



COURT OF CRIMINAL APPEAL

**THE HON. MR. JUSTICE
LAWRENCE QUINTANO**

Sitting of the 15 th March, 2013

Criminal Appeal Number. 98/2012

**The Police
(Insp. Angelo Gafa`)**

Vs

**Joseph Attard
Ilir Pelinku**

The Court,

Having seen the charges brought against the appellants Joseph Attard [Identity card number 371084 (M)] and Ilir Pelinku [identity card number 19743 (A)] before the Court of Magistrates (Malta) as a Court of Criminal Judicature with having in Mosta and other places in these Islands on the 16th July 2008 or in the preceding days:

gave or agreed to give or offered or proposed to another person, directly or indirectly, that such other person should give or agree to give or offer any gift or

consideration to Saviour Darmanin, Marsaxlokk FC player, as an inducement or reward for doing or from omitting from doing, or for having, after the commencement of the Prevention of Corruption (Players) Act, done or omitted from doing any act which, if done or omitted, would be in contravention of sub article (1) or (2) of same act;

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 20th February 2012, by which, the Court, after having seen articles 3 and 9(1)(a) of Chapter 263 found the accused guilty and condemned them each to a fine of 500 Euros and a term of imprisonment each of six months which are suspended for one year by application of Article 28A of the Criminal Code.

The Court duly explained to the accused their responsibilities according to this judgement.

Having seen the application of appellant Joseph Attard filed on the 29th February 2012, wherein he requested this Court by therefore not finding him guilty of the charge preferred against him and acquitting him from the said charge and from the punishment inflicted upon him or alternatively vary the same judgement with reference to the punishment inflicted by inflicting on the appellant a lesser punishment.

Having seen the application of appellant Ilir Pelinku filed on the 27th February 2012, wherein he requested this Court to revoke the appealed judgement in virtue of which judgement the appellant was found guilty of the charges made against and condemned to a fine of Euro 500 and to a term of imprisonment of six months suspended this term for one year from the date of that judgement by application of article 28A of the Criminal Code, there for request the Court to find appellant Ilir Pelinku not guilty of the charges brought against him and as a consequence to liberate appellant from all imputations and guilt.

Having seen the records of the case.

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Having heard Counsels' submissions during the hearing of the

Now therefore duly considers.

That the grounds of appeal of appellant, Joseph Attard consist of the following :

That the charge against the same appellant could have never resulted and this due to the lack of evidence.

The evidence brought forward by the prosecution were call logs taken from mobile phones which were seized from the appellant, the co-accused Pelinku and the witness Saviour Darmanin besides the testimony of the Saviour Darmanin himself and the statement of Mr. Attard.

A cardinal rule in criminal proceedings is that the prosecution must prove beyond reasonable doubt that the person charged for any offence is indeed guilty of that offence. Surely the prosecution did not succeed in producing such proof.

1. In this case the prosecution based its evidence on the call logs and emphasized that indeed there had been calls between the appellant and Saviour Darmanin. The inspector testified that a phone call had been made between these two persons on the eve of the match in question. It is a well known fact that like any other community the football community is made up of a body of persons like referees, players, coaches and so on. Furthermore, in a Community as small as Malta and the fact that everyone knows practically everyone does not constitute in itself proof that the appellant called Mr. Darmanin to bribe him. So one has to see whether this telephone call made by a referee to a player does indeed constitute proof beyond reasonable doubt, since in his deposition Mr. Darmanin stressed on the fact that he was the coach of the appellant's son.

That furthermore, the prosecution did not bring proof of the contents of such call logs. On the other hand in the

logs which contained the messages received by the appellant no proof on the case in question was found.

2. That the testimony of the person who was allegedly bribed thus Saviour Darmanin, did indeed vary. Mr. Darmanin's testimony is not consistent and this when while testifying on the 25th May 2009 he specifically said that Mr. Attard had proposed to him that by losing in the above-mentioned match by a certain margin of goals could earn him money which involved a few thousand Euro. Also, when he was asked whether a specific amount was offered to him he replied in the affirmative. He also said that Mr. Attard had specifically told him to play badly and that he had to let in a certain number of goals.

