



**In the Court of Magistrates (Malta)**  
**as a Court of Court of Criminal Judicature**  
**Magistrate Dr Nadine Lia; B.A., LL.M(Kent); LL.D (melit)**

**Comp No: 692/2014**

**The Police**

**(Inspector Sylvana Gafa')**

**vs**

**Harish Daswani**

The Court after having seen the charges in respect of:

**Harish Daswani**, 38 years, s/o Bhagwan and Pushpa nee' Mahtani, born St. Julian's, on the 30th September 1975, residing at 40, Dingli Court, Flat 4, Sir Adrian Dingli Street, Sliema, and holder of identity card number 484875M

And charge him with having on the 08<sup>th</sup> June 2014 and in the preceding months, on these Islands, by several acts committed by him, even if at different times, which constitute violations of the same provision of the law, committed in pursuance of the same design:

- 1) By means of violence or threats, including abduction, deceit or fraud, misuse of authority, influence or pressure, by giving or receiving payments or benefits to achieve the consent of persons having control over another person, and by abuse of power or of a position of vulnerability trafficked persons of age namely Oriance Kelin for the purpose of exploiting such person in the production of goods or provision of services, in breach of articles 248A of Chapter 9 of the Laws of Malta;
- 2) Conducted himself in such a manner as to cause another namely, Oriance Kelin to fear that violence will be used against her or her property or against the person or property of any of her ascendants, descendants, brothers or sisters or any person mentioned in article 222(1) of Chapter 9 of the Laws of Malta;
- 3) Uttered insults or threats against Oriance Kelin;

- 4) As an employer contravened or failed to comply with any recognised conditions of employment prescribed by a national standard order or by a sectoral regulation order or collective agreement, or with any provisions of this Act 452 or any regulations made thereunder.

The Court is being humbly requested, on reasonable grounds, to provide for the safety of any vulnerable witnesses including Oriance Kelin and her family, and forthwith apply the provisions of Section 412C of Chapter 9 of the Laws of Malta and thus issue a protection order against the accused with all the necessary restrictions or prohibitions;

The Court is also being humbly requested to apply *mutatis mutandis* the provisions of Article 5 of Chapter 373 of the Money Laundering Act of the Laws of Malta, in accordance with Article 23A(2) of Chapter 9 of the Laws of Malta, and on conviction apply the provisions of Article 23B of Chapter 9 of the Laws of Malta;

The Court is finally being humbly requested, in pronouncing judgment or in any subsequent order, sentence the person convicted to pay the costs incurred in connection with any experts and this in accordance to Article 533 of Chapter 9 of the Laws of Malta.

Having seen that in the sitting of the 29<sup>th</sup> July 2014 the Court ordered that proceedings continue in the English language since the accused did not understand or speak Maltese<sup>1</sup>.

Having seen that the case had been assigned to this Court as currently presided on the 10<sup>th</sup> May 2019 by means of a decree of the Chief Justice Dr. Joseph Azzopardi<sup>2</sup>.

Having seen that in the in the sitting of 17<sup>th</sup> June 2019 the parties exempted the Court as currently presided from re-hearing once again all the witnesses who have already been heard by this Court as otherwise presided before this case was assigned to this Court as currently presided<sup>3</sup>.

Having seen that The Attorney General on the 6<sup>th</sup> January 2016 presented the formal accusatory document wherein the accused was charged with the following articles of law<sup>4</sup>:

(a) Articles 248A(1)(2)(3), 248E(1) and 18 of Chapter 9 of the Laws of Malta;

(b) Articles 251B, 222(1)(a), 202(h)(v) and 18 of Chapter 9 of the Laws of Malta;

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<sup>1</sup> Folio 5 of the act of proceedings

<sup>2</sup> Folios 963-965 act of proceedings

<sup>3</sup> Folio 967 act of proceedings

<sup>4</sup> Folio 539 act of proceedings

(c) Article 2, Part II of Title I, 45(1)(2), 47 and 18 of Chapter 452 (Employment and Industrial Relations Act) of the Laws of Malta;

(d) Articles 382A, 383, 384, 386 & 412C of Chapter 9 of the Laws of Malta;

(e) Articles 17, 18, 23A, 23B, 31 and 533 of Chapter 9 of the Laws of Malta & article 5 of Chapter 373 of the Laws of Malta.

Having seen that during the sitting of the 27<sup>th</sup> January 2016 the Articles of Law for judgment which were sent by the Attorney General on the 6<sup>th</sup> January 2016 were read out, during which sitting the accused declared that he does not object to his case being tried and decided summarily<sup>5</sup>.

Having seen the written Note of Submission filed by the Prosecution on the 15<sup>th</sup> January 2018<sup>6</sup>

Having seen the written Note of Submission file by the Defence on 30<sup>th</sup> May 2018<sup>7</sup>

## **Having Considered**

### **Summary of facts of the case**

On the 6<sup>th</sup> of June 2013, the complainant Oriance Kelin, an Indonesian national, was employed in the household of the accused through a

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<sup>5</sup> Folio 540 act of proceedings

<sup>6</sup> Folios 809-821 act of proceedings

<sup>7</sup> Folio 844 act of proceedings

Singaporean Agency to assist and take care of the accused's 85-year-old father as a home carer. The victim was recruited via an agency called Home Maid in Singapore. An interview over the phone was conducted by the complainant and the accused where terms of her engagement were discussed and an agreed monthly salary of \$450 US Dollars. The accused took care of finalising the agreement with the recruitment agency, handling all travel arrangements and documents, completing and submitting all local administrative documents related to her work permit and employment and introducing her to the household.

Upon her arrival to Malta, the complainant was picked up from the airport by the accused and his wife and taken to the residence where her passport was taken and held by the accused. After about a month of being in employment, the complainant alleged that the attitude of the accused changed towards her such that she was subjected to ill-treatment, abusive behaviour, physical assault, threats with the use of a knife around her neck, force fed salt by way of punishment, and forced to work long hours with no pay, restrictions to her movement as well as being at the receiving end of verbal abuse. The complainant further stated that throughout this one-year period she received no remuneration except for €6 in total as pocket money when she went out.

Shortly after a year of being in employment, the victim escaped through the assistance of a Filipino domestic worker she had gotten to know whilst running errands for the accused and his family and a local NGO assisted her in finding accommodation in a shelter. The victim alleged that during her

time working in the accused's household she was not paid her wages, treated poorly, worked longer hours than the norm, was subjected to physical and verbal abuse and had little to no freedom and liberty of movement. This compounded with the fact that the accused had taken her passport from her when she arrived and had no money to leave the household.

### **Having Considered**

That reference will be made to the most salient testimonies heard and documents exhibited during these proceedings

**Inspector Sylvana Briffa**<sup>8</sup>, stationed at the Vice Squad, testified on the 6<sup>th</sup> August 2014. She stated that on the 13<sup>th</sup> of June 2014 she received an email from a certain Dr. Katrine Camilleri from the Jesuit Refugee Service stating that there was a potential victim of human trafficking residing at Ghabex and was asking for Police assistance to be able to collect her belongings from her former employer.

Dr. Camilleri had explained that this person is a certain Oriance Kelin, an Indonesian National who came to Malta on the 6<sup>th</sup> of June 2013 to work as a carer for an Indian family in Sliema. The Police were informed that on the 8<sup>th</sup> June 2014 Oriance managed to escape from her employers' house after same had suffered ill treatment and abuse throughout the year that this person

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<sup>8</sup> Folio 27-32 act of proceedings

had lived with this family. She did not have her documents and passport in her possession, and it was also reported that her wages were never paid.

Dr Camilleri had continued that she had referred Oriance Kelin to a shelter as a potential victim of trafficking however she also told the Police that at that stage, she does not want to initiate criminal proceedings against the family. Upon such information, WPS 261 Donna Frendo and WPC 308 Kim Camilleri were instructed to accompany Oriance Kelin to collect her personal possessions from her employer's house situated at Flat 4, Dingli Courts, Sir Adrian Dingli Street, Sliema and after collecting her belongings she was informed that if she wanted to speak about her current situation the Police were there to help her.

During the two month reflection period which every potential victim of human trafficking is granted, Oriance Kelin informed the Police that she wanted to cooperate and report her ex-employer, in fact on the 16<sup>th</sup> July 2014, Oriance was spoken to in the presence of Dr. Katrine Camilleri where she recounted all the details she had passed through during her stay with the Daswani family.

