MALTA

COURT OF CRIMINAL APPEAL

THE HON. MR. JUSTICE
LAWRENCE QUINTANO

Sitting of the 11 th February, 2013

Criminal Appeal Number. 491/2011

The Police

Vs

Michael Leonard Paul Hammond

The Court,

Having seen the charges brought against the appellant Michael Leonard Paul Hammond [I.D card no. 22340 (L)] before the Court of Magistrates (Malta) as a Court of Criminal Judicature with having on the 3rd of June, 2011 at about 20.25 hrs at Coast Road, Limits off Naxxar and at Salini Road, near Kennedy Grove Gardens, Limits off St. Paul's Bay

1. whilst driving vehicle no. FBW-401 he crossed the continuous white lines;

2. whilst driving vehicle no. FBW-401 he failed to indicate when he was going to alter his direction or overtaking another vehicle;
3. whilst driving vehicle no. FBW-401 he failed to keep on the left hand side of the road;
4. drove vehicle no. FBW-401 at an excessive speed;
5. drove vehicle no. FBW-401 in a negligent manner;
6. drove vehicle no. FBW-401 in a dangerous manner;
7. drove vehicle no. FBW-401 in a reckless manner;
8. moreover he drove or attempted to drive or was in charge of vehicle no. FBW-401 on a road or other public place when he was unfit to drive through drink or drugs;
9. also drove, attempted to drive or was in charge of vehicle no. FBW-401 on a road or other place after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeded the prescribed limit;
10. He drove vehicle no. FBW-401 when he had his driving licence suspended and while he was so disqualified from driving a vehicle by the Criminal Court of Appeal on dates 09/02/2011 and 09/03/2011;
11. he drove vehicle no. FBW-401 without a driving licence;
12. thus he had drove vehicle no. FBW-401 when he was not covered by a policy of insurance in respect of third party risks;
13. he committed a crime which is punishable with imprisonment during the operative period of a suspended sentence imposed on him dated 09/03/2011;
14. also he was deemed to be a recidivist by two Court sentences given to him by the Criminal Court of Appeal dated 09/02/2011 and on 09/03/11, which such judgement has become absolute and cannot be altered.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 15th November, 2011, by which, the Court, after having seen Section 3(1) of Chapter 104, Sections 15(1)(a), 15(3), 15A, 15B and 15E of Chapter 65, Regulations 75 and 127 of Subsidiary Legislation 56.11 and Section 28B, 49 and 50 of Chapter 9 found the accused guilty of all the charges brought against him and thus bring into effect, in terms of Section 28B(1) of

Chapter 9, the judgement of imprisonment for a period of nine months delivered against him by the Court of Criminal Appeal on the 9th March 2011, which imprisonment shall be with effect from the date of this judgement.
Furthermore, having considered all the circumstances of the case and the accusations brought against him, it also condemned the accused Michael Leonard Paul Hammond to a fine multa of five thousand Euros (€5,000).

Finally, the Court, by applying Section 15H (2) of Chapter 65, disqualified the accused Michael Leonard Paul Hammond from possessing or from obtaining any driving licence for a period of two years, which period is to commence upon the lapse of all other period or periods of disqualification from possessing or from obtaining any driving licence to which the accused has already been found guilty prior to this judgement.

Having seen the application of appeal filed by appellant on the 25th November, 2011, wherein he requested this Court to revoke the appealed judgement and in default varies in the light of the punishment awarded taking into consideration article 28B(2)(a) and (b) of Chapter 9 of the Laws of Malta and/or providing any other sentence which such Honourable Court deems suitable and opportune.

That the grounds of appeal of appellant consist of the following:-

1. Whereas the punishment of inflicted by the Court of Magistrates as a Court of Criminal Judicature is excessive and this due to the fact that the First Court did not take into account the early admission of the accused of all the accusation against him, saving time and money of the Court, and he did not benefit from a mitigation in penalty;
2. Whereas the appellant understands that taking into account his early unconditioned admission, it would have been fair if the Court of Magistrates as a Court of Criminal Judicature, rather than ordering his suspended sentence to become operative, applied article 28B(2)(a) and (b) of Chapter 9 of the Laws of Malta, as had been suggested

by the appellants' defence lawyer and this in order for the appellant to have another time span of actual and effective control;