On the other hand when he testified on the 17th January 2012, Mr. Darmanin said that on the day he met Mr. Attard it was prior to the game and confirmed that he did not know if he was to play or not the following day as the line up was decided just before the game. He also added that Mr. Attard did not specifically offer him money but just made reference to the U-Bet about the match to be played.

That furthermore Mr. Darmanin said that when he was being interrogated at the police headquarters he was shown the statement of Mr. Attard. He continued that it was not read out to him word by word but a rephrase was made although later he was given the opportunity to read it.

That Mr. Darmanin's testimony was even considered conflicting by the prosecution itself when the prosecution made a "verbal" where it requested the Court to warn the witness given the gross disparity between the two times he testified (a fol. 143). Thus, the prosecution itself affirmed that there is conflicting testimony as to where Mr. Darmanin, the prime witness, is involved.

That from the conflicting versions of the two testimonies given by the prime witness Mr. Darmanin and furthermore from the verbal made by the prosecution with regard to

the testimony given by the same, it is clear that this prime witness was not credible at all in his testimony.

That from the evidence brought forward by the prosecution with all due respect, the prosecution did not bring sufficient evidence so as to go beyond reasonable doubt as seen above starting from the prime witness brought forward and ending with the logs taken from the appellant's mobile phone.

3. That in addition Mr. Attard released a statement to the Police which was released without him being assisted by legal counsel before releasing the statement and without the prosecuting Officer having before the taking of the statement informed the accused of his rights to contact his lawyer of choice. This omission in view of recent judgments given on similar issues has rendered the release of the statement unlawful (vide *The Police vs Amanda Agius*, Civil Court, First Hall in its Constitutional Jurisdiction per Judge Anthony Ellul, 23rd February 2012, *The Police vs Tyrone Fenech*, Civil Court, First Hall in its Constitutional Jurisdiction, per Judge Anthony Ellul, 23rd January 2012).

This ground of appeal concerns the punishment inflicted on the appellant.

That whilst it is not being contested that the punishment inflicted is one within the parameters of the law, however when one considers the circumstances of the case in question it is evident that the punishment is exaggerated. One must keep in mind the facts of the case in question and without prejudice to the above mentioned the only witness produced by the prosecution gave conflicting testimonies on the two occasions he took the witness stand. That in addition the Court must take into consideration that the appellant has a clean conviction sheet (a fol. 5).

That the grounds of appeal of appellant, Ilir Pelinku consist of the following:

1. It is perhaps the ABC rule in Criminal proceedings that it is the prosecution that must prove, beyond reasonable doubt that the person charged for any offence is indeed guilty of that offence and therefore that the accused may well remain silent during the whole length of the criminal proceedings and will not be found guilty by a Court of Criminal Judicature unless evidence based on facts lead to the moral conviction of guilty by the presiding Magistrate.

2. In the case under consideration the accused was mentioned by absolutely none of the witnesses called upon by the prosecution to tender evidence against him in this case.

3. The only evidence that the Police had in their hands were the two statements issued by the accused and the evidence given by the prosecuting officer Inspector Angelo Gafa who could only and indeed did refer to the contents of the accused statements. In that both statement were taken in an unlawful manner they could not and should not have been even considered by the Court of Magistrates, indeed that Court expressly states at page 3 of the judgment and at paragraph two thereof that the Court “cannot base a conviction solely on a statement released by an accused who was not afforded the right to consult and seek advice from a lawyer prior to his interrogation by the Police”. At this stage the Court of Magistrates also declared that the statement/s released by co-accused Joseph Attard could not be relied upon as this was basic Criminal Law.

4. The sole reason why the Court of Magistrates found applicant guilty of the charges against him was solely on one telephone call which allegedly was made by the accused to the co-accused when this telephone call was neither recorded nor was in any way its contents ever revealed. Unlike the various sms messages that the Police produced as evidence and which messages were taken from a number of mobile phones which were seized by the Police from the hands of both accused Pelinku those of accused Attard and those of Mr. Saviour Darmanin. In all these sms messages never was any mention made of the applicant still less did the accused make any sms messages except several months before

the date of the relative fixtures and which messages contained absolutely nothing which could in any way incriminate Pelinku.

