



COURT OF CRIMINAL APPEAL

The Hon. Madame Justice Dr. Consuelo Scerri Herrera LL.D.

Appeal no. 438/2014

The Police
(Inspector Michael Mallia)

Vs

Yilmaz Azlan

This, 18th day of June 2019

The Court,

Having seen the charges brought against the appellant **Yilmaz Azlan** holder of Maltese Id card number 13519A, accused before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having:

1. On the days before the 8th August, 2003 in Paceville, and other localities in Malta, with intent to make any gain whatsoever, gave aid, assisted, counselled or procured any other person to enter or to attempt or to leave or attempt to leave Malta, in contravention of the Laws thereof; or who, in Malta or outside Malta, conspired to that effect and this in violation of Article 337A of Chapter 9 of the Laws of Malta;

2. And also of having on the same days and circumstances, received a passport that was transferred to him by any other person and this in violation of Article 3(b) of Chapter 61 of the Laws of Malta.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 23rd October, 2014, by which, the Court, after having seen Articles 337A of Chapter 9 of the laws of Malta, and Article 3(b) of Chapter 61 of the Laws of Malta.

With regards to punishment, considered the gravity of this crime and the effects it leaves on the entire Nation, plagued with the influx of illegal immigrants, and the effects left on those displaced people constrained to adapt, if ever, to other cultures and countries, with all the difficulties these poor people are put through - this for the avarice of others.

The Law, taking into account the seriousness of these crimes, in fact prohibits the judge/magistrate to impose a non-custodial punishment - a clear message with regards to the nature of this case.

Therefore, the Court, having also seen Articles 17 and 31 of Chapter 9 of the Laws of Malta, condemned Aslan Yilmaz to a year and a half effective imprisonment and a fine of five thousand Euros (€5,000).

Having seen the application of appeal of the appellant Yilmaz Azlan filed on the 4th November, 2014, wherein he humbly asked this Court to reverse the said judgment and order his acquittal or, alternatively, vary the same judgment by awarding a lesser punishment, possibly one of a pecuniary nature only.

That the grounds of appeal of Yilmaz Azlan consist of the following:

1. That the first grievance consists in the fact that the Court of Magistrates made a wrong and unbalanced appreciation of facts.

That the Court failed in its evaluation of all the circumstances that are to serve as a back-up to the deposition of the accused whilst at the same time included submissions on the part of the prosecution that cannot be traced anywhere in the proceedings.

That whilst it was highlighted by the First Court that *'Inspector Jeffrey Cilia also testified with regards to Philip Azzopardi's telephone numbers, He deposed that he had obtained these numbers during the investigation with regards to the same Azzopardi who was obliged to hand over the information to the police when he released a statement. The numbers were 79294639 and 99452892.'*; the defence has no indication at all as to any document and/or documents from where all this emanates and therefore the defence contends that such an inference can in no way form part of these proceedings worst still form the basis upon which the First Court's decision rests. That likewise can be said in regard to the mobile number '99270750' which appears at the middle of the first page of the statement released by the accused on the 12th of August 2003, yet which, at the same time pinpoints at no particular person as can be verified from document filed at fol 176.

That the task in proving the *'nexus'* of the accused with these numbers rests fairly and squarely with the Prosecution and such a nexus must result from the acts of the proceedings and not be inferred from inexistent evidence.

That the Court failed also to take into account that Achibalik primarily had a problem with his visa (as this was about to expire within two days) and as rightfully highlighted by Inspector Jeffrey Cilia – it was *'Acibalik (who) had gone to the Top Kapi Restaurant'* on account that *'through the Grape Vine he knew that Aslan sent a lot of people to Italy, that everybody knew this'* only to be confirmed by

the same Inspector that *'none of the other illegal immigrants knew the accused'* and that *'they only mentioned Philip Azzopardi and had his mobile number on a piece of paper'*.

That from above it follows that it was incumbent on the Police to delve further into any other connections with the surname Aslan since apart from Yilmaz, the accused, there was also a second Aslan, i.e. Yilmaz's brother – Imdat, nonetheless a person of Turkish origin who incidentally is the owner of the Top Kapi Restaurant.

Nevertheless Dok F also requires revisiting since both Azlans' details appear on this document and it is pretty much questionable as to how a fol 79 Tahir contends that *'I know his telephone number by heart'* yet at the same time he writes the number 0035699270750 twice as opposed to other numbers indicated on same document.

That the Court, notwithstanding the above, thought it fit to place complete leverage on the demeanour of Achibalik; the Court even going as far as to state that (notwithstanding the passage of more than 11 years!) it had a good chance of assessing Tahir's demeanour up to the level of accepting his deposition in its totality; whilst at the same time discarding completely the statement, ¹released 'a

¹ Of Criminal Appeal (Inferior) *Mallia Michael II-Pulizija Vs Psaila Carmelo Joseph* 06/03/2014

L-istqarrija hija regolata bl-Artiklu 658 tal-Kap 9 illi jghid, "Kull haga li l-imputat jew akkuzat jistqarr sew bil-miktub kemm ukoll bil-fomm, tista tittiehed bi prova kontra min ikun stqarrha, kemm il-darba jinsab li din il-konfessjoni giet maghmulha minnu volontarjament u ma gietx imgieghla jew mehuda b'tHeddid jew biza' jew b'weghdiet jew b'xi twebbil ta' vantaggi.

L-Artiklu sussegwenti 659 jghid, "Meta l-konfessjoni titnizzel bil-miktub filwaqt tigi maghmulha l-kitba ghandha tigi prezentata.. ". Imkien minn dawn iz-zewg Artikoli ma jinghad illi l-istqarrija biex tkun valida trid bilfors tkun iffirmata minn dak li jkun ghamilha.