3. Whereas in the sentence Police (Spettur Jesmond Micallef) vs Mircea Remus Rostas, presided by Onor. Micallef Trigona on the 31st October 2011, the accused had also committed a crime during the operative period of a suspended sentence and was deemed to be a recidivist and upon the admission of the accused the Court decided in accordance with article 28B(2) of Chapter 9 of the Laws of Malta;

4. Whereas the appellant suffers from a personality disorder and resorts to alcohol as a form escapism with the hope of hindering such disorder;

5. Whereas in the judgement Police vs A.B. decided by the Court of Magistrates as a Court of Criminal Judicature on 11th October 1989, the Court considered that if it sentenced the defendant to imprisonment this would prevent him from undertaking a rehabilitation programme to free him from his problem of drug addiction;

6. Whereas in the judgement namely Police vs George Farrugia, delivered on the 18th January 2001, by the Onorable Vincent De Gaetano, the Court provided that even in the case of a person of an age which is not so young and who is maybe a recidivist, a window of opportunity can be emerged within the life of such person, through which the cycle of condemnation of imprisonment can be broken;

7. Whereas it is not the function of this Court as a Court of appellate jurisdiction to disturb the discretion of the First Court as regards the quantum of punishment unless such discretion has been exercised outside the limits laid down by the law or in special circumstances where a revision of the punishment meted out is manifestly warranted. At the moment the appellate is undergoing a rehabilitation programme with the hope and effort of overcoming his severe alcohol problem. A disturbance of such programme would set back all the efforts made in order to cure his problem;

8. Whereas the Court of First Instance failed to apply the disposition of Article 28E(2) of Chapter 9 of the Laws of Malta. The Court had to apply a prison sentence after

applying the rule contained in 17(b) of Chapter 9 of the Laws of Malta. This was also provided in the sentence Police vs Alexander Scerri 30/5/2011 Appeal Number 6/2001, Onor. Vincent De Gaetano;

9. Whereas article 382 of the Criminal Code provides that the Court in delivering judgement against the accused shall state the acts of which he has been found guilty, shall award punishment and shall quote the article of this Code or of any other law creating the offence. The Court of Magistrates as a Court of Criminal Judicature has quoted Subsidiary Legislation 56.11, Regulations 75 and 127; (as can been seen from the original copy of the judgement hereto attached and marked as Document A). In addition the appellant is invoking article 413(1)(b)(ii) whereby any judgement of the Court of Magistrates as a Court of Criminal Jurisdiction may be appealed against – the punishment awarded by the inferior Court is by reason of its quality or quantity, different from that prescribed by law for the offence for which the party convicted has been sentenced. In the sentence Police vs Karmenu Attard delivered on the 28th April 1995 by Onor. Vincent Degaetano LL.D, the Court stated that tali nullita tista tigi ssollevata biss mill-imputat. The Court is here referring to the nullity based on Article 413(b)(iii), and provides that hi konsegwenzjali ghan-nuqqas ta' indikazzjoni korretta fis-sentenza ta' l-Ewwel Qorti ta' l-artikolu tal-ligi li jikkontempla r-reat li tieghu persuna tkun giet misjuba hatja minn dik il-Qorti.

10. Whereas article 382 of the Criminal Code provides that the Court in delivering judgement against the accused shall state the acts of which he has been found guilty, shall award punishment and shall quote the article of this Code or of any other law creating the offence. The Court of Magistrates as a Court of Criminal Judicature in her sentence provided that "having seen the Police conduct exhibited by the prosecution as well as the Breath Alcohol Test Record issued by the Police dated 3rd June 2011 at 21.00 hrs which indicated that his level of intoxication was below the prescribed limited of 35 mg, this being 81mgs, article 15B (1) of Chapter 65 provides that no person shall drive, attempt to drive or be in charge of a motor vehicle or other vehicle on a read or other public place after

consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit;

11. Whereas without prejudice to the above, the Court of Magistrates as a Court of Criminal Judicature has made a wrong interpretation and a wrong or incomplete application of the law and also a wrong interpretation of the facts and this despite an early admission of guilty;

12. Whereas as explained by David Thomas in his book namely Principles of Sentencing (Heinemann, London, 1979): "The term "inadequate recidivist" is used to describe an offender, middle aged or older, who has over a long period of years committed numerous offences, not in themselves in the first rank of seriousness, and has served many terms of imprisonment as well as experiencing an extensive selection of other penal measures. Faced with such an offender, the Court will usually grasp any chance of breaking the cycle of offence and sentence, even if the chances of success are obviously limited….As in the case of the intermediate recidivist there must be some prospect of success, however remote" (pp. 22, 23);

13. Whereas in accordance with Blackstone's Criminal Practice 2004 "However now our powers are somewhat difference, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such, it is a reaction which can be produced by the general feed of the case as the Court experiences it".