Oriance Kelin told the Police that she initially came to Malta precisely on the 6<sup>th</sup> June 2013 to work with an Indian couple as a carer in Malta. Same stated that she had found this job with this family whilst she was still in Singapore through an agency called Home Maid. The agreement was that she would work for the Daswani family in Malta for three (3) years for a monthly salary of five hundred fifty Singapore Dollars which are equivalent to four hundred fifty Dollars plus food and lodging. Oriance said that her employer whom



she knows as Mr Daswani paid her the ticket to come to Malta and as soon as she arrived in Malta this Mr Daswani took her passport from her and told her that he was going to keep it himself for safe keeping but she stated that this was without her consent.

When asked about her working conditions Oriance stated that while she was still in Singapore, she used to make contact with Mr Daswani through the phone and he had told her that in Malta she was going to work from Monday to Saturday on a full-time basis but when she came to Malta, the agreement had changed and she was working from Monday to Sunday from 5:30am till late at night. She claimed that the Daswani family had never paid her any money apart from six euro €6.00 by way of pocket money in total and used to beat her up during her stay.

Furthermore, Oriance Kelin said that her employers whom she knows as Mr Daswani and his wife, Mrs Daswani used to beat and mistreat her on numerous occasions. She explained that on one occasion, they bashed her head against the wall, held her down and forced her to eat spoon full of salt because they told her that the food was salty. When she reported him to her agency back in Singapore, they told her that the employer in Malta was complaining about her because she was not doing her job well. She even reported him that she did not sign any contract in Malta and that he was not giving her any money.

The company way back in Singapore told her to tell her employer if he was able to send her the money to her family instead of giving her cash maybe he would accept and give her the money but told her that Mr Daswani called

them and told her that he was not paying her because she was not doing her job well.

In addition to physically abusing her, her employer constantly threatened her and intimidated her by telling her that if she tried to leave his place, he would report the Police that she had stolen things from them and that she would end up in prison.

Oriance Kelin was not allowed to go out of the house except to shop in the area and added that when she used to go out and take long Mrs Daswani used to make a big fuss. When she managed to run away, she managed to do so without her documents, without her passport and without her things.

From inquiries carried out by the Police, it was established that Oriance Kelin was employed by a certain Harish Daswani, 38 years old, who was residing at 40, Dingli Courts, Flat 4, Sir Adrian Dingli Street, Sliema and holder of Maltese Identity Card number 192308, which person was recognised by the witness in the courtroom.

On the 28<sup>th</sup> July 2014, Harish Daswani was spoken to by the witness at her office. He was given the usual caution and chose to contact a lawyer of his choice, who initially was D., Roberto Montalto. During the interrogation, Mr. Daswani denied all the allegations being made against him and he stated that he hired Oriance Kelin through an agency in Singapore called Home Maid to work for his dad as a carer.

Mr Daswani explained that whilst Oriance was still in Singapore, he used to make contact with her through the phone and informed her about the

working conditions should she be engaged in Malta. She was going to get paid a minimum wage and she had to work full days from Monday to Saturday and Sunday she had to work half day. He said that he did not tell her anything about the number of hours she was going to work because she never asked him but when Oriance Kelin arrived in Malta, he claimed that Oriance was working from eight in the morning to one thirty in the afternoon and then she would start her work again from four thirty in the afternoon to eight in the evening from Monday to Saturday and then on Sunday from eight o'clock in the morning to one thirty in the afternoon.

Mr Daswani explained the time arrangement revolved around his father's needs. When asked about Oriance's duties, the accused told the Police that she used to cook and clean the house, apart from taking care of his dad. Mr Daswani also added that Oriance worked for his family for about twelve or thirteen months and during that time, he never paid her any wages. He furnished the Police with a Western Union transaction for the amount of two thousand four hundred and sixty Singapore Dollars which he made to Home Maid agency, he said that these money were sent to Home Maid agency in order to pay what he claimed was Oriance's loan back which she had in Singapore and also because this amount covered also her flights to come to Malta.

Mr Daswani also furnished the Police with two go mobile telephone bill accounts where he stated that in these accounts Oriance contacted her family back in Indonesia and she needed to reimburse him back the money she had spent to call her family. He said that Oriance had to reimburse him for all

the expenses made. He also stated that the reason why he did not pay her the rest of the money was because she did not provide him with the bank details to enable him to send over the money to her family back in Indonesia. When asked why he did not give her money in cash, he stated that Oriance told him that she did not want the money in cash. When asked who was responsible for Oriance's recruitment to come to Malta, Mr Daswani stated that he was the person who took care of all the papers and made all the arrangements as his dad was not in good condition to do so.

According to this, Oriance Kelin had to work as a carer for a contract of one year on a monthly wage of seven hundred and seven euro (€707) and on a forty hours per week basis. Mr Daswani also pointed out that he was not satisfied with Oriance's job and used to shout at her whenever he did not like something but claimed that he never hit her or insulted her except on one occasion when Oriance gave his father the wrong medicine.

Although Mr Daswani insisted that Oriance was not the ideal person to take care of his dad, he still renewed her working permit after a year working for him and in fact, he terminated her employment only after Oriance Kelin ran away from the house. He terminated her employment on the 9<sup>th</sup> June 2014 even though he stated that she was never good at the work she was doing to his father.

There were also some discrepancies between Mr Daswani and his wife Mrs Daswani where when spoken to Mrs Daswani, she stated that Oriance used to be off on Sundays whilst Mr Daswani had stated that Oriance used to work half days on Sunday. Mrs Daswani informed that Oriance used to cook

for them as well while Mr Daswani denied this. Also, Mrs Daswani stated that she never used to have any form of communication with Oriance whilst Mr Daswani confirmed that he used to see his wife argue with Oriance Kelin and also, they did not agree regarding the passport.

Mr Daswani told the police that Oriance's passport used to be kept in his wife's handbag together with his passport whilst contrastingly, Mrs Daswani stated that she did not know where Oriance's passport was. Mr Daswani continued that Oriance was not the first carer he employed for his father and stated that the one before Oriance had also left after just three or four months without informing him and he told the Police that he had lodged a missing persons' report.

On the 28<sup>th</sup> July 2014, the accused had released a statement. Upon cross-examination, Inspector Briffa confirmed that the Police had not carried out investigations about Home Maid.

Inspector Sylvana Briffa explained that the alleged victim *"had suffered ill treatment and abuse and claimed that throughout the year that this person had lived with this family she did not have her documents and passport in her possession. She also told us that her wages were never paid."*<sup>9</sup>

Oriance Kelin had found her job with the family whilst she was still in Singapore through an agency called Home Maid. *"The agreement was that she would work for this family, the Daswani family in Malta for three (3) years for a monthly salary of five hundred fifty Singapore Dollars which are equivalent to four*

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<sup>9</sup> Folio 27 acts of proceedings

*hundred fifty Dollars plus food and lodging. Oriance said that her employer whom she knows as Mr Daswani took her passport from her and told her that he was going to keep it himself for safe keeping but she stated that this was without her consent.”<sup>10</sup>*

On the 6<sup>th</sup> August 2014 **Anita Kobacs**<sup>11</sup> testified and stated that in December 2013 she got to know Oriance Kelin through a door to door visit which she conducted on behalf of the Jehovah’s Witnesses. When she had knocked it had been Oriance who opened the door and she was interested in her endeavours on behalf of the Jehovah’s witnesses. However, she had stated that her employer does not allow her to stay at the door for a long time. The witness then asked whether it would be fine to meet up for a coffee and so asked for her phone number.

Various attempts to contact Oriance were futile. Eventually the witness managed to set up a meeting at Sliema on a Sunday in June. There, the witness and her husband saw Oriance talking to a lawyer. When the lawyer left, they met up with Oriance and the latter started to recount what had happened to her and that she didn't get food and she also showed the witness photos of the day she was hit which were taken with her mobile phone.

After buying her a pizza and a smoothie, the witness and her husband took Oriance to their house in order to give her some clothes and after took her to the shelter that the lawyer arranged in the meantime. The witness stated that

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<sup>10</sup> Folio 28 act of proceedings

<sup>11</sup> Folio 63-74 act of proceedings

she could only recall the first name of the lawyer concerned, a certain Catherine. Asked whether Oriance had ever told her who the employer was, the witness replied in the negative but also stated that she has seen them briefly through the door during a visit.