L-unici kweziti huma li tkun maghmulha volontarjament u ma tkunx imtappna b'xi theddid, biza', weghdiet jew twebbil ta' vantaggi.

tempo vergine' by the accused where he 'answered freely,' and he even signed his report; this in itself being in stark contrast to the '*unease and difficulty*' expressed by Tahir Acibalik – a good four (4) days from his apprehension, alongside 5 other illegal entrants.

That the Court states that '*yes he showed unease and difficulty to express himself. That by no means, means that he was narrating an untruth. He gave evidence at length and was in the salient necessary facts very constant*'. With all due respect, the defence begs to differ altogether from this statement particularly on account of the fact that:

(a) when the Police asked the accused as to how '*the police found Taher's passport at the Topkapi restaurant?*' he answered '*After fifteen or twenty days that Taher left I was at the restaurant and one mini bus come to the restaurant and the driver gave me an envelope and inside there was Taher's passport. The driver told me that a Turkish person sent him and told him (the driver i.e.) to give this envelope and passport to any Turkish man*'

(b) the Court of First instance failed also to take into account that when the Police, namely PC 63 Josef Farrugia acting on instructions of his superior went to retrieve the passport of Mr Achibalik this was handed over immediately and without any hesitation by the accused as can be amply verified from the '*prima nota*' exhibited at fol 100 of the proceedings and which reads out as follows:-

'Is-Sibt 9/8/03 f'xi 11.00am Insp Xuereb qalli biex immur it-Topkapi Kebab Paceville biex ingib passaport ta' wiehed Tork (Acibalik Tahir) minghand Aslan Yilmaz. Hu taghjuli dak il-hin stess min gol-hanut'

2. That the second grievance consists in the fact that the punishment meted by Court of Magistrates is too severe particularly if the accused's alleged involvement as stated is to be placed within the context of the decision delivered on the 2nd March 2011 by the Criminal Court in the case **The Republic of Malta vs Philip Azzopardi and Joseph Vella** (10/2009) where following a trial by jury:-

Philip Azzopardi and Joseph Vella jointly, were found guilty on account

1. That between the 17th and 19th of July, 2003 with the intent to make any gain whatsoever aided, assisted, counseled or procured persons to enter or to attempt to enter or to leave or attempt to leave or to transit across or to attempt to transit across, Malta in contravention of the laws thereof or, in Malta or outside Malta, conspired to that effect with any other person; where the persons aided, assisted, counselled, procured or the object of the conspiracy as aforesaid numbered more than three; less the last aggravation in the case of Joseph Vella.²

2. That on the 8th of August, 2003 and the days before knowingly harboured or caused to be harboured any person against whom there is a warrant of arrest for any offence liable to imprisonment for a term exceeding three months, or for whom the Executive Police is searching for the purpose of arresting him for any

² bejn is-17 u d-19 ta' Lulju, 2003 bil-hsieb li jaghmlu xi qliegh li jkun, ghenu, assistew, taw parir jew habirku biex persuni ohra jidhlu jew jaghmlu tentattiv biex jidhlu jew johorgu jew jaghmlu tentattiv biex johorgu minn Malta bi ksur tal-ligijiet ta' Malta, jew li, sew f'Malta sew barra minn Malta, ikkonguraw f'dak is-sens ma' xi persuna ohra ; b'dan li l-persuni mghejjuna, assistiti, moghtija parir, li jkun sar thabrik dwarhom, jew il-mira tal-konāura, kienu ta' aktar minn tlieta; u dana skond l-Ewwel Kap ta' l-Att ta' l-Akkuza. Fil-kaz ta' Joseph Vella minghajr dan l-ahhar aggravju.

such offence, or who has escaped from arrest for any such offence; all this in direct conformity with the second count.³

3. That on the 8th of August 2003 and the days before, not being charged with the custody, care, or conveyance of any person under arrest or sentence, facilitated or were accomplice in the escape of such persons, as per third count⁴ and Philip Azzopardi solely, guilty of

4. knowingly provided the means for effecting an escape from Malta, whether of a person accused of a crime or of a person under arrest or sentence for a crime, or of a person under warrant of arrest for a crime, or of a person who has committed a crime although not yet sentenced nor under arrest or warrant of arrest as outlined in the fourth count ⁵and subsequently awarded Philip Azzopardi, for a punishment of six (6) years imprisonment and Joseph Vella, on account that he was acquitted of the fourth count and on account also of the fact that the second and third counts are merged into the graver violation i.e. the first count, for an aggregate punishment of eighteen (18) months imprisonment.

Having seen the records of the case.

Having seen the updated conviction sheets of the defendants.

³ fit-8 ta' Awwissu, 2003, u fil-jiem ta' qabel, xjentement, laqghu ghandhom jew giehlu lil haddiehor li jilqa' ghandu persuni li kontra taghhom ikun hemm ordni ta' arrest ghal reat suggett ghall-piena ta' prigunerija ghal aktar minn tliet xhur, inkella li l-Pulizija Esekuttiva tkun tfittex sabiex tarrestahom ghal dak ir-reat, jew li jkunu harbu wara li ikunu gew arrestati ghal dak ir-reat; u dana skond it-Tieni Kap ta' l-Att ta' l-Akkuza.