14. Whereas Van Dijk et's book page 973, it has been provided that as is made clear in the second sentence of the first paragraph, exercising this right of appeal shall be governed by law. In other words, the modalities of the review are left for determination by domestic law. The Explanatory Report adds to this that the review may either concern a review of findings of facts and questions of law,

or be limited to question of law, or be limited to questions of law. According to the Court in the Krombach Case, states have a wide margin of appreciation to determine how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised. The Court set forth that "thus, the review by a higher Court of a conviction or sentence may concern both points of fact and points of law or be confined solely to points of law. Any restrictions contained in domestic legislation on the right to a review guaranteed by this provision must, by analogy with the right of access to a Court embodied in Article 6 para 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right". It may be decuded from this that the Court will not accept a restricted form of review of questions of law which cannot result in an annulment or alteration of the conviction or sentence concerned as sufficient".

15. Whereas in accordance to Article 392A, the Court of Magistrates has to apply *mutatis mutandis* the disposition as provided in Article 453(1) which provides that if the accused in answer to the question prescribed under article 450 states that he is guilty of the offence the Court shall in the most solemn manner warn him of the legal consequences of such statement, and shall allow him a short time to retract it, but if the accused persists in his statement, such statement shall be recorded and the Court shall proceed to pass on the accused such sentence as would according to law be passed on an accused convicted of the offence. As provided in the judgement Police (Spt. M. Sammut vs Gary Grey), in the Court of Criminal Appeal on the 10/01/2003, in order for the rights of the accused to be safeguarded, it has to result from the acts and from the verbal of the sittings in which the examination of the accused had occurred. Lack of adherence to such formality will bring along the nullity of the sentence.

Submission by the Attorney General

The Attorney General submits that the application of appeal is null because the appellant ahs failed to include a summary of the facts.

The defence submitted both orally and in writing that once appellant had filed a guilty plea, then it was not necessary that a summary of the facts should be included.

This Court holds that the requirements of section 419 should be strictly adhered to and even when a guilty plea is filed an appellant is still bound to include a summary of the facts. Section 419 makes no exceptions and though the charges should prove to be a reliable guide to the basic facts, the summary cannot be dispensed with. After all, what has really happened at the particular time when the crimes and/ or contraventions have been committed go beyond the limited phrasing of the charges.

Hence the Court is accepting the plea of the attorney general that the appeal is null because the appellant has failed to abide by the requirements of the law. However, the Court is still going to analyse all the submissions submitted by the defence to see that justice is done in the most appropriate manner.

In spite of the fifteen paragraphs of this appeal, the basic submission remains about the penalty imposed by the Court of Magistrates as a Court of Criminal Judicature in the judgment delivered on the 15th November 2011 entitled 'The Police vs Michael Leonard Paul Hammond.' However, there are some submissions that have to be dealt with and the Court is dealing with these first.

In paragraph 13, the appellant refers to what Blackstone's Criminal Law Practice (2004) says about a Court of Appeal having a 'lurking doubt'. With all due respect, the appellant has filed a guilty plea to all the charges. There be no 'lurking doubt' at the appeal level once one has filed 'a guilty plea' to **all** the charges. '*Multo magis' there can be no doubt at all* when the records include three affidavits and a record of the level of alcohol in appellant's body at the time when the Police intervened. If the appellant had doubts, then he should have challenged

them in the Court of Magistrates. Hence the Court is dismissing this submission.

In paragraph 14, the appellant refers to what the author Van Dik says on page 973. The name of the book is not given. At the end of the paragraph the appellant quotes: 'It may be deduced from this that the Court will not accept a restricted form of review of questions of law which cannot result in an annulment of the conviction or sentences concerned as sufficient.'

Understandably the Court referred to here is the European Court of Human Rights. The Court of Criminal Appeal of Malta has quashed, revoked or reformed judgments from time to time. So this Court does not see any reason why paragraph 14 has been included in this application.