The witness continued to confirm that Oriance had communicated with her through two different mobile numbers. The witness stated that Oriance had explained that her employer had smashed her mobile phone with the first SIM card but then her Filipino friends has bought her a new SIM card which she was using secretly.

Under cross-examination, the witness was referred to the first time when she had met Oriance and asked whether she had been told by Oriance that her employer and his wife were abroad for three weeks, to which question she replied in the negative. She clarified that she had not seen the employer through the door during her first visit but on a subsequent visit when she had called by to deliver some magazines.

The witness stated that she met Oriance at the front door a maximum of three times, and sometimes she would just put the magazines in the letter box. On the occasion that she had seen the employer, the latter had stated that Oriance is no longer interested in reading such magazines. It was on a subsequent occasion that Oriance had stated that her employer does not want her at the front door.

On the 6<sup>th</sup> August 2014, **WPS 261 Donatella Frendo**<sup>12</sup> testified. She stated that on the 13<sup>th</sup> June 2014 she was instructed by Inspector Sylvana Briffa to accompany Oriance Kelin from a shelter home to where she used to live before, that is 40, Dingli Court, Flat 4, Triq Sir Adrian Dingli, Sliema. Accordingly, she called there together with WPC 308. On site she met the accused Mr Daswani, whom she recognised in the courtroom. Mr Daswani accompanied the Police officers to Oriance's room and handed over her passport when this was requested.

When the witness asked why he was keeping Oriance's passport, he had replied that all the passports are kept together, including his wife's. At that point, Oriance appeared to be very scared. The witness also stated that the accused has asked her why Oriance had left his residence, to which question she had only replied that they were following a report without giving any further information.

**Dr Katrine Camilleri**<sup>13</sup>, a lawyer acting for the Jesuit Refugee Service, also testified on the 6<sup>th</sup> August 2014. She explained that she had been put in contact with Oriance Kelin by a third party who knew that she acted for an NGO and she had at a point provided legal advice. Dr. Camilleri confirmed that she did provide legal advice and accordingly after being exempted, was allowed to testify by Ms Kelin. The witness confirmed that she had known Ms Kelin since the first week of June when she received a call from a Maltese

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<sup>12</sup> Folios 81-83 act of proceedings

<sup>13</sup> Folios 75-80 act of proceedings



woman who claimed that she knew about an Indonesian maid who was allegedly ill-treated by her employers.

The witness met Ms Kelin for the first time on the 8<sup>th</sup> June at 16:00 in Sliema and they arranged a meeting place. During such meeting, Ms Kelin had explained that she had been in Malta for a year, she came to Malta regularly to work as a house maid, however she had never been paid, she had only been given six euros (€ 6), two euros (€ 2) and four euros (€ 4) to be able to go out two consecutive Sundays, she also claimed that she had been physically abused by her employers, that she was beaten on several occasions and insulted and threatened and that her freedom was very limited, she had no passport and no money and she felt that she was virtually a prisoner basically. She could not go out of the house except for very short periods of time, shopping or whatever and it was on these occasions that she met this other Filipino house maid and she sought her assistance as what she should do in the circumstances and they told her we will try to find someone to help you.

During the meeting Ms Kelin explained that she suffered physical abuse, insults and humiliation and produced photos of injuries allegedly suffered on her mobile phone. She also stated that her employer used to say that if she reports him to the Police she will not be taken seriously and that they had money and they would pay the Police as much money as they wanted to keep it under wraps.

The witness explained that she told Ms Kelin that if she wished then she could leave her employer's house and then if she did so that there were

services in place to assist her and also informed her that she had a right to lodge a report which she wished to do so and she at that point said that she did wish to retrieve the wages due to her but she was not yet willing to file a Police report. However at that point, her priority was her safety and wellbeing.

At that time, a woman named Anita who appeared to be Ms Kelin's friend turned up and thus the meeting ended. Eventually the witness was informed that Ms Kelin had left her employer's house and was given assistance by Agenzija Appogg and the Jesuit Refugee Service which included psychological support given by a certain Alexia Rossi.

The witness confirmed that after a few days, she wrote to the Police in order to request assistance to retrieve the documents and personal possessions from her employer's house because she had nothing and informed them at that stage that she was not willing to lodge a report. However later on, around the 2nd of July she informed her that she was willing to lodge a report and steps were taken to inform the Police. The witness explained that Ms Kelin came across as a very fearful, very submissive, disempowered and she was very convinced that she was in a very weak position and so she was afraid to make a Police report.

On the 13<sup>th</sup> August 2014, **Alexia Rossi**<sup>14</sup> testified that she is a psychologist who is employed with the Jesuit Refugee Service. She had been asked by

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<sup>14</sup> Folio 88-99 act of proceedings

Agenzija Appoġġ to assess Ms Kelin following the alleged abuse and ill treatment she suffered.

The witness met Oriance Kelin on the 13<sup>th</sup> June 2014 and conducted an assessment over four sessions and subsequently continued to meet her for psychological therapy. The assessment which was carried out was a comprehensive one, during which Oriance explained quite a bit on what she had undergone throughout the year while in employment.

It resulted that she was very scared as a result of her experience and exhibited symptoms of post-traumatic stress disorder. Basically, Oriance Kelin had recounted that she had been insulted on numerous occasions by the couple that employ her to look after the father of the accused, who is an elderly person. She explained further that there were numerous insults and physical violence over very small matters, including an occasion when she was threatened with a bread knife by Mr Harish Daswani, the accused. She was also denied food on some occasions.

Oriance Kelin had explained that she had worked for the couple for the approximate period of one year and that that the ill treatment started about a month after her arrival. She mentioned that she was hit numerous times on the face, was kicked on the head and made to kneel and repeat things like *"I have no brain"*, *"I am an idiot"* and numerous other things. She was told that and then she was made to either kneel or stand and repeat those words and she was bitten if she did not repeat them. These facts came out of numerous sessions and there were other situations such as for example another episode

where she cooked food that was too salty and was made to eat salt by way of a form of punishment.

The assessment sessions were held between the 13<sup>th</sup> and the 27<sup>th</sup> June 2014 at the shelter where Oriance was residing and used to last between an hour and an hour and a half each session. The witness continued to explain that she had noticed that Oriance had been made to believe that she was powerless in this situation and that if she said anything, she would either end up in jail herself or she would end up working in a different job such as prostitution and that was one of the reasons why according to her, she never tried to escape.

When recounting her experiences, Oriance referred to the alleged perpetrators in the plural, a certain "Sir" and "Madam", but eventually clarified that their names were "Harry" and "Nikita". She did speak with differentiation as to who committed which acts and when she recounted being threatened with a knife, she mentioned it happened twice by Sir and once by Madam. The witness recalled that during the sessions with Oriance, the latter would sit away from her at the opposite end of the sofa and keep her head down the whole time. She spoke in short sentences and was visibly scared. This mode of behaviour was most prevalent in the first two sessions and then she started to feel more comfortable, but it was a slow process.

Under cross-examination, the witness was asked whether Oriance had told her about any pills which she was taking, to which question the witness answered that the only pills mentioned were ones to help her sleep. The witness was also asked whether Oriance had told her that she had asked Mr

Daswani, the accused, to import some pills and anti-depressants from Indonesia or from India, to which question she replied that Oriance had not mentioned this episode, although it could be the case that the pills which she was taking were actually anti-depressants but she was using them to help her sleep.

On the 13<sup>th</sup> August 2014, the alleged injured party **Oriance Kelin**<sup>15</sup> testified. She stated that she arrived in Malta on the 6<sup>th</sup> June 2013. Her passage was facilitated by an agency in Singapore called Home Maid that helps Indonesian nationals in finding employment overseas. After two years working in Singapore, she was informed that there was the possibility of employment as a carer with Harish (Harry) Daswani in Malta.

The witness added that the agency told her that she will have a job in Malta against the salary of 450 USD per month and that their “loan” will be paid in the first three months. The relative interview was conducted over the phone, where she was asked about her job experience.

Mr Daswani informed her that if she comes to Malta, her job will be that of looking after his father as well as some cooking and cleaning duties. This telephone interview occurred round about the months of March and April 2013. Oriance was informed by the prospective employer that there had been agreement and that he would apply for the VISA. She waited for three

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<sup>15</sup> Folios 100-182 act of proceedings

months at the agency house in Singapore and then she came over to Malta on the 6<sup>th</sup> June 2013.

