

First Offenders Under Maltese Law

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THE local law relating to First Offenders is contained in Section 23 of our Criminal Code. Before dealing with the said section in some detail, it would not be amiss to make a brief reference to its historical origin.

Section 23 was first introduced in our Criminal Code by Ordinance XI of 1900. In its original form, the said section, which was culled from the English Law on the subject, was limited to minors because — as the Crown Advocate of the time stated in the Council of Government (Sitting, May 16th, 1900) — the mental outlook of persons under age was not sufficiently mature and experience had shown that, in the case of minor offences, prejudice to their standard of morality that might derive from their imprisonment far outweighs, from the standpoint of the interests of society, the advantage which might be expected from their confinement in prison. This limitation was strongly criticised by Mr. Azzopardi, a member for the Third District, who, whilst admitting that due consideration was to be given to minors since, on account of their tender age, they were unable to cope with the wiles of the world, nevertheless felt that some consideration was to be given also to those who for long years had led an honest life and who in a moment of weakness committed a crime. The latter — Mr. Azzopardi further stated — would have even stronger motives to reform themselves than a minor. They would lose all they had built up during the past, if they were sent to prison. They would have a family whose honour would be at stake. Furthermore, English law did not admit of the said limitation. These arguments failed to convince the Crown Advocate and the section was passed unamended. But, later on, Mr. Azzopardi's views prevailed and by Ordinance XVI of 1921 the said limitation was abolished.

It has been stated that the said section has been culled from English law. Under this law up to 1861 there was no statutory provision relating to persons convicted for the first time. It was however the practice of the Courts to discharge, upon recognizance to come up for judgement, persons convicted for the

first time of minor offences. Under the Larceny Act 1861, and the Malicious Damage Act 1861, the power to discharge conditionally a first offender in cases of larceny or malicious damage was laid down in the law. The Probation of First Offenders Act, 1887, extended this power of the Courts to other offences (besides larceny and malicious damage) and to offences punishable with not more than two years' imprisonment. This Act of 1887 was superseded by the Probation of Offenders Act, 1907, afterwards amended by the Criminal Justice (Amendment) Act, 1926.

It may be added (see *La Polizia vs. Borg*, 30th January, 1923) that although Section 23 has been suggested by a like provision in English law, still its special wording should not be lost sight of and it should be at all times coordinated with the other provisions of the Criminal Code in which it has been embodied.

The said section runs as follows :

(1) Where any person, who has never been previously convicted of a crime, is convicted of grievous bodily harm excusable under this Code, or of theft not aggravated by violence, or of fraud, or of the crime referred to in Section 339, or of any other offence punishable with not more than two years' hard labour or imprisonment, the Court may, if, having regard to the trivial nature of the offence, the circumstances under which it was committed, the age, character and antecedents of the offender, it should deem it expedient so to do, declare the offender guilty, and instead of sentencing him forthwith to any punishment, direct that he be released on his entering into a recognizance that he will not commit another crime, if he is guilty of a crime, or another contravention, if he is guilty of a contravention, within the time established for the prescription of the first crime or of the first contravention.

(2) If it shall be proved that the offender has committed a second crime or a second contravention within the time referred to in subsection (1) of this section, he shall be liable to the punishment laid down for such second crime or contravention, and the Court may also sentence him in respect of the first offence of which he had been found guilty as provided in the said subsection.

The first question that falls to be discussed is whether conditional release under Section 23 constitutes a mere conviction without sentence proper or includes also the latter. In *The Police vs. Pawlu Calleja*, 20th September, 1941, the Court, relying on a previous decision (*La Polizia vs. Borg*, 30th January, 1923), held the view that a decision ordering the discharge of the accused under Section 23 of the Criminal Code constituted a sentence proper, the punishment being provisionally suspended, and that such a decision is not an exemption from punishment.

This judgment seems to conflict with that in *The Police vs. Isabelle Blanc*, 5th December, 1936, where it was held that a person conditionally released under Section 23 of the Criminal Code is convicted but *not* sentenced. The Court in this case observed that Section 23, in its opening words, refers to an accused person who has been *convicted* of an offence specified therein. Furthermore, the said section goes on to say that, in the circumstances therein mentioned, the Court may *declare the offender guilty and instead of sentencing him forthwith to any punishment* direct that he be released on his entering into a recognizance. The Court therefore drew the inference that the word "convicted" properly means *only* the declaration of guilt and does *not* include the sentence of the Court. This view falls in with that expressed in Wharton's Law Lexicon where the word "conviction" is defined as "the act of a legal tribunal adjudging a person guilty of a criminal offence" and in Byrne's Law Dictionary where the term is defined as "the declaration of guilt". It is in accordance with the decision taken in England in the case *Rex v. Blaby*, 1899 (2 Q.B. 170) where the Court for Crown Cases Reserved, presided over by Lord Coleridge as Chief Justice and composed of five of His Majesty's Judges, ruled that the word "convicted" must be taken to refer *only* to the finding of a verdict of guilty and not to include the sentence or judgment of the Court.

