Court of Criminal Appeal

Hon. Ms. Justice Dr. Consuelo Scerri Herrera LL.D.

Appeal number: 331/ 2018

The Police

Inspector Maurice Curmi

Vs

Nahom Asmerom Negasi

Today the, 8th November, 2018,

The Court,

Having seen the charges brought against Nahom Asmerom Negasi holder of identity card number 113029A, before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having:

On the 4th May 2018, at about 00:05hrs and in the previous two years as the person responsible of the establishment 'Marley's Magic Bar' situated in Harifa Street, Saint Paul's Bay:

1. Played and/or permitted to play amplified music without the permit from the competent authority;
2. Also accused played and/or permitted to play amplified music without the permit from the competent authority;

3. Also accused of having operated a loudspeaker, gramophone, amplifier or similar instrument made or caused or suffered to be made which was so loud to have caused a nuisance to his neighbors John Spiteri and Angelo Xuereb;

4. Also accused having permitted and/or played music that could be heard from outside after 23:00hrs.

Having seen the judgment meted by the Court of Magistrates (Malta) as a Court of Criminal Judicature proffered on the 10th of July, 2018 whereby the Court, after having seen Regulation 6 (4) (a), (b) and (d) of Subsidiary Legislation 441.08, and section 41 (2) (a) of Chapter 10 of the Laws of Malta found the accused guilty of all the charges brought against him with the exception of the second charge as it is identical to the first charge and hence the Court did not taking cognizance of the same charge, and condemned him to the payment of a fine (ammenda) of one thousand euro (€1000) and in terms of section 30 of Chapter 9 of the Laws of Malta disqualified the accused from holding the license of the establishment Marley's Magic Bar, Triq il-Harifa, St. Paul's Bay for a period of fifteen (15) days from today.

Having seen the acts of the proceedings;

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

Having seen the appeal application presented by Nahom Asmerom Negasi in the registry of this Court on the 25th of July 2018 whereby this Court was respectfully petitioned to reverse and cancel the judgement given by the Court of Magistrates as a Court of Criminal Judicature on the 10th July 2018, consequently proceeding to acquit the appellant from all guilt and punishment. Alternatively, this Court is respectfully petitioned to vary the judgement given by the Court of Magistrates as a Court of Criminal Judicature on the 10th July 2018 by awarding a lesser punishment which is qualitatively and quantitatively more proportionate in relation to the facts concerned.

Having seen the grounds for appeal of Nahom Asmerom Negasi:

1. The articles of law quoted in conjunction with the charges are erroneous

The charges under which the appellant was accused quote "S.L. 441.07 sec 38 2a" [sic] and "S.L. 441.07 sec 38 2c"as the effective articles of law. It is humbly pointed out that really and truly, section 38 of the quoted law concerns appeals from decisions regarding trade licenses – a matter which is totally unrelated to the instant case. This error was not corrected prior to closure of prosecution's evidence. In fact, as is evident from the judgement, the first Court opted to apply different articles of law to the facts at issue *marte proprio*. The appellant is aggrieved by the lack of impartiality demonstrated by the first Court who took on the mantle of correcting the prosecution's errors.

2. License to play amplified music

In its decision, the first Court stated that "*when the accused took the witness stand, he stated that on the premises there are only three small loudspeakers which in total cost €35 and therefore that there couldn't be that much noise. However from the license exhibited by the prosecution, it does not result that the accused has any permit to play amplified music from the bar in question. Therefore he cannot play any kind of amplified music*".

First and foremost, it must be stated that the "license" exhibited by the prosecution was simply a photocopy. From the acts of the case, it does not result that this was actually presented and confirmed on oath by a representative of the Malta Tourism Authority which is the license-issuing body according to law. One cannot honestly state that the best evidence rule has been followed in this regard.

One may also comment that the (underlined) comment passed by the first Court is too categorical, besides being legally incorrect. One cannot state that the appellant cannot play any kind of amplified music when the law itself [S.L. 441.08 Art. 6(4)(a)] states that "*the playing of music by whatever means inside commercial premises when they are not licensed to play amplified music shall stop by 11.00 p.m. and between 1.00p.m and 4.00 p.m*". So therefore, even a commercial establishment which is not specially licensed is actually

allowed to play amplified music until 23:00. It is respectfully submitted that the approach adopted by the first Court is based on a mistaken interpretation of the regulatory framework regarding the playing of music within commercial establishments.