⁴ fit-8 ta' Awwissu, 2003 u fil-jiem ta' qabel, ghad li ma jkunux lilhom fdati l-kustodja, il-ghassa jew ittrasport ta' arrestati jew ta' ikkundannati, ghenu l-harba taghhom jew kienu komplici fiha; u dana skond it-Tielet Kap ta' l-Att ta' l-Akkuza

⁵ Tali fit-8 ta' Awissu 2003, u fil-jiem ta' qabel, xjentement ta l-mezz sabiex issir il-harba minn Malta, ta' persuni akkuzati b'delitt jew ta' arrestati jew ta' ikkundannati ghal delitt, inkella ta' persuni li jkunu taht mandat ta' arrest ghal delitt, jew ta' persuni li tkun ghamlet delitt, ghad li din il-persuna tkun ghadha mhix ikkundannata, arrestata jew taht mandat ta' arrest, u dana skond ir-Raba' Kap ta' l-Att ta' l-Akkuza.;

Now therefore duly considers.

On the 13th August, 2003 Tahir Acibalik gave evidence in the Turkish language and this was translated into the English language by the court appointed interpreter. The witness states that he came to Malta from Istanbul on the 17th July 2003 at 05.05 a.m. as per air ticket exhibited in the proceedings at fol.25. He claims that he is a technician in Ankara and came to Malta for a holiday. He said a person and in the acts of the proceedings, the name of the person is not indicated who told him that he would send him to Italy. He said that the accused had sent me to Gozo for 12 days. He explained that the accused together with a Maltese man named Philip took his money, the sum of one thousand euros (€1,000) and passport and sent him to Gozo.

Asked where he met the accused he states in a restaurant named Topkapi, Asked how the connection came along between the accused and the witness the reply was *"He sent a lot to Italy"*. Asked how he knew this he replied, *"He has adverts everywhere everybody knows"*. Asked where he saw the advert he replied *"every month from Turkey 35 persons go to Italy"*. Asked how he knew the accused was involved he replied *"he told me."* Asked if it were the accused who told him that he has sent other people to Italy, Turkish people" he replied *"yes yes"*. Asked when he told him this he replied *"approximately 20 days ago"*.

He said that he had told him this when he met him at the topkapi restaurant about twenty days before. He explained that it was the accused himself who told him that he would send him to Italy because he had already sent many. He remarked that he had only two days left on his visa before it would expire. He confirmed that whilst in Malta he was living at the Elena Hotel for a period of four days and then moved elsewhere. He said he went to live in a house very near to the Topkapi restaurant and it was Philip who took him there. There he stayed for five days and lived with an employee of the restaurant. He claimed

that the restaurant belongs to the brother of the accused. Asked who Philip was he said that he was shareholder with the accused.

He explained further that the accused kept his passport and took his money. The accused took him to Gozo and he stayed there for 12 days he was very upset he was going to commit suicide. With him in Gozo, three Africans were caught by the police. Shown document marked with the letter 'D' he states that it is a photo of Philip. He said that the telephone numbers on this image were written by the accused. They are the telephone numbers for the bus terminus to go to the Topkapi restaurant which were written by the accused. He also wrote the registration number of the car which belongs to the owner of the hotel in Gozo because he was afraid that something was going to happen.

He explained that he was taken to Gozo at 11.30p.m and taken to the fourth floor of the hotel where he met two Sudanese men. At 12.00, he was taken downstairs and was given some food. In the morning he would be given a fish meal and in the evening spaghetti. He was given room number 8 and they were given room number 9, He said they remained locked up for 12 days and everywhere was closed. He was only allowed to leave the room to go to the toilet and at 11.30 a.m. for lunch and at 12.00pm for dinner.

Then on one fine day he was put in a boat together with three others, two men and a lady and was told that they could not take them abroad so they were going to Malta. He was frightened. He was told that in Malta there were eight other persons and that they were going to collect them. When they arrived in Malta, they boarded a boat. Then they took them on a mini bus and went around Malta and collected other persons. They collected 12 other persons and were then taken to a boat. Money was collected there and Philip was there. He was not asked for money there since he had already given the money to the accused. Philip told him that he would take him to Italy and then collect the money from the accused. After ten minutes the police arrived. In all he said that he did not have any

connection with his family for 25 days. In the hotel there was the daughter of the owner and she would not let anyone in.

Asked why he gave the money to the accused he says he was tricked, His visa was going to expire on the 8th August. He knew he was going to Italy in an illegal way,

He said he paid LM12 per day at the Elena Hotel which was normal in price and it was the taxi driver who took him there. He said that he had also spent one night at the Tropicana hotel in Paceville for LM7 per day and it was the accused who took him there. This happened in the second week of his stay in Malta. Asked why he did not mention this night earlier in his evidence he said that he had forgotten all about it. He had wanted to stay for two nights but they did not have room. He said that he had paid LM20 rent for his stay in Gozo and gave them to the accused.

Whilst in Gozo he had no contact with the accused. There was no phone and he had no chance to go out. He did not see him. He only managed to speak to him once from the reception and told him that he was in a disastrous state and wanted his passport so that he could leave and he was told to go to the ferry and go back.

In the hotel he confirms that there was a reception but he could not leave. There was only one family in the Hotel, being family members of the owner. One of which spoke English and Arabic and told him this. The family lived in room number 11 and the owner of the hotel said that they did not have to hide from this family since this was his family.

Asked if he told his family that he was going to Italy he says no because when he went to Gozo he lost contact with them. He says that he had eight children. Five

of which work and one is studying and he is supporting two. His wife does not work. Asked why he decided to go to Italy if he was happy in Kurdistan he said he was sad with the decision he took of leaving his kid behind and knowing that his wife could not work.

He confirmed that the agreement to go to Italy was between himself and the accused and Philip was going to take him there. He gave the money and passport to the accused and the police got his passport back from the accused. He did not know Philip before it was the accused who introduced him to him.