The decision given in *The Police vs. Isabelle Blanc* is supported by subsection 2 of Section 429, Cap. 12, (*vide* words in italics) which lays down that "Where the award of punishment has been suspended under the provisions of section 23, the offender may, within the term prescribed in subsection (1) of this section, appeal against *the judgment which has declared him guilty of the offence*". Moreover, S. 520 (Cap. 12) in envisaging

the case of a first offender who has subsequently committed a second offence (violating the terms of his recognizance) states that in any such case the Court (*totidem verbis*) "shall proceed to sentence the offender....." This wording seems to imply that as yet there was no sentence proper.

If Section 23 is taken to mean only a declaration of guilt (conviction) and not a sentence proper, it would follow that such conviction is not taken into account for the purpose of an increase of punishment in the case of a recidivist (See *Rex vs. Giuseppe Deguara*, 11th December, 1942, which confirmed *Rex vs. Carmelo Aquilina*, 10th June, 1911). For relapse to be an aggravation of punishment the law requires not only a declaration of guilt but a sentence awarding punishment. This may be conveniently argued from Section 49 which defines a recidivist as a person who "after being *sentenced* for any offence by a judgment which has become absolute, commits another offence" as well as from the spirit underlying an increase of punishment in case of a relapse: the second or subsequent punishment is increased because it is considered that the first punishment proved to be inadequate. If no punishment was awarded because of the application of Section 23, a more exemplary punishment is not called for.

Section 23 can only be awarded where a person, who has never been previously convicted of a crime, is convicted of grievous bodily harm excusable in terms of law, or of theft not aggravated by violence, or of fraud, or of the crime referred to in Section 339, or of any other offence punishable with not more than two years' hard labour or imprisonment. Lately, an amendment was enacted by Ordinance VI of 1947 according to which the Court may, even if the theft is aggravated by violence, grant a conditional release, if the offenders are minors and if the violence consists merely in the circumstance of the thieves presenting themselves unarmed in a number of more than two.

Interpreting the section our Criminal Court in *Rex vs. Spiteri*, 14th October, 1920, held that the limitation of the liability to a punishment not exceeding two years' hard labour or imprisonment as a condition for the applicability of the said section referred only to offences other than theft or fraud in which case the limitation was not operative. Moreover, in *Rex*

vs. Francesco Magro, 3rd October, 1903, the Court held that the law, when referring to *any other offence punishable with not more than two years' hard labour or imprisonment* had in mind the punishment to which the offence as such is subject without taking into consideration any extraneous circumstance which, without altering the nature of the offence, might constitute a reason for aggravating the punishment thereof. This, in fact, is the literal meaning of the words of the section and is consonant with the intention of the legislator which was evidently that of restricting the operation of Section 23 to those offences which are not in themselves of considerable gravity.

The Court, in granting the benefit of conditional release, takes into consideration the trivial nature of the offence, the circumstances under which it was committed, the age, character and antecedents of the offender. Thus Judge Debono, in *Rex vs. Maria Carmela Bonnici*, 17th January, 1905, granted conditional release in view of the fact that the accused was of good character and the jury had added a rider to their verdict recommending the accused to the clemency of the Court. Vice-versa, in *Rex vs. Bartolomeo Cefai*, 4th March, 1908, the Court refused to apply this section as it appeared that although the accused had not been previously sentenced, he was, however, notoriously of bad character.

Finally, the question arises: Can Section 23 be applied in the case of a conviction for a second offence *before* the conviction for but *after* the commission of the first offence? — The question was solved in the affirmative in *Rex vs. Alfred Rizzo et*, 20th October, 1938. In that case, one of the accused Borg, after committing the first offence, had committed a petty theft of which he had been meanwhile convicted by the Court of Magistrates and released conditionally. The Court in this case applied Section 23 in respect of the first offence on the ground that, as at the time of the commission of the first offence, Borg had not been sentenced for any crime, and as Section 23 was meant to be applicable in the case of the first crime, Section 23 could be properly applied. However, this would appear to be a somewhat liberal construction. Moreover, there would be the anomaly of the benefit of Section 23 being awarded twice.

It may not be amiss to add that Luigi Maino in his textbook "*Commento al Codice Penale Italiano*" (3rd edit. Vol.

I, P. 61, p. 106), speaks very highly of the benefit of first offenders and makes reference to the writings of Prins and Lammasch in the Bulletin de l'Union internationale de droit penal (Ann. 1. 161). He states further that the system of conditional release with regard to offenders "costituisce un freno assai più potente, perchè sono essi direttamente gli interessati ad evitare la recidiva."

THE GENERAL GOOD

"Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a deliberative assembly of **one** nation, with **one** interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good resulting from the general reason of the whole".

BURKE.

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THE RULE OF LAW

The process of re-establishing the rule of law once it has been shattered is slow and difficult; it is so much easier to destroy than to rebuild. But until the world once more becomes law-abiding it cannot hope to regain peace and happiness.

LORD MACMILLAN.