In paragraph 9, the appellant submits that the Court quoted only Subsidiary Legislation 56.11 and regulations 75 and 127. Hence the judgment is null.

However, in its judgment the Court of Magistrates did not quote these sections only. In fact, it referred to section 3(1) of Chapter 104, sections 15(1)(a), 15(3), 15A, 15B and 15E of Chapter 65 – Regulations 75 and 127 of subsidiary legislation 65.11 and sections 28B, 49 and 50 of Chapter 9. These sections cover the charges made and hence this Court is dismissing any nullity plea filed by the defence because the judgment fully complies with section 382 of Chapter 9.

In the same paragraph – paragraph 9 - the appellant refers to section 413(1)(b)(ii). However, this section can be relied on by the Attorney General when he files an appeal and not by the accused. So the Court is dismissing the plea which appears as part of paragrpah 9 starting with the words 'In addition.....il-Qorti'.

In paragraph 10, the appellant quotes these words from the judgment 'his level of intoxication was below the prescribed limti of 35 mg, this being 81 milligrams.'

However, on page 27 of the records of the case, the Magistrate in question corrected the word 'below' by substituting it with the word 'above'. Hence the Court is also dismissing the pela in paragraph 10.

In paragraph 11, the appellant submits that the Court of Magistrates as a Court of Criminal Judicature has made a wrong interpretation and a wrong or incomplete application of the law. However, the appellant fails to indicate where the Court made a wrong interpretation of the law or an incomplete application of the law (whatever the latter phrase may mean). Once a guilty plea was filed, all the Court of Magistrates as a Court of Criminal Judicature had to do was to pass on to judgment. So the Court is also dismissing this totally unsupported plea in paragraph 11.

In paragraph 15, the appellant refers to section 392A of the Criminal Code. Now, according to the records of the case, on page 23,

'the accused admitted all the charges being brought against him. However, due to personal circumstances he requested that the Court apply section 28B subsection of Chapter 9.'

So there is no doubt that the guilty plea was registered. Moreover, the Court referred to the guilty plea in its judgment , to the warning of the Court about the consequences when one files such a plea, and to the time given to the defendant to think about the guilty plea. Hence the Court of Magistrates followed sections 392A and 453 to the latter and so this Court is dismissing the submission of a nullity of the judgement which appers in paragraph 15.

The rest of the paragraphs – namely 1, 2, 3, 4, 5, 6, 7, 8 and 12, the appellant makes submission about the penalty meted out. In paragraph 8, he submits that the Court should ahve applied article 28E(2) of Chapter 9. But the

Court of Magistrates as a Court of Criminal Judicature could not do so at all as one of the conditions for the application of section 28E is that a suspended sentence can be imposed. Now applicant pleaded guilty to being a recedivist and the law expressly prohibits the imposition of a suspended sentence when the person pronounced guilty is a recidivist. (28A(7) Chapter 9). Hence thsi Court is dismissing this plea.

In the other paragraphs, the appellant refers to other judgments which, according to him, gave the guilty party a window of opportunity.

This Court has had a close look at the criminal record of the appellant. This stretches to eight pages which reveal that the appellant has been given chances time and again. Moreover, the charges in connection with this appeal refer to the 3rd June 2011. On the 9th March 2011, the appellant was found guilty of infringements of traffic laws and had his suspended sentence reduced by three months and his driving licence was withheld for two years.. So within less than three months, the appellant faced fourteen charges and one of them is that he was driving without a driving licence which had been suspended for two years.

Appellant also refers to personal problems. In that case, the Court has to consider the safety of other drivers or of people who are quietly walking along the street. One does not solve one's personal problems by disobeying the law or by wilfully disobeying a Court order.

Conclusion

(1) The Court upholds the plea by the Attorney General that this application of appeal is null as no summary of the facts has been included.

(2) However, the Court has examined all the pleas to ensure that justice is done and dismisses them all.

(3) In view of the record of the appellant, this Court is confirming the judgement delivered on the 15th November 2011 that is (a) the bringing into effect of the condemnation to a term of imprisonment of nine months which was imposed on the appellant on the 9th March 2011; (b) the condemnation to pay a fine (multa) of five thousand Euros (€5000); the prohibition from obtaining any driving licence for a period of two years which period is to commence upon the lapse of all other periods of disqualification from possessing or from obtaining any driving licence to which the accused has already been found guilty prior to today.

< Final Judgement >

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