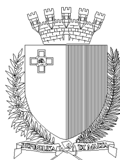

Court of Criminal Appeal

Hon. Mrs. Justice Dr. Edwina Grima LL.D.

Appeal Nr: 203/2016

The Police

[Inspector Maurice Curmi]

Vs

Beres Szabales Sandor

Today the, 23rd February, 2017

The Court,

Having seen the charges brought against Beres Szabales Sandor holder of Passport Number 77080489 before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having:

On the 17th October, 2015 at about 18:30hrs whilst in Gandoffli Street, St. Paul's Bay:

1. Through imprudence, negligence or unskilfulness in his trade or profession, or through non-observance of any regulation, caused slight injuries to Lela Micallef ax certified by Dr. L. Gatt MD reg 2189 of Mosta Health Centre.
2. Also accused with having on the same date, time and place drove vehicle registration number KBN 725 make Yamaha which emits smoke, grit, sparks, ashes, cinders or oily substances from the exhaust pipe.

3. Also accused with having drove mentioned vehicle in a manner that caused undue noise.

Having seen the judgment meted by the Court of Magistrates (Malta) as a Court of Criminal Judicature proffered on the 15th April, 2016 whereby the Court, after having seen section 328 (d) of the Criminal Code declares the accused Beres Szabales Sandor guilty of the first charge and condemns him to the payent of a multa of seventy euros whilst declaring him not guilty of the second and third charge and consequently acquits him from the same charges.

Having seen the appeal application presented by the Beres Szabales Sandor in the registry of this Court on the 25th April, 2016 whereby this Court was requested to confirm the said judgement in so far as the appellant was declared not guilty of the second and third charges and acquitted therefrom and and revokes and annuls the said judgement in so far as the appellant was declared guilty of the first charge and condemned to the payment of a multa of seventy Euro and instead declares the appellant not guilty of the first charge and acquits him therefrom.

Having seen the acts of the proceedings;

Having seen the updated conduct sheet of the appealed, presented by the prosecution as requested by this Court.

Having seen the grounds for appeal of the appellant are clear and manifest and consist in the following:

1. **First ground of appeal**

   The first charge against the appellant, that is the only charge the appellant was declared guilty of by the first Honourable Court, was issued under article 328 (d) of Chapter 9 of the Laws of Malta. This is evident both from the notes at the bottom of the charge sheet as well as from the fact that the first Honourable Court, in delivering its judgement, specifically quoted this article of the Criminal code;

This article contemplates an offence of causing involuntary work fire or damage and textually provides that:

Whosoever, through imprudence, negligence or unskilfulness in his trade or profession, or through non-observance of any regulation, shall cause any fire or any damage, spoil or injury as mentioned in this sub-title, shall on conviction, be liable:

(d) in any other case, to imprisonment for a term not exceeding three months or to be a fine (multa) or to the punishments estabilished for contraventions.

The relative sub-title under which this disposition of the law is found is entitled 'Of Crimes Against Public Safety and Of InjuryTo Property'. The said sub-title is sub-title IV of Title IX of the Criminal Code entitled 'Of Crimes against Property and Public Safety'

It is amply clear that this sub-title does not deal with injuries on persons but on damage caused to property;

In the instant case, the alleged offence was that of slight injury on the person of the parte civile Lela Micallef which is an offence which falls within the parameters of the article 221 of Chapter 9 of the Laws of Malta but does not fall within the parameters of article 328 (d) of Chapter 9 of the Laws of Malta. In other words, the offence allegedly committed by the appellant, that is. Slight injury, does not constitute the material element of the offence under article 328 (d) of Chapter 9 of the Laws of Malta. The charge issued by the prosecution – that of slight injury – should have been, for argument's sake, issued under article 221 of Chapter 9 of the Laws of Malta. Article 328 (d) of Chapter 9 of the Laws of Malta contemplates offences in relation to things or property not in relation to persons;

For this reason alone and without going into the merits, the appellant should be acquitted of the first charge proferred against him;

2. **Second Ground of Appeal**

The second ground of appeal is also procedural. If for argument' s sake, one were to argue that article 328 (d) of Chapter 9 of the Laws of Malta is indeed applicable, the prosecution were in duty bound to

present a copy of the complaint ('kwerela'). This since the proviso which follows article 328 (d) of Chapter 9 of the Laws of Malta specifically requires the complaint of the injured party in that it states that: *Provided that in the cases referred to in paragraph (d), except where damage is caused to public property, other than a motor vehicle, proceedings may be instituted only on the complaint of the injured party;*

The Prosecution failed to exhibit the complaint ('kwerela'). From the proof exhibited namely the affidavit of PS 1157 and the incident report classified as ' Disturbance of Public Peace and Order' it does not result that the injured party asked that the prosecution to press charges against the appellant for slight injuries;

For these reasons, the first charge proferred against the appellant could not succeed;

3. **Third Ground of Appeal**

As regards the merits of the first charge brought against the appellant, appellant humbly submits that the first Honourable Court was wrong in tis finding of guilt. This for a number of reasons;

The first reason is that both the injured party and the appellant testified that at the time when the incident allegedly happened there were two motor cycles the engine of which had just been started. Charges were issued against the appellant only. The appellant queries that if for argument' s sake only one were to concede that the exhaust caused slight injury to the injured party, how could the First Honourable Court estabilish, determine and or be convinced beyond reasonable doubt that it was appellant' s motor ccle' s exhaust which caused the injury and not the other motor cycle? It was not estabilished by the prosecution as a fact that the motor cycle which appellant started and later drove caused the slight injuries and not the other motor cycle. There is evidently a doubt which should have led to the acquittal of the appellant as in dubio pro reo;