As regards the conditions of her employment, she had been told by the employer that her salary will be 400 Singapore Dollars every month and that for the first six months there will be no salary to make good for the costs incurred. She was also told that her off day is on Sunday, but she could only go out after lunch as before, that, she had to cook for lunch and had to return back home by 6 o'clock in the evening.

At first the employer used to contact the witness through the agency but eventually also started calling her directly on her mobile phone. The witness remembered that the employer had told her that it may be the case that she is woken up at 6 o'clock in the morning and then at night, she may sleep early if she has finished all her work.

According to the witness, it was Harry who took charge of drawing up all the required papers. Harry also coordinated her passage to Malta and paid her flights. Whilst still in Singapore she had been asked about her personal details by the agency and signed some papers.

The witness could not recall signing any document here in Malta except for documents dealing with the ETC. The witness got to know who paid for her travel arrangements from both the agency as well as certain comments which were uttered by the accused and his wife during argument in the sense that they had paid a large amount of money in order to bring her over to Malta.

The witness also stated that she does not know whether the accused had actually paid the agency the sum equivalent to the first three months' wages.

When she arrived in Malta on the 6<sup>th</sup> June 2013, the witness was picked up from the airport by Harry and his wife, from where they took her to their house in Dingli Street, Sliema and when she went into their house, they showed her the room which she would be using for herself. At that point, Harry asked her to hand over her passport for safekeeping.

During the first days, the employer was quite nice but after some time it became clear that both he as well as his wife did not like her. The wife had also stated that she preferred to have an Indian maid. On some occasions Harry insulted the witness using words such as "*you bloody fucker*"<sup>16</sup> and calling her "*useless*". Round about September 2013 there was an occasion where the witness was beaten physically by the accused for using the telephone.

Another occasion concerned the accused getting very angry over the cleaning of the bathroom. He started hitting the witness on the head with plastic toys. The wife was also constantly telling her that she will tell her husband to beat her.

Between December 2013 and January 2014, the accused and his wife visited India. The accused returned on the 5<sup>th</sup> or 6<sup>th</sup> January 2014 whilst his wife came back on the 14<sup>th</sup> or 15<sup>th</sup> January 2014. Following their return, the witness claims that the situation appeared to have worsened.

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<sup>16</sup> Folio 113 act of proceedings

On a particular day, the accused hit the witness so hard that her ear started to bleed. On another occasion she was forced to eat salt because the food which she had prepared was deemed to be too salty. There were also two occasions when the accused threatened the witness with a knife put next to her neck. On another incident on the 27<sup>th</sup> May 2014, the witness suffered physical aggression by the accused, following his wife alleging that she could not find a bra. Following this incident, the witness took photographs of the injuries which she sustained using a Blackberry mobile phone.

On the 4<sup>th</sup> June 2014, the accused allegedly hit the witness ten to fifteen times on the face because according to him, she did not use enough herbs on the potatoes she had cooked for him. The witness recounts that following this she was also punched in the face and kicked from behind when she went to the bathroom to wash the blood from her face. About an hour later, the accused allegedly banged her head against the wall. Pictures of the injuries were also taken following this incident.

There was also another occasion when the accused started insulting and threatening the witness by saying things such as *"you bloody bitch"*, *"you bloody fucker"*, *"I will make your life miserable"*, *"I will send you away without any payment"* and the latter managed to record the occurrence using her mobile phone. At that stage, the accused's wife noticed this and snatched the mobile phone and threw it to the floor, destroying it. The witness had been advised to take photographs and recordings of what was going on by some people whom she used to meet whilst she was grocery shopping and showed



concern as to her state. Eventually, a Filipino friend named Melinda passed on Dr. Camilleri's mobile number and a meeting in Sliema was set up.

When asked about what the agreed scope of her work was, the witness conformed that she had known that role would include both acting as a carer to accused's father as well as cooking and cleaning for the Daswani's, who all lived in the same residence. On many occasions her work lasted from about 6am up to 8pm or 9pm as she worked on a live-in basis and thus was constantly at the workplace. She was told that Sunday is an off day, but she could only go out after having cooked lunch and had to return by 6pm in order to prepare a snack for the accused's father. After about a month into the job, the accused allegedly started pressuring the witness to work on a Sunday in the same manner as any other day of the week. The witness used to be kept up until the Daswani's finish their evening meals which sometimes was up to 11pm.

The witness stated that over the period of approximately one year during which she was in employment, she did not receive any wages for the first six months as the accused used to tell her that the first three months were for the agency and the following three months were for himself. However, even after this mentioned six-month period, no payments were forthcoming. At one point the witness contacted the agency in Singapore and was informed that it is best to tell the employer that her family needs money so that he will send an amount by bank transfer and then she can start preparing to leave. When she raised this with the accused, he had originally asked her for a bank account number and the relative swift code however no

payment ever materialised and when the abuse got worse, she did not dare to mention it again out of fear.

The witness stated that for over a year's work, she only received the sum of €6 just before she left. This sum was divided into a €2 payment so that the witness could buy an ice cream and, on the following day, a €4 payment given to her by the accused so that she could go out after lunch. The witness did not use the money but saved it in her wallet.

The witness was asked by the Court how come she remained in employment up to June 2014 when in reality the physical abuse was already rampant by September 2013. To this question, she replied that she did so because she was at a loss about what to do. She had tried to obtain help from the agency in Singapore however the only guidance she received was to be patient.

There were also the threats by the accused and his wife that if she leaves, they will see that she is jailed for being without a passport and thus will never see her family again. She was also ridiculed and told that if she leaves the job her only other option would be that of working as a prostitute. The agency was actually very angry at the witness herself because the accused had complained about the level of work being performed by the witness.

The witness confirmed that during her period of employment she was not in possession of neither her passport nor work permit. On one occasion when she had asked for her passport, the accused had stated that he will burn it so that she definitely cannot leave.

The witness was asked by the Court whether apart from Melinda, she has made other friends in Malta. The witness mentioned Anita the member of Jehovah's Witnesses, whom she befriended during the previous summer. Anita had invited her to meet over a coffee, but it was always very difficult to meet because she was not allowed to go out and even when the accused and his wife were in India, she still had to be continually present because of the accused's father.

Under cross-examination, the witness stated that she contacted the agency when she was still in Indonesia and wanted to work overseas. From Indonesia she went to Singapore and made contact with the Home Maid Agency back in 2011 where she dealt with a certain Gerry, Angela and Alice. The witness was shown photographs of two people whom she recognised as being Gerry, Angela and Alice. These people were coordinating the paperwork so that she could work in Malta and it was them who had asked her to renew her passport, have a health check-up and that she must wait for her work permit and visa. She paid the agency for their services through wage deductions. In fact, the first three months of her salary in Malta covered the agency fees. This meant that the employer was obliged to pass on the salary for the first three months to the agency in Singapore. When on an occasion she called the agency to complain about the way in which she was being treated, she was informed that the accused was not happy with her services and did not want to pay her loan. The witness also confirmed that apart from first three months' salary going against agency fees, she also agreed that the second three months would be retained as a security deposit

in case she does not fulfil the three-year contract. However, the accused had once informed her that if she fulfils the three year contract the second three months' salary will be refunded to her. Furthermore, the witness confirmed that whilst still in Singapore she had agreed that she will only start receiving her seventh salary in hand.

The witness could confirm that there was an occasion when she needed to call back home because her brother had fallen off a tree. The Daswani's did not normally allow her to call abroad via the normal landline however they used to provide her with a SIFA calling card. However, it did transpire that there were occasions when the witness had actually used the landline to call abroad. In fact, the witness admitted that on one occasion the phone bill amounted to around six hundred Euro and the accused got very angry and started to hit her.

It was only after the accused had taken the witness's mobile phone and cross-referenced the numbers on the bill that the witness admitted that she had made a number of calls from the fixed line telephone. Following this, the accused stated that he will deduct the extra costs incurred from her salary. She agreed to this but stated that she was very scared of him because he had just been hitting her and did not have any money with which to reimburse him. When it was suggested to the witness that the Daswani's had allowed her to use their iPad to call her family using Skype, she confirmed this fact but stated that it was of no use because her parents did not have internet and thus, Skype could never work.

When asked about who had paid for her flights from Singapore to Malta, the witness clarified that it was the agency who paid for the flight, but it was reimbursed by the accused. The same was done in relation to her travelling visa from China. The witness was also asked whether she ever paid for her food, lodging and toiletries in Malta, to which question she replied in the negative and stated that it was all provided by the Daswani's as well as SIFA calling cards which were provided occasionally. There was also an occasion when her card had run out and the accused's wife allowed her to use hers.

