

*26th May, 1994*

*Judge*

*The Hon. Mr. Justice Vincent Degactano LL.D.*

*The Police*

*versus*

*Darryl Burr*

*Breach of Section 338(z) of the Criminal Code - Public Deed of Personal Separation - Whether Maintenance was Ordered by a Court - Rules of Interpretation.*

*In interpreting the law in order to determine whether a particular act or omission falls within the purport of a given statute, the court must be careful not to usurp the functions of the legislator.*

*If conduct of a particular kind stands outside the language of a penal section, the fact that a Court takes the view that it is through inadvertence of the Legislature that it has not been included does not authorize it to assume to remedy the omission by giving the penal provision a wider scope than its language admits.*

*The decree authorizing the parties to proceed to the deed of separation lacks the essential ingredient of a "court order". A "court order" is essentially the manifestation of the court's will which is being imposed on one or more of the parties, even though one or more of the parties may have, previously to the order, agreed with such imposition.*

*The Court:-*

*Having seen the charge preferred by the Executive Police against Darryl Burr, to wit the charge of having during the three months prior to the 31/10/93 failed to give to his wife Jacqueline Burr the sum of LM75 monthly as maintenance for his children Tamara of 9 years, Jessica of 7 years and Rebecca of 6 years as fixed by the Civil Court on the 7/2/93;*

*Having seen the judgment of the Court of Magistrates (Malta) of the 25 February, 1994 by which the said Darryl Burr was found guilty of the charge preferred against him and sentenced to a fine (ammenda) of twenty-five liri (LM25);*

*Having seen the appeal application in the Maltese language filed by the said Burr on the 3rd March, 1994; having seen the English translation of this appeal application filed by said appellant as ordered by this Court by its decree of the 9 May, 1994; having seen that appellant is requesting the reversal of the judgment of the inferior court;*

*Having seen the record of the proceedings; having heard the evidence and submissions by counsel for appellant and by the Attorney General;*

*Considers:*

*1. The facts of this case are quite straightforward. On the 7 February, 1992, the appellant and his wife Jacqueline Burr entered into a public deed of separation from bed and board (or, as it is now called, personal separation) as provided in section 59 of the Civil Code, having first been duly authorized so to proceed by a decree of the competent civil court (the copy of the deed of separation exhibited in the record of the proceedings mentions two decrees so authorizing). In the said deed appellant had*

*undertaken to pay to his wife by way of maintenance for their three minor children, who were being entrusted to the care and custody of the said wife, the sum of LM75 every week in advance by cheque. For reasons which are really irrelevant for the purposes of this appeal, appellant began defaulting on this undertaking from November of 1992 and was still defaulting in the period mentioned in the writ of summons issued by the Executive Police. Appellant's grounds of appeal may be reduced in substance to this one submission, namely that the undertaking to pay the sum aforementioned in the said public deed does not amount to an order of a court for the payment of maintenance (whether for the spouse or for the children) as fixed by that court and, consequently, that failure so to pay does not amount to the contravention contemplated in s.338(z) of the Criminal Code. In other words, failure to pay maintenance as undertaken in a public deed of separation by mutual consent, is not, according to appellant, a criminal offence;*

2. Section 338(z) of the Criminal Code provides that "Every person is guilty of a contravention against public order, who when so ordered by a court fails to give to his or her spouse the sum fixed by that court as maintenance for that spouse and, or, the children, within fifteen days from the day on which, according to such order, such sum should be paid ". This provision owes its origin to Act XIV of 1983. The provision introduced by that Act was, however, couched in rather different terms and read as follows: (Every person is guilty of a contravention against public order, who) when so ordered by a court fails to give to his wife such sum, fixed by that court as maintenance for her and, or, his children, within fifteen days from the day on which, according to such order, he should pay such sum ". Following the decision of this Court of the 26 June, 1986 in the case *Il-Pulizija v. Antonia Incorvaja*, which held that the provision, as it then was, did not

*cover default in the payment of maintenance which a wife had been ordered by the court to pay to her husband, the law was changed by Act XXXII of 1986 to its present state. Apart from making the provision applicable to the default of both husband and wife, the 1986 amendment did not otherwise alter the constituent elements of this offence;*

3. *The point at issue, therefore, in this present case is whether the maintenance which appellant had to pay to his wife was maintenance which he had to pay because "so ordered by a court" and whether the quantum of that maintenance had been "fixed by that court";*