5. The Court of Magistrates seems to have been morally convinced and beyond reasonable doubt that a telephone call made from the residence of a house which is as every other house all over the world is open to any number of people who frequent that house particularly when in one's house one lives with one's wife and children and when as a coach Mr. Pelinku's house was open to any number of players and committee members of the club that hired him as its coach, Mr. Pelinku when arrested and charged had been the only coach of Lija Athletics Football club for around a year with his team as other football teams consisting of some twenty players and reserves besides the normal complement of a football club committee of around fifteen members.

6. It is inconceivable with respect to find that a person is guilty of the charges brought against that person solely on account of a co-accused having received a telephone call from the residence of that person. Not even in a Court of Civil Jurisdiction would the mere fact of a telephone call been made when the contents of that telephone call are absolutely unknown to cause a Judge to consider that such call is evidence enough to find for a plaintiff or a defendant.

7. It is an acknowledged fact that the football community in Malta like every other community on this island is made up of players, committee members, officials, club officials, referees and lines man and football reporters/journalists. Would, one may ask any of these persons, having made a telephone to a referee prove, beyond reasonable doubt that telephone call was made for the sole purpose of corrupting or suborning that referee to act against his duty or to commit bribery, not in a million years!

8. Finally it is also inconceivable again with all respect due to the Court of Magistrates how even during the oral pleadings made by the prosecuting Officer before that Court not even the prosecuting officer did make reference or insist on that one call during his oral pleadings something this that would certainly have been mentioned

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by the prosecuting officer if indeed that call was a fact and as such corroborative evidence which like any other evidence before a Court of Criminal Judicature should pass the test of “beyond reasonable doubt”.

Having heard the submissions made by the Prosecution and the Defence

Has considered

That this Court does not disturb the appreciation of the facts made by the Court of Magistrates (Malta) as a Court of Criminal Judicature as long as the sentence is one that is legal and reasonable.

The Court has reviewed the evidence.

In particular, the Court refers to the statement made by Joseph Attard on the 16th September 2008 where he refers to a meeting between him and Saviour Darmanin who used to keep the posts for Marsaxlokk Football Club. Saviour Darmanin had immediately refused the offer of a sum of money if he helps ensure a defeat for Marsaxlokk by a three-goal margin. In the same statement Joseph Attard also referred to co-accused Pelinku’s role in the affair. (pages 23-25).

In another statement made on the 16th September 2008, Ilir Pelinku described how he had received a phone call from a certain Edward who is an Albanian. This Albanian promised him a sum of €5000 if Marsaxlokk were to lose by a three goal difference against a Croation team. Joseph Attard then informed him that Saviour Darmanin had not accepted the offer. He then passed on the information to Edward who did not pursue the matter any further. (page 28). He denied having approached any other player.

Ilir Pelinku made another short statement on the 2nd November 2008. He confirmed that a particular telephone number was linked to Albania and his last contact with the Albanian was on the 16th July 2008. He informed the

Albanian that the deal had fallen through. He also confirmed that on the 16th July 2008 he had also phoned Joe Attard from his mobile. The latter informed him that Saviour Darmanin had not accepted the proposal.

On page 36 there is a list of incoming calls for called number 79706768. This number belongs to Mr. Joseph Attard (see page 26). On the 16th July 2008, there was a call at 7.02.57 and a disconnect time at 07.05.04 from phone number 21524285. [This number is registered on a certain Maryanne Vella, holder of identity card number 797659 (M). It was installed at 247, Triq il-Kunsill tal-Ewropa, Mellieha on the 29 (month not mentioned) 1997. This address is the residence of Ilir Pelincu]. On the same date at 08.17:25 there was another phone call from 79639054 – the mobile which belongs to Saviour Darmanin. (See page 17).

Messages coming from phone number 79962842 to Joseph Attard's number 79706768 appear on the 3rd, 7th, 9th and 10th July (page 37).

There were messages from Mr. Attard's phone number to Pelinku's mobile on the 3rd and the 9th July 2008. There were two further messages from Mr. Attard to Mr Pelinku on the 16th and the 17th July 2008. (See page 40).