Asked if when he met the accused he showed him dok E and asked for Ibrahim he said yes. Asked who wrote the name Ibrahim he said there was a worker who wrote it. Ibrahim is a Turk and he thought that he might need him in the future. Whereas the name of the accused on dok E was written by himself since, he had given him his passport and the money. He is not sure if he wrote it on the first day that he met him, it could be on the day that he was taken to Gozo. However, he confirms that this was a receipt for him that he had given the money to him.

Superintendent Neville Xuereb gave evidence on the 14th January 2004 and confirmed that on the 8th August, 2003 he was duty officer at the Immigration and at about 2.00am he was informed that between Friday and Saturday between the 8th and 9th of August a group of immigrants were found in a van near Bahar ic Caghaq and he was informed by ex-inspector David Saliba that he was going to pass on to me 10 immigrants for him to verify their immigration position and to see if they were illegal immigrants.

Amongst these immigrants was Taher Acir Balak and when asked for his passport he stated that it was being kept by the owner of the Topkapi restaurant in St Julians. He remembers sending PC 63 to the restaurant to get the passport and after some time he returned with the passport and told him that the passport was kept by the accused Yasmin Aslan. He said that at that time no mention was made that he was attempting to leave Malta in a clandestine manner but this

person (Acir Balak) was being investigated by the CID officers. He confirmed that at a later stage he was informed that Acir Balak had given the accused his passport and a sum of money in the region of one thousand euros in order to assist him to leave Malta in a clandestine manner. He also stated that Acir Balak remained silent when asked about why he wanted to escape to Italy.

Inspector Jeffrey Cilia gave evidence on the 14th January 2004 and confirmed that in July 2003 they were investigating an escape, which took place on the 19th July 2003, of a number of illegal immigrants from the GHQ lock up. On the 8th August they managed to intercept a van in Bahar ic Caghaq that was carrying a number of illegal immigrants and some of which were those who had escaped from the GHQ whilst others were just over staying.

Amongst these immigrants was Taher Acir Balek who claimed that his passport was retained by the accused. He confirmed that Superintendent Xuereb had sent an officer to the Topkapi restaurant for the passport of Taher Acir Balek and this was handed over to him by the accused. He confirmed that Taher Acir Balek had told him that he had given the accused the sum of one thousand euro and his passport. He also explained that the accused had passed him on to a certain Philip so that he could take him to Italy and in fact he showed Taher Acir Balek a photo of Philip Azzoardi since he was being suspected of aiding the immigrants escape from the GHQ and Taher Acir Balek confirmed that he was the same Philip. In fact the photo is dok D exhibited in the acts of these proceedings. Taher Acir Balek explained to him that Philip took him to a Hotel in Gozo which resulted to be Marsalfron Hotel and after 12 days was taken back to Malta so that they could leave the island. He confirmed that subsequently the accused was arrested by the police, released a signed statement and also confirmed that he had known Taher Acir Balek. He told him that Taher Acir Balek had asked him to find him a cheaper hotel to stay in and in fact had taken him to the Tropicana Hotel. However he told him that on day Taher Acir Balek left the Hotel and

never came back. Asked how he was in possession of his passport the accused said that after 15 or 20 days that Taher Acir Balek was had left there was a taxi driver who took him this passport and he just took it and did not bother to see what was inside. He asked him what the taxi driver had told him and he replied that the driver was told to give it to a Turkish national. Asked the name of the taxi driver or the number of the taxi he said that he did not know it.. Asked if he reported to the police that he was in possession of this passport he said no. Asked if he knew Philip Azzopardi he said that he did not know him even when shown the photo Dok D he said nothing. He exhibited that statement released by the accused and marked it as dok AY .

Asked if it resulted whether Philip Azzopardi knew the accused he said no it did not result to him from what Azzopardi had told him. He confirmed that the other illegal immigrants knew Philip Azzopardi and not the accused. They even had his telephone number written on a paper. They did not indicate the accused and neither the Topkapi restaurant.

On the 20th June 2008 the witness was reproduced and said that when he got to know about Philip Azzopardi he also managed to get his mobile phone numbers being 79294639 and 99452892 and as can be seen from the document exhibited by Dr Joseph Borg there is an exchange of calls between the accused and Philip Azzopardi.

PC 63 Josef Farrugia gave evidence on the 14th January 2004 and confirmed that he was ordered to go to the Topkapi restaurant in Paceville and check if there was a Turkish passport of Taher Acir Balek. He said that the restaurant he was met by the accused and when he asked him for this passport he handed it over to him from near the cash register. He said that the accused told him that a mini bus driver had stopped in front of his shop and the driver gave it to him because it is a Turkish kebab shop. Asked if he was given the name of the mini bus driver he

said no. He insisted that when he went to this restaurant he had asked specifically for the passport of Taher Acir Balek not merely of a Turkish national.

PC 165 Jason Gilson gave evidence on the 17th November 2004 and confirmed his signature on the statement released by the accused as document AY.

Dr Joseph Borg on behalf of Vodafone gave evidence on the 18th February 2005 and exhibited the incoming and out going calls originating from telephone number 99270750 between 1st July 2003 and 8th August 2003. Asked for the registration details of this phone he said he was not asked to bring them. These calls were exhibited and marked as doc A.

However on 2nd March 2007 Denise Formosa Grupetta gave evidence on behalf of Vodafone and confirmed that the phone number 99270750 is not registered. It was a pre paid phone and connection date was 24th February 2003 and de activated on the 28th February 2004

The Court took note of the verbal dated 4th May 2005 wherein the court appointed Dr Martin Bajjada to examine the mobile phone exhibited and marked as document JC.

