



COURT OF CRIMINAL APPEAL

**THE HON. MR. JUSTICE
DAVID SCICLUNA**

Sitting of the 25 th January, 2012

Criminal Appeal Number. 306/2011

**The Police
(Major John Chalker)**

v.

Akturk Mehmet

The Court:

1. Having seen the charge brought against Akturk Mehmet before the Court of Magistrates (Malta) as a Court of Criminal Judicature on the request of the Employment and Training Corporation with having, on the 30th July 2008 and before that date, failed to notify the Employment and Training Corporation of having employed Mahir Can, a person who is not a citizen of Malta, in breach of Regulation 3(a) and regulation 10 of Legal Notice 110 of 1993 made under the Employment

and Training Services Act (Act XXVIII of 1990, Cap 343 of the Laws of Malta;

2. Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 28th June 2011 by which that Court, having seen articles [*recte*: regulations] 7 and 3(a) of Legal Notice 110/93, found the said Akturk Mehmet guilty of the charge brought against him and condemned him to a fine of one thousand one hundred and sixty-four euros (€1164);

3. Having seen the application of appeal filed by the said Akturk Mehmet on the 8th July 2011 whereby he requested this Court to cancel and revoke the appealed judgement whilst declaring him not guilty and acquitting him from all charges brought against him and from the punishment inflicted;

4. Having seen the records of the case; having seen appellant's updated conviction sheet; having heard submissions; having considered:

5. Appellant contends that he should not have been found guilty of the charge brought against him. He states that the prosecution had to prove that he was the operator and person responsible for the business of the restaurant, that he willingly employed a third country national and that he did so without informing the ETC. According to appellant, from the evidence produced it was clear that the identity of the owner, or operator or person responsible for the business of the restaurant was not established. Nor was it established that appellant was present at the time of the inspection and that he admitted employing a foreigner without informing the ETC. All that the inspector who gave evidence said was that he saw a person behind the counter whom he identified as Mahir Can serving and preparing food and without this person being registered with the ETC. Said inspector did not verify any official documents. Moreover, appellant says, the MTA representative indicated another person as the licensee. The prosecution did not produce the best evidence as to Mahir Can's nationality, said evidence being the

Expatriates and Citizenship Office. As to appellant, the only evidence produced was that he is self-employed and working at the restaurant in question.

6. This Court heard the witnesses anew. From the evidence tendered by P.L. Quintin Tanti on behalf of the Malta Tourism Authority and from the documents exhibited by him, it results that Bayrak Turkish Restaurant was licensed in the name of a certain Joseph Bonello on the 2nd November 2006. With effect from the 24th February 2010, the licensee was a certain Ejder Karadol and with effect from the 9th June 2010 the licensee was a certain Cemil Yildiz, while the name of the outlet was changed to Millenium Turkish Kebab House. This means that on the day to which the charge refers, the licensee was the said Joseph Bonello. From the evidence tendered by Fiorenzo Desira, a senior clerk working at the ETC and from the documents exhibited by him, it results that the appellant worked at the Bayrak Turkish Restaurant as a chef in the capacity of a self-employed person, while Mahir Can was unemployed.

7. Louis Buhagiar, an ETC inspector, stated that during an inspection of Bayrak Turkish Restaurant on the 30th July 2008, on entering they saw a person preparing food and serving a client. According to this witness, “we spoke to him, we took his particulars, he stated to be Mahir Can with date of birth 12th March 1984 of Turkish nationality, but he denied that he was working in that restaurant. He stated that he was just helping out... the owner of this restaurant whom we even took his particulars. His name is Mehmet Akturk ID card number 27827A.” Witness Buhagiar stated further that Mehmet Akturk, whom he identified as appellant, told them that he is “self-employed owner of the restaurant”. They spoke to appellant face-to-face at the restaurant. When asked during cross-examination what appellant said about Mahir Can, witness stated that appellant said that Can was just helping him out and that he was not employed with him in the restaurant.

8. So, contrary to what appellant says in his application of appeal, according to Louis Buhagiar the appellant was present in the restaurant on the day in question and, moreover, was spoken to by the ETC inspectors. Witness Buhagiar's affirmation that appellant said he was "self-employed owner of the restaurant" has not been contradicted. The fact that the licensee was a totally different person is irrelevant as it is well known that licensees of commercial outlets need not necessarily be the owner or the person who is responsible for the running of the business. Regulation 3(a) of Legal Notice 110/1993 clearly provides: "**Any person, hereinafter referred to as an employer, who employs another person whole-time, part-time or otherwise under a definite or indefinite contract or on probation, shall notify the Corporation of such employment as herein determined**" (underlining by this Court).

9. Now, although the first Court referred to regulations 7 and 3(a) of Legal Notice 110/1993, appellant was not charged with having employed a person who is not a citizen of Malta as per regulation 7¹ but with having failed to notify the ETC of his having employed a person who happened not to be a citizen of Malta. Consequently, for the purposes of the charge brought against appellant, it was irrelevant whether the person found working was a Maltese citizen or not. Thus, when appellant told witness Buhagiar that the person concerned "was just helping him out", appellant was thereby admitting that he had made no notification of employment to the ETC about said person.

10. Regulation 5 of Legal Notice 110/1993 provides: "**Any person performing work in a factory, office, shop or other place of work shall be deemed for the purposes of these regulations to be in employment or self-employed.**" This is a presumption *juris tantum*, that is to say a rebuttable presumption. Now, there is no doubt that the person noticed by the ETC inspectors preparing food and serving a client was "performing work". According to

¹ Regulation 7 provides, *inter alia*: "Any employer who employs any person who is not a citizen of Malta, other than such person as may be in possession of a work permit, shall be guilty of an offence...."

witness Buhagiar, appellant said that the person in question “was just helping him out”. In the Court’s opinion, this simple declaration by appellant does not rebut the presumption mentioned in regulation 5. Indeed, it does not constitute convincing and unequivocal proof that the person found by the ETC inspectors was not “performing work” for the purposes of Legal Notice 110/1993. Appellant’s grievance as to the finding of guilt cannot therefore be acceded to.

11. As already indicated, the first Court based its decision on regulations 7 and 3(a) of Legal Notice 110/1993, whereas it results that appellant was only charged with having been in breach of regulation 3(a). The punishment applicable in this case is therefore that contemplated in regulation 10 of Legal Notice 110/1993, that is to say a fine (multa) of not less than one hundred and sixteen euros and forty-seven cents (€116.47) and not exceeding one thousand and one hundred and sixty-four euros and sixty-nine cents (€1,164.69). In applying the punishment in respect of regulation 7, the first Court applied the minimum punishment applicable for a breach of that regulation, i.e. €1,164, which is almost the maximum punishment for a breach of regulation 3. This Court believes that in the circumstances the punishment has to be reviewed.

11. For these reasons, the Court varies the appealed judgement by confirming it insofar as it found appellant guilty of the charge brought against him in terms of regulation 3 of Legal Notice 110/1993, and revoking it insofar as the appellant was convicted to the payment of a fine (multa) of €1,164, and instead condemns him to the payment of a fine (multa) of €300.

Informal Copy of Judgement

< Final Judgement >

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