One witness for the prosecution was Dr Joseph Mifsud who presented a copy of the registration of Saviour Darmanin as a football player with Marsaxlokk FC. He also confirmed that Mr Joseph Attard was a referee with the Malta Football Association and that Mr. Pelinku had the right to coach a club. When contacted by the President of the Croatia Federation he informed the latter that someone from abroad had contacted a person in Malta to speak to players of a Maltese club to influence the result.

The second witness for the Prosecution was Saviour Darmanin who gave evidence on the **25th May 2009**. He confirmed that he had received an SMS on his cell phone 79639054 from Mr Joseph Attard on the day before the

match. The witness met Joseph Attard and the latter asked him whether he would have liked to earn some money (a few thousand Euros) in connection with the match which was going to be played on the following day. Mr Joseph Attard mentioned the betting and a margin of goals. Mr Attard promised a specific amount of money. Mr Attard had instructed him to 'play badly' and to ensure that Marsaxlokk were to lose by a margin of goals. The witness confirmed that he had not accepted the deal and that he had informed the club president about the matter. The club president had called a players' meeting and warned the team about any betting. (See further down)

Anthony Bonnici, junior executive with GO Mobile, testified the documents show a list of phone calls and sms's that cover the period from the 1st July 2008 to the 17th July 2008.

Charmaine Galea Triganza, on behalf of Go Mobile, that the registered owner of phone number 21524285 belongs to a certain Maryanne Vella (ID 797659(M)).

Robert Micallef, President of Marsaxlokk Football Club, testified that Saviour Darmanin had called on his office looking rather confused. The latter told him that he had been approached and offered money if the Marsaxlokk team loses by a margin of three goals. Saviour Darmanin also informed him that he had refused the offer and that the contact person on that occasion was Joseph Attard.

Mr.Martin Bajada, an expert appointed by the Court, testified on the 15th March 2010. He confirmed his report based on the contents of four mobile phones.

The Attorney General sent the list of the relevant articles in connection with Chapter 263 on the 24th May 2010. The articles are: 3(3) and 9(1)(a) of Chapter 263 and articles 23 and 533 of the Criminal Code. (page 131).

The Prosecuting Officer declared that he had no further evidence to produce on the 23rd May 2011.

Saviour Darmanin testified once again on the **17th January 2012** (2 years and nearly eight months after he had testified for the first time). (page 144). He confirmed that the meeting with Mr.Attard took place prior to the game when the witness was not sure whether he was going to be in the line up or not. The witness also said that he had received an sms from Mr Joseph Attard on the day preceding the match. They had eventually met at Mosta where Mr.Attard had informed him that there were lots of people who made lots of money form betting. The witness told Mr.Attard that he was not interested in such affairs. He even switched the conversation from this matter to talking about Mr.Attard's son.

At one stage, the Prosecution referred to the transcript on of what the same witness had testified (on page 49). When the Prosecution read out ten lines from his previous testimony, the witness confirmed it. He added that when he was being interrogated at the Police Headquarters, he was shown the statement that Mr.Attard had made. The witness added this:

'The way Attard referred to the money made through U-Bet I understood this consisted of an offer.' (page 146 four liens from the bottom of the page.)

On page 147, the Prosecution once again read out another twenty (9 + 11) from the previous testimony. At this stage the witness testified as follows:

'At this stage I refer to the fact that when I had been shown Mr Attard's statement, I confirmed to myself that what he said was confirming what I understood.'

The witness also affirmed that Mr.Attard had spoken about the goal margin by which Marsaxlokk had to lose. They had spoken quite close to the technopark and the conversation did not last more than five minutes. Mr Attard had urged him to play badly; at least, that is what the witness understood from the context. At the time the witness was Marsaxlokk's first goalkeeper.

The Court is now dealing with the two appeal applications.

The appeal by Joseph Attard

Mr Attard's first found of appeal is what he describes as lack of evidence and deals with it under three heads.