More importantly, it is an established fact that the appellant does not have a professional sound system installed in the premises (this could also have easily been verified by the Police Officers who executed a spot check on the 4th May 2018). The defence has proven that the only speakers on the premises are a very small domestic model which is normally used in private residences. They are used to provide background music, something which *per se* is not prohibited by law. It is highly doubtful whether the use or otherwise of such speakers can actually fall squarely within the definition of "amplified music" contemplated by the law. Rather, it is humbly submitted that this should have been treated as a case of *de minimis non curat prætor*.

3. The first Court found guilt notwithstanding the fact that the prosecution failed to bring forward the best evidence in various instances

It is respectfully submitted that the first Court should have proceeded to acquit the appellant due to the fact that the prosecution failed to adduce the best evidence available in relation to no less than three important factors which are essential in the understanding of this case.

Whilst it is an accepted fact that on the night at issue, 4th May 2018, a number of Police Officers from Qawra district carried out a spot check at appellant's establishment, it is surprising why none of the officers were called to testify about what they saw or found during such check. In such a case, doubt should militate in favour of the accused, who testified that he was not playing loud music after 23:00.

Similarly, the officer who received the reports from John Spiteri and Angelo Xuereb, namely WPC 58 Jessica Vassallo was also conspicuous by her absence on the witness stand.

As has already been stated above, the "license" exhibited by the prosecution was simply a photocopy. From the acts of the case, it does not result that this was actually presented and conformed on oath by a representative of the Malta Tourism Authority which is the license –issuing body according to law. Here again, the evidence brought forward by the prosecution was seriously defective in terms of procedural requirements.

4. The witnesses produced failed to mention a date and time

In charges of this nature, the establishment of the time of the offence is of a crucial nature, this is because the law itself establishes a chronological demarcation. Surprisingly, the three witnesses who testified *viva voce* before the first Court, namely Angelo Xuereb, John Spiteri and Giovanna Antida Spiteri, whilst being univocal in their manifest contempt for the appellant, failed to state clearly a date and time when the amplified music was actually being played. The prosecution also failed to produce the Police Officers who executed the spot check on the appellant's bar. This latter omission would indicate that they did not witness amplified music being played after 23:00.

It is therefore clear that the fact that amplified music was being played after 23:00 was not established beyond reasonable doubt by the prosecution. One must keep in mind that in the criminal proceedings, any doubt should militate in favour of the accused – *in dubio pro reo*.

It is humbly submitted that since finding of guilt of the offences as stated in the charges depends on the establishment of the fact that amplified music was actually played after 23:00, the appellant should be acquitted.

5. The punishment meted out by the first Court is excessive and disproportionate

Without prejudice to the other grounds of appeal, it is respectfully submitted that the punishment meted by the first Court, that is, the payment of a fine of €1,000 and disqualification from holding the license of the establishment for a period of 15 days, is rather draconian in relation to the minor nature of the facts at issue in this case. One must bear in mind that the appellant's conviction only rests on the disjointed testimony of

persons who arguably hold a personal grudge against him and have every interest to use the instant judicial proceedings as an instrument of reprisal. No official or impartial witnesses were brought.

Reference is made to judgement given by this honorable Court in the case **Pulizija Vs. Mark William Grima** (decided on 16 December 2015 per Madam Justice E. Grima), the facts of which were analogous to the instant case. The Court, on an appeal lodged by the Attorney General on punishment, raised the punishment from a reprimand and admonition to a fine (*ammenda*) of **€150**. It is humbly suggested that something on these parameters would constitute a more reasonable option were this Court to confirm guilt on part of the appellant.

Duly considers,

The Court heard the parties make their final oral submissions with regards to the appeal of the applicant and declared that they wish this court to pronounce judgment with regard to the first preliminary plea raised by the applicant regarding the alleged nullity of the proceedings,

Considers.

The Appellant was brought to court before the Courts of Magistrates and charged with having on the 4th May 2018 at about 00.05 and in the previous two years as the person responsible of the establishment 'Marley's Magic Bar' situated in Harifa street, Saint Paul's Bay and charged with offences relating to the playing of music .The accused was fund guilty by the Courts of Magistrates on the 10th July 2018 and condemned to the payment of a fine and to the suspension of license for a period of 15 days.

The appellant felt aggrieved with this judgment and presented an appeal. In his first plea he alleged that the articles of law quoted in conjunction with the charges are erroneous and thus the judgment delivered is null despite the court having quoted other articles at law in its judgment.

Considers further

From an examination of the proceedings it transpired that the prosecution quoted the following subsidiary legislation namely SL 441. 07 in particular article 38 (2) (a) and article 41 (2) (30 of chapter 10 of the laws of Malta, whereas the first court in its judgment made reference to articles 41 (2) a) of chapter 10 of the laws of Malta it also made reference to sections 6(4) (a) (b) and (d) of the Subsidiary Legislation 441.08 (and not AL 441.07 as mistakenly quoted on the charge) . The Court examined the charges brought forward against the accused and noted that the relevant sections at law are those quoted by the courts of Magistrates in tis judgment.