The second reason is that whilst it is true that the prosecution exhibited an 'affidavit' by Dr Louise Gatt stating that the injured party suffered slight injuries, the prosecution did not establish a link of cause and effect, that is to say, the prosecution did not provide medical evidence or, for that matter, any evidence at all that the possible or probable cause of the injured party' s slight injuries was the inhalation of exhaust. Since the prosecution did not estabilish any link of cause and effect between the material fact of starting the motor cycle by the appellant and the slight injuries sustained, the first Honourable Court erred in its finding of guilt of the appellant;

The third reason is that the appellant has in actual fact proved that the injured party is a smoker and as such the symptoms diagnosed by Dr. Louise Gatt could easily have been due to the fact that the injured party is a smoker. Indeed, appellant humbly submits that it is more likely that the injured party's symptons are due to her regular habit of smoking rather than to the incident of a one off inhalation of exhaust which she could easily have avoided by moving away from where the motor cycles were parked. This is even more the case owing to the fact that both the injured party and appellant agreed that the starting of the motor cycle and driving away could not have taken longer than one (1) minute: a fact which resulted from the proof submitted and which results from a reading of the first Honourable Court' s judgement. Hence, even here there is a strong doubt which should also have led to the appellant's acquittal;

The fourth reason is that the proof submitted by the prosecution in the form of a medical certificate attached to the 'affidavit' of Dr Louise Gatt is not the best evidence as the affidavit is not duly confirmed on oath before a commissioner of oaths or notary public. This renders the 'affidavit' invalid and the medical certificate just a document which is not confirmed on oath. In criminal proceedings the prosecution has to prove its case beyond reasonable doubt and documents submitted should be duly confirmed on oath. This shortcoming translates into

the lack of proper proof submitted by the prosecution and evem for this reason, appellant should have been acquitted;

The fifth and final reason is that the judgement delivered by the first Honourable Court is conflicting in that whilst the appellant was found guilty of the first charge, he was acquitted of the second charge. If the motor cycle in question did not emit smoke, grit, sparks, ashes, cinders or oily substances (since the appellant was acquitted from the second charge proferred against him), how could the appellant be guilty of the motor cycle in question emitted smoke, grit, spsrks, ashes, cinders or oily substances, how could the first Honourable Court find guilt as regards the first charge? Not only a link of cause and effect was not estabilished but the prosecution failed altogether to prove that a cause (that is the emission) actually existed;

4. **Fourth Ground of Appeal**

   In any event, even if for argument's sake it is argued that his Honourable Court of Appeal does not agree with any of the grounds of appeal detailed above, the appellant could have never been found guilty of causing slight injuries. He could have been charged with some other offence possibly disturbance of public peace and order as indicated in the incident report or of causing an inconvenience but definitely not of causing slight injuries. It is unheard of that by starting a motor cycle and the inhalation smoke or exhaust a third party, who incidentally is a smoker, can claim suffering slight injuries. God forbid that this is the interpretation of the law which will become prevalent as residents of congested areas of Malta, for example Msida, Hamrun, Fgura and similar, will indunate the police with claims of having been slightly injured by the passing traffic. This is not an interpretion of the law which makes juridical sense and is definitely not desirable.

Considers,

Having heard submissions put forward by counsel for the defence and the Attorney General and this with regard to the first grievance put forward by appellant regarding the nullity of the judgment of the First Court.

Considers,

That appellant in his first grievance raises the plea of nullity of the decision of the First Court on the ground that the article of law cited in the decisive part of the judgment refers to an offence which was not imputed to accused. This error seems to have found its basis in the charge sheet itself wherein the Prosecuting Officer after preferring the charges against appellant indicates that the offence contemplated in the first charge is based on article 328(d) of the Criminal Code which section of the law, however, contemplates the offence of involuntary damage to property and not that of involuntary bodily harm as contemplated in article 226 of Chapter 9 of the Laws of Malta.

The Attorney General from his part concurs with the arguments raised by appellant as it clearly results that the First Court in finding the appellant guilty of the offence of involuntary bodily harm erroneously refers to the wrong section of the law indicating another offence, being as already premised, that of involuntary damage to property. Although this seems to be a *lapsus computetri* on the part of the First Court, however it is abundantly clear that the facts of this case did not refer to involuntary damage to property and there is no evidence to be adduced to such an offence, rather all evidence pointing toward the offence of bodily harm albeit of an involuntary nature.

It has been established both juridically and legally that this error on the part of the First Court necessarily carries with it the sanction of nullity. In fact article 382 of the Criminal Code clearly states that:

"The court, in delivering judgment against the accused, shall state the facts of which he has been found guilty, shall award punishment and <u>shall quote the article of this Code or of any other law creating the offence</u>."

Having thus premised it is therefore evident that this Court cannot proceed with the hearing of an appeal from a judgment which of its very nature is legally null and void, the article of law quoted creating another offence totally different from the offence of which appellant has been tried and found guilty of. In circumstances such as these, this Court cannot but declare the judgment null and void, proceeding forthwith to hearing the case afresh with regards to its merits[1].

Consequently in view of the above-made considerations the Court upholds the first grievance put forward by appellant, declares the appellate judgment null and void, and in virtue of the powers conferred on this Court by section 428(3) of the Criminal Code orders that the case be tried once again on its merits, the other grievances submitted by appellant being considered as submissions in defence.

(ft) Edwina Grima

Judge

True Copy

Franklin Calleja

Deputy Registrar

[1](Vide judgments: **"Il-Pulizija vs. Joseph Muscat**" [10.6.94] , **"Il-Pulizija vs. Anthony Zahra "** [26.5.94]; **"Il-Pulizija vs. Charles Micallef"** [23.6.1995] and others.)