On the 26th July 2006 **Dr Martin Bajjada** gave evidence and exhibited his report marked as document MB.

The accused **Aslan Yilmaz** voluntarily took the stand on the 19th February 2014 (fol. 229) and chose to give evidence. Explains that he got to know Taher Acir Balek when he went to his shop and asked for his help to find him a cheap hotel. He took him on foot to the Tropicana Hotel and they rented a room for one night .He said that the Hotel is two minutes away from his restaurant. He confirmed that Taher Acir Balek paid for the Hotel accommodation. He said that he spoke to the receptionist for him on his behalf because he does not speak English at all.

Asked for an explanation why he held the passport Taher Acir Balek once he had left 15 or 20 before he states that whilst he was at the restaurant a red mini bus driver went in to his restaurant between 8.00 and 9.00pm and gave him an envelope and inside there was this passport. He explained that the driver told him that a Turkish person had told him to give it to any Turkish man. During this time in the restaurant he says there were three Turkish nationals working besides himself there was the chef Nulgun Bulant and a waiter. When the mini bus driver came he says that he was outside next to the waitress, who was an 18 year old student, smoking a cigarette. He stated that the driver was Maltese as he spoke Maltese and he understands Maltese. He took the brown envelope and placed it near the cash since there were people inside he did not open the envelope.

He remembers that then he received a phone call from a policeman and asked if he have a passport and he said yes and asked the police to send someone to pick it up because he could not go. The following day a police man appeared at his restaurant and he gave it to him. He went through the messages presented by Dr Bonnici and indicate that most of them were from family members .

Asked if he received any money from Tahir he said he did not. He confirmed that he had been in Malta for 15 years ever since 1989. He said that he had a business with a certain Marco which lasted for 9 months that did not go well and thus he closed the shop. Asked if he ever received money from abroad prior to 2013 he said no. Asked if he ever assisted anyone in obtaining a visa he said no.

In cross examination being shown the statement he released on the 12th August 2003 he recognized his signature. He said that Taher Acir Balek had asked him for his number in case he goes to Bugibba and gets lost. Asked why he offered to help him find accommodation offered him to stay with his cook and staff, when he did not even know him the accused answers that Taher Acir Balek was crying and that he did not have enough money. That is why he told him that the chef

had an extra room and he could stay with him. He confirms that when the police called him and asked for the passport they did not tell him whose it belonged to but asked him if he had a passport and then he opened the envelope and told them that it was of a certain Tahir. He confirmed that he did not report the fact that he had this passport to anyone.

The Court took note of the note of submission of the appellant presented before the courts of Magistrates on the 24th July 2014 (fol. 252) wherein the defence stated that the witness Taher Acir Balek is not credible where as the accused is consistent and kept to the same version of events .

The Court took note of the judgment delivered by the Criminal court on the 2nd March in the names **Repubblika ta Malta vs Philip Azzopardi et** (Dok Ay fol. 256)

Considers further.

The facts of this case are the following

1. In July 2003 the police were investigating a report of an escape of illegal immigrants from the GHQ and in the beginning of August Inspector Cilia had received confidential information that there were a number of immigrants to leave Malta clandestinely between the 7th and 8th August, 2003.
2. On the 8th of August 2003 Taher Acir Balek was intercepted by the police as having been in Bahar ic Caghaq waiting to leave Malta in a clandestine manner on a boat together with other illegal immigrants and he was taken to the police head quarters for investigation.
3. The accused then released a statement and explained what had happened to him particular that he had given his passport and the sum of one thousand

euros to the accused so that he would help him leave Malta and go to Italy in an illegal manner.

4. He said that he was sent to Gozo to meet a certain Philip and then stayed twelve days in a Hotel lock up and leaving his room only to use the bathroom and eat twice a day.

5. Then on one day he was taken on a boat with other immigrants and was told that he would not be taken to Italy but back to Malta.

6. When in Malta he was out on a mini bus and went all round Malta and picked up other persons who were going to leave with him.

7. Then they were taken on a boat altogether and a few minutes after they were apprehended by the police and ended up arrested and subsequently brought to court to testify against the accused.

8. He recognised the accused in court as the person he gave his passport to together with the sum of one thousand euros.

9. The accused states that the passport ended up in his possession by chance when an unidentified mini bus driver went to his shop and gave him this passport in a brown envelope and he placed in by his cash for a period of about 15 to 20 days till when the police called and asked him for it.

Therefore in this case the court is faced with two versions of events. The one put forward by Taher Acir Balek being the version of events as proposed by the prosecution that the accused was involved in the crime of Human Trafficking and that put forward by the accused wherein he only tried to help the accused find cheaper accommodation when asked upon. Therefore this case depend solely on the examination of evidence put forward by the parties and the credibility that has to be given to each witness.

Considers further

This is an appeal filed on the basis where the defence is alledging that the first court did not carry out a thorough examination of the evidence put forward by the parties and thus reached a wrong conclusion in its judgment. The defence believes that the first court failed to take note of the inconsistencies that exist in the proceedings together with the fact that it made a wrong and unbalances appreciation of the given facts. It is to reminded to the parties that we are here in the realm of appreciation of facts and as has always been accepted in our legal jurisprudence this court of revision does not easily disturb the appreciation of facts carried out by a Court of Magistrates once it reaches a reasonable and legal conclusion. In other words this court does not substitute the discretion exercised by the Magistrate's courts if the judgment delivered was safe and satisfactory. If on the other hand, this court is of the opinion that the lower court could not reach the decision it gave then that would be a just reason why this court should depart from that same reasoning and consequently disturb such discretion and judgment⁶.