Legal Considerations

A judgment delivered by the Court of Magistrates shall include the Court by which the decision was delivered, names of the parties, date of the judgment, and the elements found in **Article 382**, whereas a judgment delivered by the Criminal Court or Court of Criminal Appeal shall include the Court by which the decision was delivered, names of the parties, date of the judgment, the elements found in **Article 382** apart the reasons which led the Court to that decision.

Therefore, **Articles 663 (5), 377 (1) and 382** all indicate what should be included in a judgment delivered by the Court of Magistrates. Our Courts have repeatedly held that judgments should be upheld as much as possible especially when the rights of the accused have not been prejudiced. In fact, the Court of Criminal Appeal in **Il-Pulizija vs Francis Zammit**[1] held that:

> *Mhix il-prattika ta' din il-Qorti tkun formalisitika żżejjed specjalment meta nullita' simili ma ssibx konsegwenzi partikolari ... il-formaliżmu m'hemmx postu u għandha tigi salvata s-sentenza anki fuq il-massima 'ad salvandum actum consummatum omnis favorabilis capienda venit interpretatio.*

[1] Decided on the 16th of January 1986

As a result our Courts have given a rather restrictive interpretation of these articles especially **Article 382** and have simply abided by the formalities mentioned in these articles without adding further requirements which are not mentioned in such provisions. For instance in **Il-Pulizija vs Jesmond Sant**,[2] the Court of Criminal Appeal held that neither Article 377 (1) nor Article 382 provide that the judgment should on pain of nullity be written by the Magistrate himself/herself but these articles only stipulate that what has been said by the Magistrate is registered and written in the judgment, and as a result the grievance raised by the defence that the judgment delivered by the first Court was null was rejected.[3]

Moreover the Court of Criminal Appeal in **Il-Pulizija vs Carmel Polidano,**[4] after differentiating **Article 382** to **Article 662 (2)** stated that:

Jiġifieri sentenza tal-Qorti tal-Maġistrati li ma ssemmix ir-raġunijiet li wassluha għad-deċiżjoni tagħha ma titqiesx nulla. Naturalment huwa dejjem rakkomandabbli li jissemmew almenu minimu ta' raġunijiet, iżda n-nuqqas tagħhom ma jwassalx għan-nullita` tas-sentenza.

In fact, according to jurisprudence, judgments delivered by the Court of Magistrates which are not motivated are not null and void. Moreover, the need by our Courts not to motivate their judgment has been considered even truer in cases when an admission was given by the accused to the charges brought against him. In fact in **Il-Pulizija vs Emmanuele Magro**,[5] the Court of Criminal Appeal held that:

[2] Decided on the 19th of February 2014

[3] "*L-Artiklu 382 tal-Kap 9 jaghti direzzjoni lil Qorti ta' x'ghandu jkun fiha s-sentenza u cioe, ghandha tghid ilfatti illi taghhom dak li jkun gie misjub hati, taghti l-piena u ssemmi l-Artiklu tal-Kodici jew kull Ligi ohra li tkun tikkontempla r-reat. Izda dan l-Artiklu ma jghidx li ssentenza ghandha bilfors tinkiteb mill-Magistrat*".
Vide also: Il-« Pulizija kontra Albert Bezzina », deciza mill-Qorti ta' l-Appell Kriminali fil-25 ta' Lulju tan-1994 intqal "La l-Artiklu 377 (1) u lanqas l-Artiklu 382 tal-Kodici Kriminali ma jirrikjedu li s-sentenza tinkiteb mill-Magistrat. Dak li trid il-Ligi hu li dak li jghid il-Magistrat meta jghid is-sentenza jigi registrat u riprodott fil-kopja tas-sentenza."

[4] decided on the 11th December 2013

[5] delivered by the Court of Criminal Appeal on the 30th October 2014

Rigward l-ewwel aggravju illi s-sentenza ma kinitx motivata, il-Qorti taghmel riferenza ghall-ammissjoni tal-istess appellant permezz tal-verbal tad-disgha u ghoxrin (29) ta' Novembru 2012, f'liema kaz, allura, l-ewwel Qorti ma kellhiex alternattiva hlief li tghaddi minnufih ghas-sentenza kif fil-fatt ghamlet u stante din l-ammissjoni ma kellhiex ghalfejn toqghod tidhol fid-dettal b'hafna argumenti dwar il-htija o meno tal-appellant. Kien bizzejjed ghall-ewwel Qorti illi ssemmi l-artikolu tal-ligi illi tahtu l-appellant kienet qed jinstab hati u l-fatti tal-kaz li liema fatti gew esposti fil-bidu tal-gudikat tramite l-akkuza migjuba mill-Prosekuzzjoni.