There were also three occasions when the witness was invited out to lunch with the Daswani's. When the witness was asked about who used to settle her medical expenses it resulted that there was an occasion when the accused had taken the witness to see a dentist and paid for the medicines which were prescribed. It also resulted that the accused's wife had bought her some items of clothing including sweaters and socks. Inside the Daswani's apartment, the witness had her own bedroom.

At the beginning of her employment she shared the same bathroom with the other occupants however after about two months, another room was repurposed so that she could have her own bathroom. The witness also generally had access to the house keys. When asked whether she knows a person called Rahima, the witness stated that there is an Indian lady called Rahima who used to cook for the Daswani's. The witness had encountered this person on two separate occasions, and she had cooked a large amount of food, most of which was frozen to be eaten in the future.

The witness was then asked whether she was encouraged by the accused to go out for walks on the Sliema Promenade. She replied that at first, she used to be allowed to go out but as time went by and the situation deteriorated, she was always told that she must stay in to work. She used to go grocery shopping various times a day as she used to buy items individually according to what the accused and his family requested. There used to be a small float of money for this purpose which was generally kept in the kitchen. The witness had free access to this money. It also transpired that there were occasions when the witness used to attend at the accused's office which was a short walk away from his apartment in Sliema and cut out individual stickers from sheets. There were also about three occasions when she cleaned the office.

Upon being asked about the faith which she professes, the witness confirmed that she is a Christian Protestant. When she was still in Singapore, she was asked about her religion by the accused. During her stay with the Daswani's, the witness was allowed to practice her religion and also to keep religious items in her room. The witness categorically denied the allegation that she used to leave the gas cooker and the iron on when she was not using them. There were occasions when the accused's wife started screaming at the witness and told her to pack up and leave however this was impossible as the witness did not have her passport and any money.

When asked whether she had ever sent letters to her family and written any notes, the witness stated that she had occasionally written letters by hand to her family which however were never sent. In some of these letters she

wrote that she is happy with her new job and that her employers are nice people. The witness however clarified that such statements were made during her first month working for the Daswani's when things were still going smoothly. It resulted that the witness had taken a Blackberry mobile phone from a kitchen cupboard. This phone belonged to the accused. The witness could recognise the accused in the courtroom as being Harish Daswani, her employer.

On the 2<sup>nd</sup> November 2014, **Joseph Saliba**<sup>17</sup>, a representative of the Employment and Training Corporation (today Jobsplus) testified. The witness presented the Employment History relative to Oriance Kelin with work permit number 80613W. The application was signed by Harish Daswani on behalf of his father.

Under cross-examination, the witness confirmed that everything in relation to Oriance Kelin's employment was regular in the sense that the application had been submitted, processed and eventually the license was issued. Should there have been any problems with the issuing of the employment license, it would not have been issued in the first place. As a matter of fact, Oriance Kelin only had one registered employer in Malta. Joseph Saliba testified again on the 7<sup>th</sup> November 2014 where he presented a copy of the whole employment file.

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<sup>17</sup> Folios 214-220 and 251-251 act of proceedings

On the 2<sup>nd</sup> November 2014, **Dr Steven Farrugia Sacco**<sup>18</sup> testified whereby he stated that he was appointed by the Court as a technical expert in order to examine the content of two iPhones which were handed over to him. One of the iPhones was damaged to the extent that it could not even be powered up and hence data extraction could not be conducted.

On the 2<sup>nd</sup> November 2014, **WPC 308 Kimberly Camilleri**<sup>19</sup>, stationed at the Vice Squad testified. She stated that on the 13<sup>th</sup> June 2014 she was instructed by Inspector Sylvana Briffa to accompany Oriance Kelin to collect her belongings from her ex-employer's residence at Flat 4, Dingli Court, Dingli Street, Sliema. She was also accompanied by WPC 261. A certain Harish Daswani was present in the premises. He let us in, and we went to a bedroom where all the belongings were packed. The witness could recognise the accused Harish Daswani in the courtroom.

On the 2<sup>nd</sup> December 2014, **Josephine Sutter**<sup>20</sup> testified whereby she stated that she knows Oriance Kelin because she met her at the Kingdom Hall of the Jehovah's Witnesses which is situated in Marsa. She also knew Anita. There was an occasion in the beginning of June 2014 when she accompanied Anita to visit Oriance in Sliema. When they rang the doorbell the accused's wife answered the door and when they asked to speak to Oriance, she said

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<sup>18</sup> Folios 228-230 act of proceedings

<sup>19</sup> Folios 247-248 act of proceedings

<sup>20</sup> Folios 312-322 act of proceedings



*“no you cannot speak with her”*. When she and Anita were returning home on the bus, Anita received a text message from Oriance where she wrote that her employer treats her badly and that he does not want her to have contact with other people. Anita read this text message aloud and it was Anita who recognised the person whom they met at the door as Harish Daswani’s wife. The witness had only met Oriance at Kingdom Hall on three occasions which were always on Sunday approximately between 10am and noon.

On the 6<sup>th</sup> January 2015 **Dr. Maria Anthea Bonnici**<sup>21</sup>, an official of the Department of Industrial and Employment Relations testified. She stated that Oriance Kelin came to the Department and claimed that during her employment she was never paid any wages or bonuses or given any leave so a claim for one year in wages and bonuses and outstanding leave balance was put forward.

Oriance Kelin took an affidavit at the Department where she stated that she worked from the 6<sup>th</sup> June 2013 till the 8<sup>th</sup> June 2014. According to the claim worked out by the Department, Oriance Kelin is due the gross sum of €9,623.14. Two claim letters were sent, and they were followed by correspondence with Dr. Roselyn Borg. The employer had argued that Oriance Kelin was bound by a definite contract but all he handed over to the Department was an email which stated that Ms Kelin had to work for three years. This correspondence was between the accused Mr Daswani and an agency named Home Maid.

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<sup>21</sup> Folios 326-335 act of proceedings

Upon cross-examination the witness clarified that the claim for unpaid wages was based upon the national minimum wage according to law.

On the 16<sup>th</sup> December 2015 **Kurt Mahoney**<sup>22</sup> testified whereby he stated that he was appointed as a technical expert to carry out a data extraction exercise on a Blackberry smartphone. He managed to extract a considerable amount of information which was copied to several DVDs annexed to the technical report.

On the 19<sup>th</sup> January 2017, the accused **Harish Daswani**<sup>23</sup> testified. He recounted that he was born in Malta and has lived here all his life. He runs a business in wholesale of consumer items, with an office in San Gwann. He is married and has a two-year-old daughter. When asked about his relationship with Oriance Kelin, he stated that she was actually hired by his father who was in need of a carer. He got to know about the Home Maid agency when he was visiting the accused's brother in Jakarta, Indonesia.

Ms Kelin was not the first carer to work with the Daswani family. Various other carers had been employed over the years. They were all Indian. When the accused's father agreed with the idea of hiring an Indonesian, contact with the Home Maid agency was made. Since the father was elderly, he ran everything through the accused, who actually handled the communication

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<sup>22</sup> Folios 436-439 and 521-523 act of proceedings

<sup>23</sup> Folios 612-656 act of proceedings

with the agency. He had a telephone conversation with Ms Kelin and at that point she confirmed that she understood what the job was and that she was in acceptance of the proposed terms and conditions. The accused handled the ETC paperwork on behalf of his father.

Ms Kelin arrived in Malta on the 6<sup>th</sup> June 2013. The terms and conditions imposed by the father were very simple, basically her salary was to be 450 USD which equated to about €420 net in hand. Her lodging, food, any medicines, clothes, shoes, cosmetics, WiFi at home, and all her needs were to be provided for by the employer. The agreement was that the first three months' salary would be kept as a deposit that she would work for three years. Her time off was to be on Sunday from 1:30pm to the evening. Even the flight tickets were to be covered by the employer.

After Ms Kelin arrived in Malta, she was allowed to rest from her trip for the first few days. After that, the accused's father, who was still lucid at that time explained that Ms Kelin's schedule would be centred around his routine which was basically breakfast at 8am, lunch at 1pm and dinner at 7pm. Between 9am and noon the father would accompany the witness to his office which was five minutes away from the apartment. He would rest in the afternoon up to about 4:30pm when he would have tea and would then retire to his room at about 8pm after dinner. Whilst the father was away Ms Kelin was expected to clean the areas frequented by the father and prepare the food which would be served throughout the rest of the day. According to the witness, Ms Kelin would be free when not engaged in the mentioned activities.