It is a general principle practiced in our Courts that for an accused person to be found guilty in a criminal trial process, the charges brought forward against the accused are proved beyond reasonable doubt. In this regard reference I same to the learned judgment in the names **Il-Pulizija v Peter Ebejer**⁷, where the Criminal Court emphasized the degree of evidence that the prosecution must reach being that level of evidence that leaves no doubts which are dictated by

⁶ Vide inter alia, Criminal Appeal (Superior Jurisdiction : Ir-Repubblika ta' Malta vs Domenic Briffa, 16th October, 2003; Ir-Repubblika ta' Malta vs. Godfrey Lopez u r-Repubblika ta' Malta v. Eleno sive Lino Bezzina 24th April .l 2003, Ir-Repubblika ta' Malta vs. Lawrence Ascjak sive Axiak 23rd January, 2003, Ir-Repubblika ta' Malta vs. Mustafa Ali Larbed; Ir-Repubblika ta' Malta vs Thomas sive Tommy Baldacchino, 7th March, 2000, Ir-Repubblika ta' Malta vs. Ivan Gatt, 1st December 1994 ; u Ir-Repubblika ta' Malta vs George Azzopardi, 14th February 1989; Criminal Appeals (Inferior Jurisdiction) : Il-Pulizija vs Andrew George Stone, 12th May 2004, Il-Pulizija vs Anthony Bartolo, 6th May, 2004; Il-Pulizija vs Maurice Saliba, 30th April, 2004; Il-Pulizija vs Saviour Cutajar, 30th March, 2004; Il-Pulizija vs Seifeddine Mohamed Marshan et, 21st October 1996; Il-Pulizija vs Raymond Psaila et, 12th May 1994; Il-Pulizija vs Simon Paris, 15th July 1996; Il-Pulizija vs Carmel sive Chalmer Pace, 31st May 1991; Il-Pulizija vs Anthony Zammit, 31 May 1991.

⁷ Delivered by the Criminal Court of Appeal (Inferior jurisdiction) on the 5 th December, 1997

reason and not that level of evidence that leaves no shadow of doubt. Shadov doubts cannot be considered as being doubts dictated by reason. In other words the Judge must reach that level of evidence where after examining all the circumstances of the case and with the application of his good sense is morally convinced of those facts at issue brought forward by the prosecution upon which guilt can be found.

In fact the Court cited the explanation given by Lord Denning in the case **Miller v Minister of Pension**⁸- with regards to the expression '*proof beyond a reasonable doubt.*'

"Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence. 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing shall of that will suffice."

In the judgment in the names **Il-Pulizija v Joseph Gauci et**⁹ the court held that:

"Circumstantial evidence is often the best. It is evidence of surrounding circumstances which by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics."

In the case in the names **Il-Pulizija vs Graham Charles Ducker**¹⁰ the Court iterated that :

"it is true that conflicting evidence per se does not necessarily mean that whoever has to judge may not come to a conclusion of guilt. Whoever has to judge may, after

⁸ 1974 - ALL Er 372

⁹ Moghtija mill-Qorti tal-Appell Kriminali fil-5 ta' Ottubru, 1998

¹⁰ Moghtija mill-Qorti tal- Appell Kriminali-deciza fid-19 ta' Mejju, 1997

consideration of all circumstances of the case, dismiss one version and accept as true the opposing one."

It is the duty of the prosecution to bring forward the best evidence to be able to convince the court of the charges it has brought forward in that they subsist and that on the evidence brought forward the court is in a position to establish guilt of the accused. As explained by **-Manzini** in his book entitled **Diritto Penale**¹¹:-

"il cosi' detto onero della prova, cioe' il carico di fornire,spetta a chi accusa - onus probandi incumbit qui osserovit".

The Court also makes reference to another judgment in the names **Il-Pulizija vs Martin Mark Ciappara**¹² where the court explained what happens in those eventualities when it is faced with two conflicting theories as to what had happened. Two situations may arise either that the Court is of the opinion that the prosecution failed to prove its case on a level that is required by criminal law, and thus has to acquit the same accused or is morally convinced that the correct version of events is that put forward by the prosecution then it must convict and give the opportune punishment .

The court is guided by article 637 of the Criminal code when appreciating the evidence given by a witness namely that regard being must be given to the demeanor, conduct, and character of the witness, to the probability, consistency, and other features of his statement, to the corroboration which may be forthcoming from other testimony, and to all the circumstances of the case

Thus the court has to conduct a certain exercise when assessing a witness to see whether he is saying the truth or otherwise and follows the above guidelines. However, these guidelines are not exhaustive. The law leaves such matters of discretion in the hands of the Judge who has to analyse such evidence in seeing

¹¹ Vol III Kap IV pagna 234, Edizione 1890

¹² Moghtija mill-Qorti tal-Appell Kriminali fid-9 ta' Settembru 2002

whether for example a witness is credible or not, sees whether he has an ulterior motive to testify in the manner he did, to examine his behavior and how he acted whilst on the witness stand and how he answered the questions put forward to him. In carrying out such an examination the court will be in a position to judge whether such witness is saying the truth, whether such evidence is consistent with what was said by the same witness earlier on if for example he himself is makes contradictions in his own testimony or whether there are other facts which disapprove what is being said by the witness. These are but a few examples because the law does not provide any hard rules on the judge as to how he is to carry out such examination. But it is imperative that the judge is free to use his own discretion to see where the witness takes him

A judge can believe a witness in whole, in part or not at all -

In the current case the prosecution is basing its case on the evidence given by Taher Acir Balek apart from other circumstantial evidence which collaborates the evidence given by Taher Acir Balek.