Article 382 of the Criminal Code is a very important article since it embodies the necessary requisites which a judgment delivered by the Court of Magistrates must possess. In fact, **Article 663 (5**) in establishing what shall be mentioned in the summary of the judgment delivered by the Court of Magistrates provides that the elements found in Article 382 shall be present too. Thus, the elements found in this article are a *sine qua non* elements for the validity of judgments.

Article 382 provides that:

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

Therefore, according to this Article the Court in delivering the judgment must clearly mention the:

(i) Facts of which the accused has been found guilty;
(ii) Punishment meted to the accused; and
(iii) The article of the Code or of any other law creating the offence.

All these three elements must be found in the judgment delivered by the Court of Magistrates. Various times before our Courts the issue of which judgment should be considered as the final and binding one since these three requisites must be found in the final written judgment. The Court of Criminal Appeal in **Il-Pulizija vs Gesmond Sant**[6] made it clear that the judgment which is considered as binding is the official copy issued by the Deputy Registrar and therefore these three requisites must be found in the official copy of the judgment issued by the Deputy Registrar. In fact, the Court explained that:

Dan ifisser quindi illi l-appunti illi jikteb il-Magistrat, jibqghu biss appunti ghall-informazzjoni tieghu. Is-sentenza illi taghmel stat fil-konfront tal-partijiet u terzi, hija dik il-kopja ufficcjali illi tohrog minghand id-Deputat Registratur, taht il-firma tieghu biss. Il-Magistrat m'ghandux ghalfejn jiffirma l-kopja ufficcjali. Dan 'l ghaliex l-istat legali jkun intlahaq mid-Deputat Registratur u mhux mill-Magistrat pero, jekk il-Magistrat jaghzel li jiffirma ma jaghmel xejn hazin, basta li fuq il-kopja jkun hemm ukoll il-firma tad-Deputat Registratur.

Moreover, in **Il-Pulizija vs Raymond Parnis**[7] the Court of Criminal Appeal reiterated that:

Wara li l-Qorti rat l-atti tal-kawza specifikament l-appunti li kitbet il-Magistat fis-sentenza kif ukoll il-kopja ufficjali, tikkonferma illi l-raba' akkuza hija nieqsa millkonsiderazzjonijiet illi jidhru fil-kopja ufficjali. Dan jidher illi huwa zball tat-traskrittur illi bi zvista jew ghal xi haga ohra naqas milli jipproduci ezatt dak illi kitbet il-Magistrat.

Jinghad mill-bidu nett li hija l-kopja ufficjali mahruga mid-Deputat Registratur illi jaghmel stat fil-konfront ta' terzi u mhux l-appunti jew is-sentenza li tkun miktuba mill-Magistrat.Dana stabbilit u ovvju pero' illi hemm diskrepanza bejn ilpunti li kitbet il-

[6] Ibid
[7] Decided on the 4th of March 2011

Magistrat u s-sentenza ufficjali, liema diskrepanza hija sforz lapsus jew zball tekniku tad-Deputat Registratur. Peress illi huwa dmir tal-Qorti illi ssalva kemm jista' jkun latti, ma thossx illi ghandha tmur ghall-estrem tan-nullita' tas-sentenza aktar u aktar meta dan l-izball jista' facilment jigi rrangat u dak li qalet il-Magistrat jista' jigi riprodtt fedelment fis-sentenza ufficjali. jigi riprodtt fedelment fis-sentenza ufficjali.

Ghalhekk din il-Qorti tiddisponi mill-eccezzjoni tan-nullita' imqajjma mill-Avukat Generali billi tichad l-istess, izda tordna illi l-atti jintbaghtu lura lill-Ewwel Qorti halli d-Deputat Registratur johrog kopja ufficjali ohra w jirriproduci fedelment dak illi qalet il-Magistrat fis-sentenza taghha.

Courts have in various occasions stressed the importance of adherence with the requirements mentioned in Article 382. In fact, various judgments have explicitly held that the lack of any one of these formalities regarded as necessary for the validity of the judgment, should lead to the nullity of the judgment as a result of a defect in formality. [8] In other words, these requirements are not mere formalities but are necessary requisites for the validity of the judgment.

