MALTA

COURT OF CRIMINAL APPEAL

THE HON. MR. JUSTICE
LAWRENCE QUINTANO

Sitting of the 4 th October, 2013

Criminal Appeal Number. 53/2013

The Police
(Inspector Ramon Mercieca)

Vs

Aslan Imdat

Having seen the charges brought against the defendant Aslan Imdat [identity card no. 495395 (M)] before the Court of Magistrates (Malta) as a Court of Criminal Judicature with having on behalf and/or in representation of Aslan Catering Ltd and/or as a registered person with the Commissioner of Value Added Tax as per Act of 1998 regarding Value Added Tax (Act No. XXIII of 1998) and Regulations imposed by the said Act, he failed to submit within (6) weeks to the Commissioner of Value Added Tax (4) VAT declarations, with payments if any, for the periods ending 31st August 2010 till 31st May 2011 thus being in breach of Article 27(1), 66 and 76(c) of Act XXIII of 1998.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 24th January 2013, by which, the Court, upheld the plea of *ne bis indem* and discharged the defendant of the charge brought against him.

Having seen the application of appellant Attorney General filed on the 11th February, 2013, wherein he requested this Court to revoke appealed judgement and instead to find the said Aslan Imdat guilty of all the charges preferred against him, and to mete out in him respect all the punishments and consequences prescribed by Law.

Having seen the records of the case.

Now therefore duly considers.

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

That on the 30th of January 2013 applicant received the acts of the proceedings and felt aggravated by the sentence of the Court of Magistrates (Malta) as a Court of Criminal Judicature in view of the fact that such Court made a wrong appreciation and unreasonable interpretation of the evidence and a wrong interpretation of the law, and accordingly appeals on the n the basis, inter alia, of article 413(1)(b)(iv)(iii), 413(1)(c) of Chapter 9 of the Laws of Malta and Article 83 of Chapter 406 of the Laws of Malta;

That from the acts of the proceedings it transpires that the charges for misappropriation were filed before the Magistrate's Court (Malta) as a Court of Criminal Inquiry, **on the 8th October 2012**, whereas the present charges were filed before the Court of Magistrates (Malta) as a Court of Criminal Judicature on the **1st of October 2012**;

That, to this date, there was no judgment with respect to the misappropriation charges;

That Article 527 of Chapter 9 of the Laws of Malta provides that:

'Where in a trial, judgment is given acquitting the person charged or accused, it shall not be lawful to subject such person to another trial for the same fact.'

That the above-mentioned Article is clear in this respect in that it noticeably states that it shall only be unlawful to subject a person to another trial for the same fact if there was a previous judgment;

That in setting out its judgment, the Court of Magistrates (Malta) as a Court of Criminal Judicature specifically considered that the charge brought against defendant for misappropriation refers to acts of the defendant committed on the 10th October 2011 and in the months and years before; the present charge refers to returns due for the tax periods ending the 31st August 2010 to the 31 May 2011.

That the Court, however, failed to consider that no judgment was given in relation to the misappropriation charges when the present charges were brought against the accused before it;

That in view of the above, the Court of Magistrates (Malta) as a Court of Criminal
Judicature could not thus have upheld the *ne bis in idem* plea in view of the fact that there existed no previous judgment in any trial, acquitting the accused;

That applicant humbly submits therefore that, as a consequence, the Court of Magistrates could not have discharged the accused on the basis of the *ne bis in idem* plea;

Heard the submissions made by the Prosecution and the Defence.

Considers

That this appeal is about one point: this is whether section 527 of Chapter 9 covers instances where two sets of charges are filed about the same 'offence' or whether it is limited to instances where a judgment of acquittal or guilt is delivered and then the defendant is charged with the same offence even if the offence is now described as following under another provision of the law.

There is no doubt that the dates mentioned in the present writ – for the periods ending **31st August 2010 till the 31st May 2011** – overlap with the time span indicated in the writ with a charge of misappropriation (indicated as JA1 on page 11) which refers to the **10th October 2011 and previous months or years**.

According to the submissions made during the hearing, no judgment had as yet been delivered in the writ with a charge of misappropriation at the time when the judgement was delivered – that is, on the 24th January 2013.

During the oral submissions, the defence referred a judgment of the Court of Criminal Appeal delivered on the 20th September, 2012 in the names 'The Police versus Gregory Paul Brincat' where the question of 'ne bis in idem' was examined in detail.