4. *In interpreting the law in order to determine whether a particular act or omission falls within the purport of a given statute the court must be careful not to usurp the functions of the legislator. The cardinal rule for the purpose of such interpretation was laid down more than a hundred years ago by an English Chief Justice in the following words;*

*"The only rule for the construction of Acts of Parliament, is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the lawgiver " . (Sussex Peerage Claim (1884) 11 Cl. & Fin. 85, 143; 8 E.R. 1034, 1057, per Tindal C.J.);*

*More recently, in 1907, the same principle as applied to the interpretation of penal and fiscal statutes was restated in the following terms;*

*“When it is said that penal Acts or fiscal Acts should receive a strict construction I apprehend that it amounts to nothing more than this. Where Parliament has in the public interest thought fit in the one case to restrain private action to a limited extent and to penalize a contravention of its directions, and in the other to exact from individuals certain contributions to the general revenue, a Court should be specially careful, in view of the consequences on both sides, to ascertain and enforce the actual commands of the legislature, not weakening them in favour of private persons to the detriment of the public welfare, nor enlarging them as against the individuals towards whom they are directed “. (Scott v. Cawsey (1907) 5 CLR at 154);*

5. *The wording of paragraph (z) of section 338 of the Criminal Code clearly refers to a “court order” whereby a spouse, husband or wife as the case may be, is ordered to pay a sum fixed by that same court. Does the court decree authorizing the parties to proceed to the deed of separation amount to a “court order”?. In this Court’s considered view the answer is in the negative. Although a court decree might, in some sense and in some circumstances, amount to an “order”, the decree authorizing the parties to proceed to the deed of personal separation lacks the essential ingredient of a “court order”. The court understands a court order as being essentially the manifestation of the court’s will which is being imposed on one or more of the parties, even though one or more of the parties may have, previously to the order, agreed with such imposition. A similar point was dealt with by the English Court of Appeal, Civil Division, in the case *Gandolfo v Gandolfo (Standard Chartered Bank Ltd., garnishee) (1980) 1 All E.R. 833*, where the court held that an undertaking by the husband (in this case to pay the school fees of the child of the marriage) which had been incorporated in a written order by the court had the same effect as a judgement or*

*order of that court. In the present case, however, appellant Burr and his wife were merely authorized, not ordered or directed, to proceed to the publication of the deed of separation. Indeed, it is doubtful whether the court, in authorizing the parties to proceed to the publication of such a deed, can order or direct the quantum or other modalities of the payment of maintenance. The court may withhold its consent if it does not agree with such quantum or modalities, but the question of maintenance in such a deed remains essentially a matter agreed upon by the parties to that deed and not imposed by the court.*

6. *The Court has also looked at the record of the Parliamentary Debates of the sitting of the House of Representatives of the 12 July, 1983 (Official Unrevised Report, sitting 119, especially pages 1456 to 1458) when the provision which is to-day paragraph (z) of s.338 was being debated in Committee. It is clear from the explanation given about the relative clause by the then Minister of Justice, the Hon. Joseph Cassar, who was piloting the Bill, that what the legislator had in mind was a special remedy - - the penal remedy - - in those cases where a wife, having obtained a court decree as to provisional maintenance at the commencement of separation proceedings, was left without that maintenance because the husband refused to comply with the court's order. The payment of maintenance arising out of a deed of personal separation was clearly never contemplated;*

7. *In the course of oral pleadings, the Attorney General, represented by Counsel for the Republic Dr. Anna Mallia, submitted that in interpreting paragraph (z) the Court should keep in mind the human dimension resulting from the situation in the*

*present case where the children of appellant are not receiving maintenance or not receiving adequate maintenance. This Court is, of course, quick to this dimension, but it cannot exceed its proper function by purporting indirectly to legislate. As was stated in Ex parte Fitzgerald; Re Gordon (1945) 45 SR (NSW) 182, "If conduct of a particular kind stands outside the language of a penal section, the fact that a Court takes the view that it is through inadvertence of the Legislature that it has not been included does not authorize it to assume to remedy the omission by giving the penal provision a wider scope than its language admits". (at 186);*

8. *For these reasons the Court allows the appeal, revokes and reverses the judgement appealed from, and acquits Darryl Burr of the charge preferred against him.*

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