In **Il-Pulizija vs Emanuel Azzoparti et[9]** decided by the Court of Criminal Appeal the Court held that:

Skont ġurisprudenza paċifika tal-Qorti tal-Appell Kriminali, l-inosservanza ta' xi wieħed ir-rekwiżiti tal-artikolu 382 tal-Kodiċi Kriminali jammonta għal nuqqas ta' formalita' sostanzjali fis-sens tal-artikolu 428(3) tal-imsemmi Kodiċi, bil-konsegwenti nullita' tas-sentenza jew ta' parti minnha skont il-każ. Tali nullita' hija sollevabbli 'ex ufficio'.

[8] Vide also Crminal Appeasl in the names Il-Pulizija v. Donald Cilia, 24 h April 2002; IlPulizija v. Benjamin Muscat, 28 th June 2002 u 10 th July 2002; Il-Pulizija v. Joseph Zahra, 9 th September, 2002; Il-Pulizija v. Paul Cachia, 25 th Septmber 2003; Il-Pulizija v. Mark Portanier, 14th September 2004; Il-Pulizija v. John Axiaq et, 19th May 2005; Il-Pulizija v. Stefan Abela, 2nd February 2006; Il-Pulizija v. Emanuel Mercieca, 7th February, 2006; Il-Pulizija v. Anthony Borg, 1st June 2006; Il-Pulziija v. Marcel Dingli, 9th February 2007.
[9] Vol.LXXXIII.1999 Part IV paġina 340

Moreover in **Il-Pulizija vs Mario Agius**[10], the Court of Criminal Appeal reiterated that;

in-nuqqas ta' osservanza ta' dak li hemm provdut fl-artikolu 382 tal-Kodici Kriminali jammonta ghan-nuqqas ta' formalita` sostanzjali.

These requisites are alternatives to each other and therefore in order for a judgment to be annulled by the Court there is not the need to find a lack in all the three formalities but a lack in one of the formalities will suffice. Since, all the three requisites mentioned in **Article 382** must be present in the decision given by the Court of Magistrates, the lack of any one of them, will result in a lack of substantial formality and consequently will result in the nullity of that decision.

Although **Article 382** indicates and explicitly mentions three requisites which must be found in judgments delivered by the Court of Magistrates and the author is going to analyse each element separately.

Facts of which the accused has been found guilty

The first requisite which Article 382 mentions is that the judgment must 'state the facts of which he [accused] has been found guilty'. **Article 382** does not define or state what constitutes the facts of which the accused has been found guilty and as a result one should look at jurisprudence in order to understand what the phrase facts of which he has been found guilty means.

First of all, the Court of Magistrates in delivering judgment must explicitly either discharge or sentence the accused and if it mentions the facts of which the accused has been found guilty it must necessarily declare that the accused has been found guilty.

[10] Decided by the Court of Criminal Appeal on the third (3) of February 1995

Therefore, the Court of Magistrates in delivering judgment must on pain of nullity declare that the accused has been either found guilty or not guilty of all or any of the charges brought against him. In fact, in **Il-Pulizija vs Joseph Agius**,[11] the Court of Criminal Appeal held that the first court after mentioning the article of the law went on to deliver the punishment without declaring the accused guilty and as such this constituted a breach of the elements found in **Article 382**:

Ovvjament la l-Qorti hija marbuta illi taghti l-fatti illi taghhom l-appellant ikun gie misjub hati dana jfisser illi ghandu jkun hemm id-dikjarazzjoni ta' htija ghax altrimenti huwa inutli illi ssemmi l-fatti.

Article 382 refers to the facts of which the accused has been found guilty. In **Il-Pulizija vs Elton Abela**[12] the Court of Criminal Appeal gave a definition of these facts;

Il-fatti li l-artikolu 382 jirreferi ghalihom huma l-fatti tar-reat u mhux, kif jippretendi l-appellant, il-fatti li jiggustifikaw ilkundanna ossia l-motivazzjoni. Fis-sentenza appellata lfatti tar-reat huma effettivament elenkati fil-bidu nett. Lewwel Qorti mbaghad ghaddiet biex telenka l-artikoli talligi relattivi ghal dawk ir-reati kollha u ddikjaratu hati wara li qalet li kienet semghet ix-xhieda kollha u ezaminat iddokumenti esibiti. Dak li kellha f' mohha l-ewwel Qorti huwa car, cioe` li kienet qed issib il-htija ghallimputazzjonijiet kollha peress li ma ghamlet l-ebda kwalifika, u wiehed m'ghandux ghalfejn janalizza ssentenza biex jipprova jiddetermina ta' x'hiex hija kienet qed issib lill-appellant hati. Certament kien ikun deziderabbli li kieku l-ewwel Qorti ziedet il-kliem "ta' limputazzjonijiet kollha" wara l-kelma "hati". Dan in-nuqqas pero` fil-kaz in dizamina ma jrendix is-sentenza nulla.