In that judgement a reference was made to a sentence of the First Hall of the Civil Court in its Constitutional Jurisdiction in the names 'John Gauci versus the Commissioner for Inland Revenue' where it was held that:

'Id-dritt taħt l-artikolu 39(9) tal-Kostituzzjoni jista' jinkiser biss jekk wara li tkun ingħatat sentenza penali li fiha jkun ġie dikjarat li l-akkużat diġa' għadda proċeduri kriminali għal dak l-istess reat quddiem Qorti kompetenti, huwa jerġa' jiġi espost għal proċeduri kriminali oħra dwar dak l-istess reat li għalih ikun ġa' ġie misjub ħati jew li minnu jkun ġie liberat.'

Freely translated, the above excerpt lays down **that a judgment** in criminal proceedings should first have been

given and then once expects a person to undergo fresh criminal proceedings for the same offence.

Now according to an examination of section 527 reproduced below

'Where in a trial, **judgment is given** acquitting the person charged or accused, it shall not be lawful to subject such person to another trial for the same fact.'

a judgment has to be delivered, acquitting or discharging a person, before one can speak of another 'trial'.

The same is true in so far as Article 4 of Protocol Number 7 is concerned. In fact, this is what the European Court of Human Rights had to say about the wording of this article:

'The Court observes that the wording of Article 4 of Protocol No. 7 does not refer to "the same offence" but rather to trial and punishment "again" for an offence for which the applicant has already been finally acquitted or convicted.'[1]

When one takes into consideration the wording of section 527, the decision in 'John Gauci versus the Commissioner of Inland Revenue' and the wording of Article 4 of Protocol Number 7 of the European Convention on Human Rights, there is no doubt that one cannot invoke the principle of 'ne bis in idem' when no judgment has been delivered in any other forum about the same offence.

A further submission by the defence

[1] Gradinger case.

The defence submitted that one offence can result in a number of violations of the law and to the doctrine about the matter. But this is not the appropriate moment to an examination of this submission **as so far no judgment has as yet been delivered.** [2]

[2] This point is also discussed in the judgment 'The Police versus Gregory Paul Brincat' of the 20th September 2012 and, to avoid unnecessary repetition, the Court is referring to the relevant paragraphs about the matter in that judgment.

' (When a fact violates more than one provision of the law

Professor Mamo in his Notes on Criminal Law wrote as follows;

' In any such case if the agent is tried for any one of the several violations of the law arising out of that fact, be it even the least serious, and a judgement is given, it shallnot be lawful to subject the agent to another trial for the more serious violations. This principle, first expressly affirmed in 'Rex versus Rosaria Portelli' has now become settled law.'..

Fil-fatt fit-2 ta' Diċembru, 1939, l-Imħallef Harding fil-każ 'Camilleri versus Cilia' kien qal li huwa prinċipju stabbilit fil-urisprudenza tagħna li meta mill-istess fatt, **mibni fuq l-istess intenzjoni,** jinkisru żewġ drittijiet jew aktar, **m'hemmx pluralita' ta' offiżi iżda offiża waħda** bil-vjolazzjoni li jkunu iżghar jkunu assorbiti fil-vjolazzjoni l-aktar serja. U jekk persuna tkun iġġudikata għal wahda mill-vjolazzjonijiet u jkun meħlus jew jinsab ħati, is-sentenza iżżomm kull prosekuzzjoni ġdida li tista' ssir għal kull vjolazzjoni oħra, ukoll jekk il-vjolazzjoni li jkun tressaq fuqha l-ewwel darba tkun l-anqas waħda serja.'

The part in Maltese freely translated reads as follows 'On the 2nd December 1939, Mr Justice Harding in the case 'Camilleri versus Cilia' held that it is a principle of Maltese jurisprudence that when through the same fact, having the same intention, there are two or more violations of the law , there is no plurality of offences but one offence only with the minor offence being absorbed in the more serious one. And if a person **is judged** on one violation and is found guilty or is acquitted, the judgement will preclude the Prosecution from pressing charges on the other violation even if the first charge happened to carry a lower penalty than the second one.

Once again the Court refers to the words 'is judged' appearing in bold in the English version.

Conclusion

The Court is upholding the appeal filed by the Attorney General and is revoking the judgement of the Court of Magistrates (Malta) as a Court of Criminal Jurisdiction in the names 'The Police vs Aslan Imdat' delivered on the 24th January 2013 and is sending back the records of the case to the Court of Magistrates as no judgment has been delivered on the merits of the case and the appellant/accused should not be deprived of having his case reviewed twice.

< Final Judgement >

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