The witness explained that in the apartment Ms Kelin had her own bedroom which was freshly laid out when she arrived, including a new bed, mattress and linen. There was also a TV with a DVD player. At a point, Indonesian language DVDs were acquired for Ms Kelin.

Initially when she arrived, she shared the same bathroom with the other occupants however in August 2013, a utility room was converted into a bathroom for her so at that point in time she had her own bedroom and her own bathroom. Photographs of the apartment, including Ms Kelin's room were exhibited by the witness.

The witness went on to explain that Ms Kelin's level of English was fairly good. He could communicate well with her however his father had some issues with this, which was compounded by his hearing difficulties.

Upon arrival, Ms Kelin was given a set of house keys and was shown around the surrounding areas, namely Sliema promenade, by the accused's wife so that she could go out for a walk when she was free. During the day, the accused would not be at home as he ran his business as a one man show and thus was very busy, going home only to eat and sleep. He would be at home during the weekends.

The witness recounted that apart from going on a number of business trips alone, in December 2013 he went abroad with his wife and thus Ms Kelin was left alone with his father in the apartment. Even at this time, she had full access to the house keys. The witness remarked that it would be absurd to think that her movement was restricted in any way,

When asked about Ms Kelin's performance as a helper, the witness stated that unfortunately, it was a negative one. The father had dentures and also had heart problems which necessitated a low sodium diet. Ms Kelin used to cook for him with a lot of salt and normally the food was too hard for him to chew.

Although Ms Kelin cooked principally for the father, there were occasions when she cooked food in a large dish, such as chicken in gravy, where there would be left overs which the rest of the family would have eaten. Normally the witness's wife cooked for the rest of the family and Oriance cooked for herself. When at the supermarket, she was allowed to pick what items she wanted for herself, particularly rice and noodles, which were her preferred dishes.

The witness went on to explain that his father required a number of medicines on a daily basis. He would fill a pill box which had the days and times marked on it. Ms Kelin's job was simply to open the corresponding day compartment of the corresponding meal and give it him with a glass of water and he would take them himself.

In the beginning this worked out fine however on an occasion the witness noticed that the morning pills seemed in surplus. He verified that the previous day's breakfast pills were still there, that day's breakfast pills were still there too. Two doses of Aspirin, which is the most important medication for any heart patient. The witness "*freaked out*" as he was very angry about what had happened. He stated that he was tired of having to deal with all her behaviour which was also frustrating his wife and his father. At that

point, the witness couldn't control himself and proceeded to slap Ms Kelin. He stated that as soon as he had slapped her, he knew that it was wrong and felt terrible about it. When he had taken stock of the situation, he immediately proceeded to apologise to Ms Kelin. The witness reiterated that although the frustration with Ms Kelin had built up over time, this was the only instance that he had laid his hand on her.

When her attention had been drawn to the poor level of her work, she had presented the excuse that her parents were getting divorced. The witness had also complained to the agency at this point. He also stated that the first time he heard about her brother falling from a tree was during her testimony before the court. She has never mentioned this before while at home.

Regarding the telephone bills, the witness explained that he had been called by GO plc and told that his account was in default of about €800. Following this, he found her sitting down in the kitchen, and asked her to borrow her mobile phone. When he keyed in one of the numbers featuring in the phone bill, it tallied with her contacts. The same applied for a second number. Following this Ms Kelin admitted to having called her friend and her cousin. She had been given various calling cards and also an iPad to use Skype. She had really no reason to use the fixed line. The witness claimed to be very upset by what had happened and told her that it must be remedied immediately as GO will suspend the service. It was she who suggested that the amount be deducted from her wage. The accused agreed but claimed it was more about trust than money.

The accused stated that he had called the agency by phone to complain in September 2013. He had spoken to a lady called Alice and said that Ms Kelin was failing in the most essential duties of cooking and she was also forgetful, sometimes she would even forget to place the tablets for his father.

The accused states that he did not ask for a replacement at this point. The situation however continued to deteriorate. On one occasion she put the pressure cooker on the high flame, creating a very dangerous situation. The accused's wife, who was expecting at this point in time, was very upset about what had happened.

In April, the father suggested that another agency should be contacted perhaps a replacement could be found. After a few days they came back with a potential candidate, of whom they sent a copy of the passport. By mistake, a copy of this passport was left on the dining table. The accused believes that it was seen by Ms Kelin and it was the catalyst of what was to happen in the following days.

As regards the payment of wages, the witness explained that the first three months were taken to cover the loan payment which was sent to the agency. September, October and November were the security deposit and December, January and February covered the phone bill which she had instructed to be deducted from her wages. Ms Kelin was due her payment for the month of March and the witness asked her how she wants to be paid and she stated that it is to be sent to her family. So the witness asked her for the bank details.

After a few days, Ms Kelin gave the bank details which were scribbled on a piece of paper. The SWIFT code was missing. Despite being asked for it repeatedly, she did not provide the relative SWIFT code. By the time she left, she had not provided the SWIFT code nor asked to be paid in Malta or anywhere else. Neither did she ask for her wages when she went over with the Police to collect her belongings. The witness confirmed that eventually, charges were issued by the Police on behalf of the Department of Industrial and Employment Relations against his father.

Under cross-examination, the witness stated that he had dealt with the ETC in relation with the employment of Ms Kelin on behalf of his father and he had written authorisation in this sense. The accused stated that he did actually sign some papers but this was always on behalf of his father.

The accused was asked whether he was informed by the ETC as to what are the minimum working conditions in Malta, to which question he confirmed that the employee had to be paid at least a minimum wage and any hours worked over 40 hours had to be paid as overtime. He did clarify that Ms Kelin never exceeded 40 hours of work per week. Although she did not have a stipulated break time, according to the accused, whenever she was not engaged in a particular task, she was free to do whatever she likes. In fact, many a time she could be found lounging in the kitchen using the WiFi with no one overseeing her. Now apart from the times when she was free, on Sunday between 2pm and 7pm she was not bound to do anything so she could go out.



As regards Ms Kelin's passport, this was kept by the accused for safekeeping. As soon as she arrived from the airport, the accused had asked her whether she wanted to keep it herself or whether he should keep it safe. According to the accused, she had told him to keep it for her. It was paramount that the passport was kept safe because Ms Kelin's work permit and residential permit were based on that passport so it was a big deal. The accused affirmed that he used to pay for Ms Kelin's medical expenses and had also given her some pocket money so that she could go out.

As regards wages, the accused confirmed that the wages for March, April, May and June 2014 up to the 14<sup>th</sup> are still outstanding and that they are due to Ms Kelin. After the incident with the medicines and the slap in May 2014, Ms Kelin had been asked on various occasions whether she wanted to leave however she always replied in the negative. The accused also confirmed that although his father had the intention of replacing Ms Kelin, he nonetheless applied for a renewal of her work permit. This was done so as to prevent her being in Malta illegally due to the accused's father's good nature.

When asked whether Ms Kelin was expected to clean the whole apartment, the accused stated that she would clean practically all the rooms except for his own bedroom, however it was not a big apartment.

The accused was re-examined whereby he was asked to confirm who used to pay for the shopping from the supermarket. The accused replied this was generally split between his father and himself without a hard and fast rule. He also confirmed that he paid the electricity and internet bills for the apartment. Ms Kelin did not pay for anything at all.

On the 15<sup>th</sup> February 2017 **Dr Roselyn Borg Knight**<sup>24</sup> testified after being exempted from the duty of professional secrecy by Court. The witness stated that she knows the accused because he had sought her advice on behalf of his father who at the time was eighty five years old and had some heart problems. This was because he had received a claim from the Department of Industrial and Employment Relations regarding Oriance Kelin who had gone to the department and lodged a report with regards to some payments that she believed were owed to her by the accused's father.

The events recounted by Ms Kelin to the Department were not as accurate and thus the witness advised the accused that it is important that he puts forward his own version of events and having seen the case, it was clear that there was money owed from both ends so obviously it made sense that there would be a set-off, in view of this she wrote to the department and explained to the department what the accused was owed and the witness said obviously that common sense should prevail but the Department did not change its position. In her letter she explained that Ms Kelin was being provided lodging.