[11] Decided by the Court of Criminal Appeal on the fifteenth (15) of March 2012
[12] Decided by the Court of Criminal Appeal on the 28th of January 2005

Usually, in various summary cases, the judgment would be written on the charge sheet itself where the facts of which the accused has been found guilty would be present. Thus, according to our Courts when a judgment by the Court of Magistrates is written on the charge sheet itself the requisites enunciated by Article 382 would be present even with regards to the facts of which the accused has been found guilty.

Moreover, our Courts have considered that the recidiva is not to be considered as a fact of the case similar to other accusations since its nature is different from the others. In **Il-Pulizija vs Paul Spagnol**[13], the Court of Magistrates in its judgment failed to pronounce itself on the sixth accusation that of the recidiva failing to find the accused guilty or not guilty of this accusation. The Court of Criminal Appeal in its judgment held that since the recidiva is not a fact of the case similar to other accusations there was no defect in the judgment delivered by the Court of Magistrates and as a result it upheld the judgment. In fact, the Court explained that:

Oltre dan, ir-recidiva mhux 'fatt' fis-sens li huma limputazzjonijiet l-oħra. Hija tissejjaħ addebitu u n-natura tagħha hija differenti mill-imputazzjonijiet. Fis-sentenza 'Il-Pulizija versus Josef Abela' (17 ta' Settembru 2008 – Qorti tal-Appell Kriminali), intqal dan li gej:

Ir-recidiva ma tistax titqies bħala akkuża oħra iżda bħala cirkostanza tas-sejbien ta' ħtija.'

The second requisite which Article 382 stipulates is that the judgment must indicate the punishment meted to the accused. Article 7 of the Criminal Code stipulates the punishments to which crimes and contraventions are subject and differentiates punishments which are to be meted out to crimes and punishments which are to be meted out to contraventions. In fact, whereas punishments that may be awarded for crimes are (saving the exceptions laid down in the law) imprisonment, solitary confinement, interdiction and fine (*multa*), those that may be awarded for contraventions (subject to

[13] Decided on the 19th May 2011

the provision of Article 53 or of any other special law) are detention, fine (*ammenda*) and reprimand or admonition.

Obviously the Court of Magistrates will give punishment if it finds the accused guilty since punishment is meted out consequent to a breach of law. In other words, if the Court does not find the person guilty of any of the charges brought against the accused no punishment will be meted out.

According to **Article 382** of the Criminal Code, the Court of Magistrates must specify in the sentence delivered by it the quantum of punishment given to the accused. In other words, the Court of Magistrates in delivering the judgment to the accused if it finds him/her guilty of all or any of the accusations brought against him/her, must state the punishment awarded to him/her. However, as rightly pointed out by our Court various times, **Article 382** does not require the Court of Magistrates, in delivering the judgment to write and quote the Article contemplating the punishment but it only requires the Court of Magistrates to mention the Article creating the offence.

In **Il-Pulizija vs Gaetano Portelli** [14]the Court succinctly held that:

> *Fi kliem iehor, dak li hu necessarju li jissemma' hu l-artikolu li jikkontempla "ir-reat" ("…the section…creating the offence", fit-test Ingliz), u mhux ukoll l-artikolu li jikkontempla l-piena jew pieni.*

This was confirmed in **Il-Pulizija vs Benjamin Muscat,**[15] wherein the First Court quoted wrongly the articles contemplating punishment. However, according to the Court of Criminal Appeal, the Court of Magistrate is not bound to quote the articles contemplating punishment but only the Articles contemplating the facts of which the person is accused

[14] Decided by the Court of Criminal Appeal on the 22nd of October 2001
[15] decided on the 10th of August 2002

of and as a result the Court of Criminal Appeal upheld the judgment delivered by the Court of Magistrates:

> *Illi kif gie ritenut minn din il-Qorti diversament preseduta fis-sentenzi taghha kontra l-istess appellant odjern tat-28 ta' Gunju , 2002 , "tali riferenza zbaljata ma ggibx in-nullita' tas-sentenza appellata . L-art. 382 tal-Kap. 9 jirrikjedi li Sentenza tal-Qorti tal-Magistrati bhala Qorti ta'Gudikatura Kriminali jkun fiha "inter alia" l-artikolu tal-ligi li jikkontempla r-reat u mhux l-artikolu tal-ligi LI JIKKONTEMPLA L-PIENA. Issa is-sentenza kjarament tindika , fost artikoli ohra , l-art. 338 (gg) tal-Kap.9 ghal dak li jirrigwarda ir-reat kontemplat fl-imputazzjoni dwar id-daqq tal-muzika wara l-11 p.m. Huwa car ukoll illi bit-talba ghas-sospensjoni jew skwalifika tal-licenzja kif migjuba mill-Pulizija fic-citazzjoni , il-Prosekuzzjoni kienet qed invoka l-art. 30 tal-Kap.9 li effettivament jaghti ssetgha lill-ewwel Qorti li , fic-cirkostanzi kontemplati fil-paragrafi (a) u (b) tas-subartikolu (1) ta' limsemmi Art. 30 tiswalifika lill-hati milli jkollu jew milli jikseb licenzja kif hemm imsemmi. Fi kliem iehor l-ewwel Qorti KELLHA s-setgha li tiskwalifika lill-appellant mill-licenzji dwar daqq ta' muzika; dak li gara kien sempliciment li, evidentement bi zvista, il-Qorti tal-Magistrrati ccitat artikolu tal-ligi flok iehor. Dan , pero' kif inghad ma jgibx ghal xi nullita' fis-sentenza. Il-piena applikata – ssospensjoni tal-licenzja - kienet wahda li l-ewwel Qorti setghet legalment tinfliggi fic-cirkostanzi talkaz u l-fatt li gie kkwotat artikolu b'iehor , b'riferenza ghall-piena (mhux ghal fatti li jammontaw gharreat) ma jgibx bhala konsegwenza li dik il-parti tas-sentenza , fejn si tratta dwar is-sospensjoni tallicenzja ghandha necessarjament tigi varjata.*

An interesting case was that of **<u>Il-Pulizija vs Lawrence Camenzuli</u>**[16] Here the appellant was accused of not allowing his wife having access to their matrimonial home and the Court of Magistrates found him guilty of the charge brought against him and by

[16] Decided by the Court of Criminal Appeal on the 30th of September 2009

application of Article 22 of Chapter 446 of the Laws of Malta acquitted him with the condition that he must return a copy of the key of the house within two weeks from the judgment. However, according to the Court of Criminal Appeal Article 22 of Chapter 446 of the Laws of Malta provides that the only condition which can be imposed on the accused when given a conditional discharge is that he does not do a crime within the period of which he is discharged. Therefore, according to the Court:

> *Sabiex l-ewwel Qorti setghet taghmel l-ordni li l-appellant jaghti kopja tac-cavetta tad-dar msemmija lil martu, tali ordni kellu jsir skond l-artikolu 377 tal-Kap. 9 tal-Ligijiet ta' Malta. Skond l-artikolu 382 tal-Kap. 9, meta Qorti taghti ssentenza kontra l-imputat,* ***"ghandha tghid il-fatti li taghhom dan ikun gie misjub hati, taghti l-piena u ssemmi l-artikolu ta' dan il-Kodici jew ta' kull ligi ohra li tkun tikkontempla r-reat."*** *Bil-mod kif iddecidiet lewwel Qorti giet illi naqset milli taghti piena peress illi filverita`, ghalkemm ghamlet referenza ghall-artikolu 22 tal-Kap. 446, hija ma applikatx, jew naqset milli tapplika korrettement, il-provvedimenti ta' dak l-artikolu. Konsegwentement ma giet inflitta l-ebda piena fuq l-appellant u s-sentenza appellata hi nulla. Ghalhekk din il- Qorti sejra tittratta l-kaz mill-gdid.*

1.3 Articles of Law

The third requisite which forms the merits of this appeal is that which Article 382 stipulates namely that the judgment must stipulate the Articles of the Criminal Code or of any other law creating the offence. As was mentioned earlier on when regarding the punishment, our Courts have held that **Article 382** only stipulates that the judgment must quote the Articles creating the offence and not the Articles contemplating the punishment.

Our Courts have always held that the lack of the article/s in the judgment will result in the nullity of the judgment itself. In **Il-Pulizija vs Anthony Zahra** the Court held that:

In-nuqqas ta' indikazzjoni tal-artikoli tal-ligi skont l-artikolu 382 tal-Kodiċi Kriminali jammonta ghal nuqqas ta' formalita' sostanzjali sollevabbli mill-Qorti "ex officio" anke jekk l-appellant ma jilmentax min-nullita' tas-sentenza.

In fact, the Court of Criminal Appeal in **Il-Pulizija vs Joseph Cutajar**[17], was very clear and held that;

Illi l-artikolu hawn fuq imsemmi [referring to Article 382 of the Criminal Code] jaghmilha cara li l-artikolu tal-ligi ghandu jissemma. Dan mhux kaz ta' 'lapsus calami' izda dan hu kaz ta' nullita' tas-sentenza msemmija.