The Court is hereby faced with two conflicting theories as to what actually happened. The version of events as dictated by Taher Acir Balek wherein he claims to have been a victim of Human Trafficking and the version of events as expressed by the accused that he met Taher Acir Balek coincidentally, when he casually walked into his brothers restaurant and asked for his assistance so that he could guide him where to rent a cheap hotel.

Human Trafficking is a global phenomenon which has been in existence for decades. Particularly since the coming into force of the United Nations and the European Union, international institutions and bodies have really considered the gravity of this problem and taken it in their stride to combat this problem. Moreover, during the last decade experts have determined that the human trafficking problem is the most fast-growing activity amongst those associated

with organised criminality and hence it is clear that concrete action must be adopted to fight it. Since human trafficking easily adapts to global progress, it is essential to re-address the offence from time to time in order to make the necessary amendments and take the necessary steps to keep in line with its modification and development¹³.

Trafficking in human beings is considered one of the most serious crimes worldwide, a gross violation of human rights, a modern form of slavery, and an extremely profitable business for organised crime. In fact it has even been defined by the United Nations as a universal offence. It consists of the recruitment, transfer or receipt of persons, carried out with coercive, deceptive or abusive means, for the purpose of exploitation including sexual exploitation, forced labour, domestic servitude or other forms of exploitation. Therefore, the response to trafficking must be robust, and aimed at preventing and prosecuting the crime whilst protecting its victims.

As **Louise Shelley**¹⁴ put it, the human trafficking phenomenon:

“...has recently emerged as a major international policy concern. Its consequences are far-reaching and diverse affecting social, political and economic life in countries across the globe ... Some suggest that it is the most lucrative form of organized crime after the drug and arms trade. Yet, human trafficking has an important distinction, often the human beings can be exploited repeatedly thereby generating significant long-term profits for the human traffickers.”¹

The section in our Criminal Code dealing with Traffic in persons to enter or leave Malta illegally. Is found in articles 377A. This provision was introduced by Act III of 2002 and was subsequently amended by Act Vi of 2005 and again by Act VIII of 2015.

¹³ Maltese Criminal Law on Human Trafficking – Dr Lara Lanfranco

¹⁴ Louise Shelley, 'The Crime of Human Trafficking' (Global Studies Review)

The sections at law regarding the trafficking of Persons under Act III of 2002 were discussed in the course of the Parliamentary debate held on the 6th March 2002¹⁵. During this meeting the Minister of Justice at the time Dr. Tonio Borg gave an explanation as to the reasons behind the introduction of these provisions and insisted on the need to introduce this offence in our law to reflect what was happening in the world. This need appeared even more apparent in the light of the United Nations Convention against Transnational Organised Crime to which Malta was a signatory, and which was accompanied by the Human Trafficking Protocol, the Smuggling Protocol and the Firearms Protocol. The new title was intended to facilitate the ratification process of these instruments which at the time of the Parliamentary debate had not yet been ratified by Malta¹⁶.

Thus when analysing the charge under examination as stipulated in article 377A of the Criminal code, the court has to take in mind the above elements and see whether they subsist. The provision provides as follows

337A. (1) "Any person who with the intent to make any gain whatsoever aids, assists, counsels or procures any other person to enter or to attempt to enter or to leave or attempt to leave or to transit across or to attempt to transit across, Malta in contravention of the laws thereof or who, in Malta or outside Malta, conspires to that effect with any other person shall, without prejudice to any other punishment under this Code or under any other law, be liable to the punishment of"

¹⁵ Kamra tad-Deputati, Kumitat Permanenti għall-Konsiderazzjoni ta' Abbozz ta' Ligi, Rapport Uffiċjali, IdDisa' Parlament, Laqgħa nru. 131, l-Erbgħa 6 ta' Marzu 2002.

¹⁶ Mr Chairman, this new clause is being introduced in the light of the Palermo Convention and its two protocols. On the 15th December of the year 2000 the Government of Malta signed the UN Palermo Convention against transnational organised crime as well as the two protocols attached to it. The first protocol goes counter to trafficking of women and children for purposes of prostitution, slavery or human organs, and the second protocol goes counter to illegal smuggling and the exploitation of illegal immigrants. The Government of Malta hasn't ratified this Convention and protocols yet and is therefore putting forward an amendment in order to facilitate the process of ratification. These shall constitute amendments to the Criminal Code

Thus to be able to establish guilt all the elements of this crime must subsist cumulatively and therefore what the Court will now outline the elements of this crime namely:-

1. Any person with the intent to make gain
2. Aids, counsel or procures any other person
3. To enter or to attempt to enter or to leave or **attempt** to leave, or to transit across or attempt to transit across Malta
4. In contravention of the laws
5. Or who in Malta or outside Malta conspires to that affect with any other persona

In this case the prosecution brought forward the Turkish national Taher Acir who explained in detail what happened in this case. He explained in his evidence given to the police a tempo vergine of the investigations a evidenced by them and later on in court viva voce before the accused that he was going to be sent to Italy in a clandestine manner. He explains how he met the accused in his restaurant Topkapi in Paceville and how he handed over his passport and the sum of one thousand euros for the trip out of Malta to Italy. He explains how he was put in contact with a certain Philip taken to Gozo for twelve days kept locked up in a Hotel together with other Sudanese persons. How he was then brought to Malta by boat, put on a mini van and taken around the island to pick up other persons who were bound to leave the island in the same fashion, illegally by boat. He explains how he was given food twice a day and kept in comunicado and then how he got caught just before leaving the island in the early hours of the morning. The witness recognized the accused as the person who put him in contact with Philip, as the person who took his passport, as the person whom he paid the sum of one thousand euros (€1,000). He spoke in a clear and consistent fashion and gave details of how he met the accused and how

the accused helped him even find a one night stay in Paceville prior to going to Gozo. He admits and he did not meet the accused together with this Philip but insisted that it was the accused who put him in contact with Philip and who was the person who suggested to him to go to Italy. He also states that he did not get in contact with his family for the entire period of 21 days,