According to calculations made by the witness, Ms Kelin actually owed Mr Daswani €804.70 for phone bills. Her National Insurance was also being paid by Mr Daswani. There was also an agreement that Daswani would pay the

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<sup>24</sup> Folios 681-686 act of proceedings

loan of € 1,020 on behalf of Ms Kelin and also that Ms Kelin had been asked for bank details on various occasions but these were never provided.

Furthermore, the witness explained that the contract was for a three year definite period and when there is a definite period, if one of the parties terminates the contract earlier, that party has to pay half the remaining wages of that period. The Department came back quoting the Wage Regulation Order applicable in the case of domestic workers. The argument was that since both parties owe each other money its best to sit down and try to reach an amicable settlement. Mr Daswani's instructions where to try and reach an agreement to set-off.

On the 11<sup>th</sup> September 2017 **Jyoti Khemchand Daswani sive Nikita Daswani**<sup>25</sup> testified whereby she confirmed that she has been married to the accused for nine years. They have a daughter who was born in October 2014. According to the witness Oriance Kelin is a person who was recruited by her father in law. She got to know her when she accompanied her husband to pick her up from the airport.

Oriance started working for the witness's father in law during summer 2013 and she stopped in June 2014 when the witness was pregnant. Oriance had to work as per the father in law's timings, in fact he told her that he wanted his breakfast at 8:20am and after that she had to give him his medication with a glass of water and lunch at 1pm, after that the medication again, and

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<sup>25</sup> Folios 757-773 act of proceedings

dinner at 7pm and after that the evening medication. So he just needed her for his needs and the medication and to clean up his room, his bathroom and just do his laundry. She resided in the same apartment with the rest of the family.

As Oriance lived in the same apartment with the Daswani's, there was a bedroom that was already laid out for her, a bed, a wardrobe in place, a television in place and her own separate bathroom. Oriance even had a DVD player and Indonesian DVDs in her room and had a copy of the house keys.

The witness had showed her around when she arrived and let her use her own iPad. The accused also got her calling cards so that she could remain connected with family and friends. The father in law had actually encouraged Oriance to go out when her services were not required. It however resulted that Oriance rarely wanted to get out of the house. For that reason the witness told her to do the daily grocery shopping so as to interact with the outside world.

According to the witness, Oriance didn't do any cleaning or cooking for her or her husband. There were occasions when she was boiling rice or pasta and the witness would have told her to add an extra cup for her or her husband but it even happened the other way round, that is, the witness boiled rice for Oriance.

The witness explained that Oriance was negligent in her duties, in fact there were issues with her cooking for the father in law, namely that the food was too salty and too hard so that he was unable to eat it. On various occasions,

the witness noticed that Oriance had forgotten to give her father in law the required medication.

The witness recounted that on a particular occasion, the accused noticed that Oriance had messed up with his father's medicine and he was very upset and angry and proceeded to slap Oriance. The witness did not see this occur but was told so by her husband who was very sorry for what he had done. This episode occurred in February or March 2014. The preceding December, the witness and her husband had gone on a three week trip to India. During this time, Oriance had the house to herself as well as some cash. Practically she had a free hand.

When it was evident that Oriance was not happy on the job, the witness asked her she wanted to leave and also offered her to buy her the flight ticket. However Oriance pleaded to stay and even burst out crying on a particular instance. A particularly disturbing episode was when Oriance put the pressure cooker on a very high flame. The witness, who at the time was pregnant was very upset by the dangerous situation created. It was at this point that her father in law decided that it was time to replace Oriance.

After Oriance left, there was another occasion when the witness met her while at the swings in around April 2017. The witness was at the swings with her daughter and she saw Oriance with a kid who looked a lot like her. When she saw the witness she went over to talk to her. The witness just walked away as according to her, she was very upset that Oriance made all the false allegations against the Daswani's which ultimately lead to the current proceedings.

Under cross-examination the witness affirmed that she had no role whatsoever in bringing Orience over to Malta. She stated that whilst she was living with them, Orience had everything covered. In fact when she used to accompany them to the supermarket she practically had a free hand and could pick whatever she needed.

On one occasion, the witness took her to the dentist because she had a bad toothache and also paid for it and bought the antibiotics and also took her to the dentist again for a second check-up. The witness confirmed that Orience had a wage but claimed not to know any details because ultimately it was her father in law who was responsible to pay wages. Her day off was Sunday but she never wanted to go out. There were occasions when Orience was invited out to lunch with the rest of the family.

Orience's passport was kept by the accused but when Orience went to apply for a Social Security number she took her passport and wilfully returned it to the accused for safekeeping – however nothing was kept under lock and key. Eventually the witness's father in law found a replacement carer but Orience had already run off. Technically speaking she was not dismissed. Whilst the witness confirmed that there were numerous occasions when the food cooked by Orience was too salty for her father in law's needs and that the accused used to get angry about this, she denied that there were any occasions where Orience was fed salt as a punishment. The witness also affirmed that there were no personal issues between herself and Orience.

## Considerations

### I. *The Statement released by the Accused in July 2014*

The accused had his statement taken by the Police as part of their investigation. The signed statement of Harish Daswani was taken on the 28<sup>th</sup> July 2014 by Inspector Sylvana Gafa' (nee' Briffa) in the presence of PS 1475 Frank Cassar. On the statement exhibited as evidence in these proceedings<sup>26</sup> it results that the accused was given the due caution in that he had the right not to say anything, and that anything stated could be produced as evidence and anything not stated can raise a rule of inference amounting to corroborative evidence in terms of the law as it stood at the time. This statement was signed by Inspector Sylvana Gafa' (nee' Briffa), PS 1475 Frank Cassar and the accused on each page.

During his statement the accused confirms and explains in detail the process entailed in making arrangements for Oriance Kelin to come to Malta, including the grounds for which she would be coming to Malta, that is, to care for and render services in favour of his father Bhagwan Rupchand Daswani. The accused also went into detail about the circumstances concerning the engagement and employment of Oriance Kelin, his involvement in this role, the decline in their working relationship, the arrangements concerning her pay, the circumstances relating to the keeping of her passport by himself and his wife, and his response to Oriance Kelin's

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<sup>26</sup> Page 52-62 act of proceedings

allegations including not denying that in one instance he had slapped her and on others he had shouted at her. In his signed statement released to the Police on the 28<sup>th</sup> July 2014 the accused confirms that he took the initiative to recruit Oriance Kelin and that he was looking for a home carer.

Having said this and as a preliminary basis this Court needs to first and foremost establish if the statement released by the accused is admissible as evidence in these proceedings and this in the light of recent decisions delivered by the Court of Criminal Appeal who based its judgments on emerging case law of the European Court of Human Rights.

When this statement was taken, Maltese law did not provide for the right to be assisted by a lawyer during interrogation. Therefore this Court needs to determine whether this statement, as others taken before introduction of Act LI of 2016 and the correct transposition of Directive 2013/48/EU of the European Parliament and of the Council, is still to be considered as in line and in conformity with the interpretation given by the European Court of Human Rights and the Maltese Courts with respect to article 6 of the European Convention of Human Rights and article 39 of the Constitution of Malta.

When the accused released his statement, he was given the right to consult with a legal counsel of his choice, which right was in fact written and is



documented throughout the acts of proceedings. However, the accused Daswani was never given the right to have his lawyer present before or during the interrogation, simply because, as already stated, the procedure was transposed into the Criminal Code later in time following the introduction of the relevant provisions in our law, including article 355AUA(8), Chapter 9 Laws of Malta by means of Act LI of 2016<sup>27</sup>. Therefore, this law came into force nearly two and a half years after his statement was taken.

Truly, there have been diverging interpretations in both local and regional fora about this legal state of affairs and in a number of local cases the validity of these statements has been successfully challenged. This has been particularly the cases in criminal matters, whereby whilst in such cases the right to consult a lawyer was given, no right to have a lawyer present was provided to the suspect before or during interrogation.