In particular, he finds Saviour Darmanin's testimony as conflicting and hence unreliable. The Court thinks otherwise. When a person is testifying, one can believe all he says, part of what he says or nothing at all. This Court believes that when testifying on the 25th May 2009, Saviour Darmanin was telling the truth. When he testified more than two years later, he seemed to be a little nebulous but the questioning by the Prosecution brought him back to his original version. In fact, the Court does not see any clear conflicts in the evidence and the inconsistencies pointed out by the defence are not serious enough to undermine the credibility of this witness. Nor does the Court think that Mr. Attard's had any significant effect on the story line given by Saviour Darmanin. After all, he said that the statement only confirmed what he had been thinking. Finally, it is significant that the same witness had also informed the president of the Marsaxlokk football club about the attempted bribery. Nor is the credibility of the witness shaken.

According to section 638 (2) of Chapter 9, the testimony of one witness, if believed by those have to judge on the facts, is enough.

The appellant also refers to the call logs between Saviour Darmanin and Joseph Attard which he dismisses as insufficient by way of evidence as we do not know the call contents. The Court considers this as corroborative evidence that the meeting had taken place.

As to the statement that Mr Attard acknowledged that he had actually been involved in the attempted bribery, it is true that several Constitutional Court decisions about statements released by the accused without the assistance of a lawyer have been

considered as a breach of Article 6 of the European Convention on Human Rights. However, the last Constitutional Case decision about this point was delivered on the 8th October, 2012 in the case Stephen Muscat vs Attorney General. This decision took a different line and found no breach. Moreover, the provisions on confessions in the Criminal Code still stand. Hence such evidence is still admissible.

But even if one were to ignore Mr.Attard's statement completely, this Court is convinced that there is enough evidence which establishes Mr.Attard's guilt beyond reasonable doubt.

Hence the Court is dismissing the first ground of appeal.

The second ground of appeal.

The appellant submits that the punishment is one within the parameters of the law and that the appellant has a clean conviction sheet.

The Court is considering the attempted bribery of a football player as extremely serious. The penalty imposed is a reasonable one even if one were to apply 41(1)(a) of Chapter 9.

Hence the Court is dismissing both grounds of appeal.

The Appeal by Ilir Pelenku.

The submissions made by the defence may summarised as follows: (i) The statements made by the appellant should be discarded; (ii) There is no evidence which proves guilt beyond a reasonable doubt.

Like the Court of Magistrates, this Court is not relying on the statement made by Mr.Joseph Attard as it is prohibited from doing so by section 661 of Chapter 9 which states:

'A confession shall not be evidence except against the person making the same, and shall not operate to the prejudice of any other person.'

The defence submits that the two statements made by Ilir Pelenku should not be taken into consideration because of the Constitutional Decisions about breaches of Article 6 when statements are made to the Police without the assistance of a lawyer.

About this submission reference is made to the paragraph in bold, seven paragraphs above this one. So those statements are not 'illegal' as described by the defence.

Then the defence dismisses the 'first phone call' on page 36. While it is true that the contents of the telephone call have not been revealed, it is a rather strange probability that this phone call is made on the 16th July 2008, the day before the match in question and this date coincides exactly with the date of the meeting with Mr Joseph Attard given by Saviour Darmanin. And then Saviour Darmanin called Mr.Attard within less than an hour after the phone call from 21524285 had been answered by Mr Attard which phone call finished at 07.05.04. This telephone call should not be treated as a one off call or just a normal call given the time and the date when it was made and the circumstances resulting from other evidence.

Secondly, Saviour Darmanin's testimony mentions certain points which are reflected in Ilir Pelenk's statement – such as the three goal difference; the match being played by Marsaxlokk; and that this match is against a Croatian team.

In other words, once the statement is not taken on its own, but there is other evidence in the proceedings which mirrors what appears in the statement, then the confession no longer remains just the only evidence in the proceedings. The fact that the witnesses did not mention the appellant Pelinku by name and the absence of any messages does not mean that there is no other evidence

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on which the Court can rely for proof beyond reasonable doubt. (Points i. ii, iii, iv, v, vi of paragraph 3).

Hence the Court is dismissing this ground of appeal submitted by Ilir Pelenku.

As to the punishment, the Court's observations regarding the appeal filed by Mr. Joseph Attard apply.

Conclusion for both appeals.

The Court is rejecting all the grounds of appeal in both appeals and it is confirming the judgment in the names 'The Police vs Joseph Attard and Ilir Pelenku' delivered on the 20th February 2012.

< Final Judgement >

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