This brings us to the point of contention in this appeal namely as to whether our Courts have held that the Articles which **Article 382** makes reference to need only be mentioned in the judgment itself or also in the summons. In **Il-Pulizija vs Saviour Borg D'Anastasi**[18], the Court held that:

Illi dwar l-aggravju li hu ma giex mgharraf bl-artikoli tal-ligi jew regolamenti li tahthom kien qed jigi akkuzat, dan hu manifestament infondat ghax dan mhux rikjest bil-ligi. Di fatti l-art.360 (2) tal-Kodici Kriminali li jiddisponi x'ghandu jkun fiha ic-citazzjoni, ma jsemmix dan ir-rekwizit fost id-dettalji kollha li jinkludi li ghandhom ikunu inkluzi fic-citazzjoni, kuntrarjament ghal dak li hu provvdut fl-art. 382 talistess kodici li jghid li is-sentenza ghandha issemmi "l-artiklu ta' dan il-Kodici jew ta' kull ligi ohra li tkun tikkontempla r-reat" vot li gie osservat mill-ewwel Qorti fis-sentenza Taghha.

[17] Decided on the 17th June 2014
[18] Decided on the 18th April 2002

This was explained better in **Il-Pulizija vs Gary Grech**[19] whereby the Court held that;[20]

> *L-appellant jissottometti li la c-citazzjoni originali ma tindikax l-artikoli li abbażi tagħhom ħargu l-artikoli, spetta għall-ewwel Qorti li dawn tispecifkahom fic-citazzjoni li fiha hemm miktub is-sentenza minn idejn il-Qorti stess.*
>
> *L-artikolu 382 tal-Kap 9 jesigi li jkunu inidkati l-artikoli li tagħhom imputat ikun isntab ħati. Iżda mkien ma jorbot lill-Qorti lil dawn tniżżilhom fuq ic-citazzjoni fejn tkun kitbet is-sentenza b'idejha. L-ewwelnett l-ebda artikolu tal-Kap 9 ma jirrkjedi li s-sentenzi jinkitbu fuq ic-citazzjoni nnifisha u t-tieni mhux l-ewwel darba li s-sentenza ma tinkitibx fuq ic-citazzjoni, specjalment meta l-Qorti tkun tirrikjedi aktar ħsieb jew ma tinkitibx dak in-nhar stess tal-udjenza u l-każ ikun iddefirit għal data oħra għas-sentenza.*
>
> *B'danakollu l-artikolu jridu jidhru fis-sentenza. F'dan il-każ jidhru fis-sentenza dattilografata li ggib ukoll il-firma tal-istess Magistrat ... galadarba fis-sentenza dattilografata hemm imniżżlin l-artikoli, l-artikolu 382 kien soddisfatt u għalhekk il-Qorti qed tirrispingi din il-parti tal-ewwel aggravju.*

The importance of Article 382 is seen by the fact that the validity or otherwise of a judgment in terms of Article 382 can be raised ex officio. In fact, in **Il-Pulizija vs. Paul Cachia**[21] decided on the 25th of September 2003 the Court of Criminal Appeal held that:

> *Illi qabel xejn, ghalkemm l-appellant ma adduca ebda aggravju dwar dan, din il-Qorti osservat illi l-Ewwel Qorti fil-parti dispozittiva tas-sentenza ccitat biss l-artikoli tal-ligi taht il-Kap. 37 u taht l-Att dwar it-Taxxa tal-Valur Mizjud li jirrigwardaw biss is-sejbien ta' htija tal-ewwel imputazzjoni w dana ghalkemm kienet sabet htija wkoll*

[19] Decided on the 17th June 2014
[20] decided on the 17th June 2014
[21] Vide also Il-Pulizija vs Fiona Marie Aquilina decided on the 15th September 2010

taht l-erba` imputazzjonijiet l-ohra dedotti kontra l-appellant li jaqghu taht ligijiet ohrajn. Issa dan in-nuqqas jimporta n-nullita' tas-sentenza appellata ghax ma giex rispettat il-vot tal-ligi indikat fl-artikolu 382 tal-Kodici Kriminali.

Therefore what is important is not that the articles are mentioned in the charge sheet but that the right articles upon which the court establishes guilt are mentioned in the judgment Therefore the first plea raised by the appellant regarding the nullity of judgment is being rejected an the Court orders the continuation of the case.

(ft) Consuelo Scerri Herrera

Judge

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Franklin Calleja

Deputy Registrar