

IL-HAMES PARTI  
QORTI TA' L-APPELL KRIMINALI  
(Sede Inferjuri)

10th January, 1984

Judge:-

The Hon. Mr. Justice Carmel A. Agius B.A., LL.D.

The Police

*versus*

William Eric Dobson

**Attorney General - Appeal Application**

*If the Attorney General fails to file the record of proceedings together with his application of appeal in the Superior Court in terms of section 431 (2) of the Criminal Code (today S.419(2)), such record does not exist before that Court and therefore, the Court of Appeal cannot take cognizance of such record.*

*In matters of procedure there cannot be a filing of an act "in vacuum" as every act that is filed in the registry or even during a sitting must of necessity bear a statement by an authorised official certifying the filing, the date thereof and the name of the person filing that act. Anything short of this would be tantamount to rendering the rules and notions of procedure useless.*

The Court:-

This is a judgement on a preliminary plea of nullity of the application of appeal of appellant raised by respondent in the sitting of the 27th September, 1983;

By a judgement of the 23rd June, 1983 respondent had been acquitted by the Criminal Court of Magistrates of Judicial Police for the Island of Malta of all charges brought against him;

By an application filed in the Registry of this Court the Attorney General entered an appeal against the said judgement praying for the reversal of same and the conviction of respondent;

In the sitting of the 27th September, 1983 respondent pleaded the nullity of the application of the appeal of the Attorney General on the ground of non-observance of section 431 subsection 2 of the Criminal Code in the sense that when the application was filed on the 8th July, 1983 there is a note by the Deputy Registrar that the application was filed by the Senior Counsel for the Republic, Dr. S. Camilleri but there is no record at all that at the same time the records of the proceedings were being filed by the Attorney General;

Submissions on this preliminary both oral and written were made by both parties;

By an order of the 27th September, 1983 this Court had decreed that respondent being an English speaking person, all proceedings relating to the present case be conducted in the English language;

This Court, now therefore, upon the said preliminary plea and upon taking cognizance of all pleadings submitted by

parties to this appeal finds as follows:

In terms of section 431 subsection 2 of the Criminal Code "if the appeal is made by the Attorney General, the application shall, under pain of nullity, be signed by him, and shall be filed directly in the Superior Court together with the record of the proceedings;

Appellant in reply to the said preliminary plea submits that the sanction of nullity as envisaged in S.431 (2) is limited to the case where the application is not signed by the Attorney General and not also to the case of failure to file the record of proceedings together with the appeal application. It is clear from the wording of subsection 2, read in conjunction with subsection 1 and 3 that the legislator was reserving the extreme sanction of nullity to certain defects or omissions in the contents of the application - hence the margin note - for which the appellant alone is responsible. Failure to file the record of the proceedings together with the appeal application would not render the application null. Moreover, any entry made by the Registrar or Deputy Registrar upon the filing of the application, whether the filing is made in the Registrar's own handwriting or by the use of a rubber stamp, does not form part of the contents of the application;

Appellant also submits that the law does not state that the filing of the record of the proceedings must appear from the contents of the application;

Last but not least appellant submits also that the law does not require that the filing of the record of the proceedings together with the appeal application should result from any entry or note made by the Registrar on the application itself. Even if that were the law, surely, appellant should not be held

responsible, much less penalised, for any omission owing to the fact that the Registrar has not properly instructed his staff as to their duty or failed to provide them with the appropriate rubber stamp;

Respondent in the first place, points out that the submission that there is no record of the *processo* having been filed in the Appeal Court together with the application is tantamount to a plea that the record of the proceedings was not filed;

Respondent also contends that the law draws a distinction between appeals entered by the person convicted and by the Attorney General. In the former, the introduction of the acts before the Appellate Court is done by transmission from one Court to another, whereas in the latter case it is done through the filing of the record of the proceedings in the Registry of the Appellate Court. In the original Italian version, the law (XI.1900.70), laid down:

*“dovrà essere, insieme, cogli atti del procedimento, correttamente presentato alla Corte Superiore”* (Sec. 412. pg. 1901) and the Maltese text of S.431 (2) states:

*“u ghandu jigi, flimkien ma’ l-attijiet tal-proċess, ipprezentat mill-ewwel fil-Qorti Superjuri”*. This goes to show, contends respondent, that if the Attorney General fails to file the record of proceedings in the Superior Court, such record does not exist before that Court and therefore the Court of Appeal cannot take cognizance of such record because of the principle *quod non est in actis non est in mundo*;

Respondent also submits that when this provision (i.e. 431 (2) was introduced in the Criminal Code, it appears that the

legislator had in mind the system followed in appeals from causes of a civil nature. Moreover, even before the promulgation of the Code of Civil Procedure, the introduction of the acts in the Appellate Court was considered essential to invest that Court with the necessary jurisdiction to try and determine a cause heard before a Court of first instance. The Code of Organisation and Civil Procedure (Ord. IV of 1854) promulgated in 1855 laid down in sections 267 to 269 how the introduction was to be made. Section 270 laid down the sanction in case of non-observance of the due formalities:

*“Se non venisse fatta l'introduzione nel modo in questo titolo prescritto, l'appello rimarrà deserto”;*

Respondent also makes reference to some case law mentioned in his note of written pleadings with a view to showing that the provisions concerning the introduction of the acts are to be carried out to the letter and any non-observance is fatal to the prosecution of the appeal;

Respondent also submits that in S.431 (2) the law imposes upon the Attorney General the duty to file the record of proceedings together with his application of appeal because at the moment the appeal application is filed, the record of the proceedings does not exist in any Court Registry because the Registrar will have sent it to the Attorney General in terms of Section 426 of the Criminal Code;

Finally, respondent pleads that in the present case there is no mention of the record of proceedings having been filed together with the application and therefore the record was not filed and it is not up to the Court to determine whose fault it is that there was no filing of the records. Therefore, once the application of appeal as filed *in vacuum* the Court has no

alternative but to pronounce its nullity, the more so since at this stage the Court has no power to order the filing of the record of proceedings;

This Court is of the opinion that respondent is correct in contending that if the Attorney General fails to file the record of proceedings in the Superior Court, such record does not exist before that Court and that therefore the Court of Appeal cannot take cognizance of such record;

The Court also agrees that at law in matters of procedure that is no, and cannot be a filing of an act *in vacuum* as every set that is filed in the Registry or even during a sitting must of necessity bear a statement by an authorised official certifying the filling the date thereof and the name of the person filing that act. Anything short of this would be tantamount to rendering basic rules and notions of procedure useless;

The Court furthermore cannot draw any conclusions from the fact that the *processo* has indeed been presented before it as the same does not carry any effect until and unless there is the relative statement that it was filed together with the application of appeal and in terms of section 431 (2) of the Criminal Code. The Court cannot make presumptions of its own however logical they may appear in despite of what the law clearly requires;

Finally, the Court does not agree with the submission of appellant that the sanction of nullity of the application of the appeal is restricted only to the requirement that the relative application must be signed by the Attorney General. Section 431 (2) is in its opinion clear enough and imposes on the Attorney General under pain of nullity not only the filing of the application in the established form but also that the same be

filed together with the record of the proceedings. In cases of appeals by the Attorney General, an exception to the rule that records of the proceedings remain in the Registry of the Court which delivered judgement, is excepted to in the sense that the same are forwarded to the Attorney General. Hence the duty imposed on the Attorney General to file such records in the Court of Appeal when entering an appeal. But it need not be emphasised that this Court is seized with jurisdiction not when the application of appeal is filed but when the records of the proceedings are filed simultaneously therewith. The registration and recording of such filing therefore becomes a *sine qua non* for the validity of the appeal;

The Court therefore upholds the preliminary plea raised by respondent, declares the appeal entered by the Attorney General as null and void in terms of section 431 (2) of Chapter 12 of the Laws of Malta and consequently abstains from taking further cognizance thereof.

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