oevelen in ordinary language that if he commits another offence during the period of conditional discharge, he will be liable to be sentenced for the original offence.

< Final Judgement >

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