The Police in their evidence confirm that the accused was found in Bahar ic-Caghaq together with other illegal immigrants just about to leave the island and board a boat. They confirm that they picked up the passport of Taher Acir Balek from the accused. That the accused told them that he was kept in Gozo and they confirmed that he was held in custody by Philip Azzopardi who was later found guilty of Human Trafficking as per judgment exhibited by the defence. That they were told from Taher Acir Balek that he had passed on the sum of one thousand euros to the accused for this trip and not to Philip and the police confirmed that Philip had not received any money from Taher Acir Balek.

On the other hand that accused says that he met Taher Acir Balek in his brothers restaurant casually when he walked in and asked for help to find a cheaper hotel to stay in. That he helped him so much so that he accompanied him to the Tropicana Hotel and arranged that he could stay there for a night. He said that he took him there because Taher Acir Balek did not speak English so that he could help him out though insisted that Taher Acir Balek paid for his stay. The accused brings no evidence to collaborate this.

The accused states that he was not involved at all in his plans to go to Italy in a clandestine way and had nothing to do with Philip and that he only met Taher Acir Balek casually in his restaurant. He thus states that it is not true that he received the sum of one thousand euros from the witness.

The accused gives an explanation as to how he received the passport of the accused by saying that whilst he was at his restaurant with the chef and salesgirl a min van driver walked I with an envelope and passed it on to him and told him that he was asked to pass this on to any Turkish national. He claims that he placed it near the till and left it there. He also claims that he did not open the envelope at that moment in time though opened it later. However when he realized who it belonged to he just kept it there and did not pass it on to the police and did not question it either. However here again the accused does not bring forward any evidence to collaborate this episode not even the chef or salesgirl who could have witnessed tis episode. When asked for details of this mini van driver he was unable to give them. It was only by chance that tis passport surfaced when Taher Acir Balek told the police where it was and subsequently was picked up by them.

Therefore the Court will not see whether the elements set out above for the existence of this crime persist in order to understand better whether the first court reached a correct judgement in finding the accused guilty of this first charge of Traffic of persons to leave or enter Malta .

The accused made gain by receiving the sum of a thousand euros from Taher Acir Balek and this in exchange for aiding him by procuring an other person namely Philip Azzopardi so that he could leave, Malta in contravention of the laws relating to immigration. It is true that Taher Acir Balek did not leave Malta though was in the process and the law also makes it a crime if the victim attempts to leave. In this case there is no doubt that the accused played an important part in this illegal activity and thus should be found guilty. This court is not binding its judgment on what is alleged in the first aggravation of the accused in other words with regards to the plea regarding the mobile number. It agrees with the defence that the prosecution did not prove the nexus of the accused with the mobile numbers exhibited in the proceedings. It does not even

result as alleged by the defence that Taher Acir Balek had a problem with his visa since the only evidence in this regard was what was stated by himself that his visa would expire on the 8th of August and thus all the preparatory work to leave the island clandestinely was done before. The appellant also states that the police should have investigated further so as to see if there was someone else with the surname of the accused. The Court holds that this too was not necessary since Taher Acir Balek indicated the restaurant where he had met the person and to whom he had given his passport and money. In this regard he remained consistent all the way.

With regards to the second offence namely that the accused received a passport that was transferred to him in violation of article 3(b) of the Passport Ordinance, chapter 61 of the laws of Malta the court does not have much to say since this offence results even from the evidence given by the same accused. The accused had no right to retain the document of identity of Taher Acir Balek and once he knew what was passed on to him, since as he says it had been at him for about 15 to 20 days he should have handed it over to the police and not keep it for safe custody as claimed by him.

With regards to the grievance regarding punishment the court opines that it is not customary for this court to change the punishment awarded by the courts of Magistrates once the punishment given falls within the parameters of the law .

In this case the accused was condemned to a period of imprisonment for eighteen months. It is to be noted that the punishment prescribed by the law for first offence is the following namely *“from six months to five years or to a fine (multa) of twenty-three thousand and two hundred and ninety-three euro and seventy-three cents (23,293.73) or to both such fine and imprisonment and the provisions of articles 21 and 28A and those of the Probation Act shall not apply¹⁷”* whereas for the second offence

¹⁷ Section 377A (1) of chapter 9 of the laws of Malta

the punishment is “*for a term not exceeding two years*”¹⁸. It is true that the appellant has a clean conduct sheet and that the offences took place in the year 2004 though the court cannot disregard the fact that the offences he is found guilty of are serious crimes aimed at taking advantage of vulnerable persons by taking money from them in exchange for aiding them to leave Malta illegally. The Court took note of the charges brought forward against Azzopardi and the punishment awarded to him and still considers that the punishment awarded in this case was.

The Court thus confirms the judgment delivered by the first court both with regards to the merits as well as with regards to the punishment awarded.

(ft) Consuelo Scerri Herrera

Judge

True Copy

Franklin Calleja

Deputy Registrar

¹⁸ Section 3(1) of chapter 61 of the laws of Malta