Amongst these judgments one finds the constitutional judgment in the names **Christopher Bartolo vs Avukat Generali et**<sup>28</sup> which related to an alleged breach to the right to a fair trial. This point had been raised in the Constitutional Court that confirmed the existing remedy of the expunging of the statements that had been released by Christopher Bartolo during the proceedings against him. In the first judgment of this case, the First Hall of the Civil Court declared:

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<sup>27</sup> 28<sup>th</sup> November 2016

<sup>28</sup> Constitutional application 92/16, decided on the 5<sup>th</sup> October 2018

*"Il-Qorti rat ukoll illi anke l-Qorti ordinarji Maltin diga b'dew jesprimu d-dubbi tagħhom rigward jekk, il-ligi, kif kienet dak iz-zmien, kienetx tiggarrantixxi adegwament d-dritt ta' smiegh xieraq konsiderat illi ma kienetx tippermetti illi suspettat jkollu assistenza legali waqt l-interrogatorju, u dan kif jidher fis-sentenza tal-Qorti tal-Appell Kriminali deciza fis-6 ta' Ottubru 2016 fl-ismijiet Il-Pulizija (Spetur Jesmond J. Borg) vs Jason Cortis fejn intqal illi:*

*"...jista' jkun hemm lok għal dibattitu dwar kemm il-provvedimenti tal-Kap 9 jirrispekkjaw d-dritt għall-assistenza legali mogħti lill-arrestat tenut kont ukoll illi dan id-dritt, kif ezistenti llum taht il-ligi tagħna, huwa ristrett għal siegħa qabel l-interrogatorju u b'hekk jeskludi l-jedd tal-presenza tal-avukat waqt l-istess interrogatorju. F'dak l-istadju l-arrestat huwa soggett għal mistoqsijiet diretti u suggestivi bir-risposti tagħhom, anke jekk jgħazel li ma jwegibx, bit-traskrizzjoni tiegħu tkun eventwalment esebita fil-proceduri kontrih fejn ikun meqjus innocenti sakemm pruvat mod iehor."*

*Huwa car għalhekk illi skont il-gurisprudenza kostanti tal-Qorti ta' Strasbourg, hekk kif zviluppat u evolviet sussegwentement għas-sentenza ta' Salduz, il-garanzija u protezzjoni ta' smiegh xieraq tirikjedi illi l-arrestat jingħata l-possibilita li jkollu miegħu avukat tal-fiducja tiegħu waqt, u mhux biss qabel l-interrogazzjoni. Għalhekk jidher illi l-argument tal-intimati illi dan l-ilment tar-rikorrent huwa nfondat għaliex kienet ingħata l-possibilita li jkellew avukatqabel l-ewwel interrogatorju huwa nsostenibbli għaliex mill-*

*gurisprudenza appena citata, jidher car illi l-arrestat ghandu jinghata l-possibilita li jkollu avukat prezenti waqt l-interrogazzjoni.*

*M'huwiex kontestat, illi fiz-zmien in kwistjoni kien hemm restrizzjoni sistematika li kienet timpedixxi lill-arrestat milli jkollu avukat tal-fiducja tieghu prezenti waqt l-interrogazzjoni. M'huwiex ikkontestat ukoll illi rikorrent ma thalliex ikollu avukat prezenti waqt l-ewwel interrogazzjoni, u illi ma inghatax access ghall-avukat tieghu qabel jew waqt it-tieni interrogazzjoni. Dan il-fatt wahdu, skont il-gurisprudenza tal-Qorti ta' Strasbourg, huwa bizzejjed biex tinstab lezjoni tad-dritt ta' smiegh xieraq."*

Moreover, it appears that this reason is being applied and operated by our Courts at present whenever faced with these legal considerations. This has also been established in the cases **Pulizija vs Claire Farrugia**<sup>29</sup> decided by the Court of Appeal (Inferior) on the 20<sup>th</sup> November 2018. In this case, the Court made ample reference to numerous cases emerging from **Salduz vs Turkey** wherein it was repeatedly confirmed that the principle to the right to a fair hearing also consists of the right to be assisted by a lawyer both before the interrogation and during the interrogation and this in addition to the right to legal representation during the proceedings in Court.

From an analysis of the aforementioned judgments quoted as well as those cited within the same judgments, the Court must also verify if there exists

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<sup>29</sup> Appeal No. 592/2018 Madam Justice Consuelo Scerri Herrera

other sufficient evidence beyond a reasonable doubt against the accused that would lead to a finding of guilt irrespective of the admissions made throughout the statement.

This was in fact the case in the judgment **Pulizija vs Claire Farrugia** wherein other material evidence besides the admission by the accused in her sworn statement was sufficient for the purposes of conviction despite the said statement was deemed inadmissible.

It has also been considered that the Courts should adopt this position even when other ordinary remedies have not been exhausted and this as a safeguard to the proper administration of justice<sup>30</sup>. This reasoning was also

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<sup>30</sup> Vide judgment *Malcolm Said vs Avukat Generali* dated 24<sup>th</sup> June 2016 as confirmed in the Constitutional Court:

"Madankollu, ghalkemm il-Qorti Ewropea hija marbuta bir-regola tal-esawriment tar-rimedji domestici, li kienet ir-raguni ghala sabet li 1-ilment ta' Dimech kien intempestiv, din il-qorti ghandha s-setgħa li tagħti rimedju fejn issib li disposizzjoni li f'hares dritt fundamentali mhux biss "qieghda tigi" izda wkoll meta "tkun x' aktarx sejra tigi miksura". Jekk, meta jsir uzu minn stqarrija li tkun ittiehdet minghajr ma min jagħmilha jkollu 1-ghajjuna ta' avukat, dan ikun bi ksur tal-jedd għal smigh xieraq, mela "x' aktarx" illi d-dritt għal smigh xieraq jinkiser jekk jithalla li jsir uzu mill-istqarrija, u 1-intervent ta' din il-qorti jkun mehtieg minn issa sabiex ma thallix li dan isir....

Għalkemm din il-qorti tenunen u tenni illi 1-interpretazzjoni minnha mogħtija fil-kaz ta' Charles Stephen Muscat u sentenzi oħra mogħtija wara hija interpretazzjoni korretta u proporzjonata billi tilqa' għal abbuzi min-naha tal-prosekuzzjoni u thares id-drittijiet ta' persuna akkuzata b' reat kriminali, jidher li din 1-interpretazzjoni - għallinqas fejn il-process kriminali jkun intemm - ilium ma għadhiex aktar tenibbli fid-dawl tas-sentenza fuq imsemmija ta' Borg v. Malta mogħtija dan 1-ahhar mill-Qorti Ewropea.

Din il-qorti għalhekk ilium hi tal-fehma li ma jkunx għaqli li tinsisti fuq 1-interpretazzjoni li kienet tat fil-kaz ta' Muscat, għalkemm itenni li għadha temmen illi hija interpretazzjoni korretta, proporzjonata u ta' buon sens.

Is-sentenza ta' Borg izda għandha tinqara wkoll fid-dawl tas-sentenza 1-oħra, ukoll fuq imsemmija, tal-istess Qorti Ewropea fil-kaz ta' Dimech fejn il-qorti tenniet illi trid tqis il-process fl-intier tiegħu biex tara kienx hemm smigh xieraq, u għalhekk, fejn il-process kriminali, bħal fil-kaz tallum, għadu għaddej, trid tistenna li jintemm il-process biex tqisu fl-intier tiegħu biex tara kienx hemm smigh xieraq. Madankollu, fil-kaz tallum il-qorti hija tal-fehma li ma jkunx għaqli li 1-process kriminali jithalla jitkompla bil- produzzjoni tal-istqarrija tal-attur għax tqis illi, fic-cirkostanzi, in-nuqqas ta' ghajjuna ta' avukat ma kienx nuqqas li ma jista' jkollu ebda konsegwenza ta' pregudizzju għall-attur billi fl-istqarrija tiegħu 1-attur ammetta 1-htija. Fic-cirkostanzi huwa xieraq illi, kif qalet 1-ewwel qorti, ma jsir ebda uzu mill-istqarrija fil-process kriminali."

applied in cases wherein the suspect or arrested person would have refused the right to legal assistance before the interrogation.

In fact, it has been determined that such refusal should not (and indeed does not) imply the suspect's or the arrested person's automatic refusal to his right to legal assistance before or during the interrogation<sup>31</sup>.

That, furthermore from what has been noted in the preceding paragraph, the Court makes reference to the judgment delivered on the 15th of January 2019 in the case **Il-Pulizija vs. Nicholas Dimech** where the Court of Criminal Appeal decided the following:

*“Ghalhekk din il-Qorti qieghda b’referenza ghat-talba maghmula mill-Avukat difensur tal-imputat fis-seduta ta’ nhar l-ghoxrin (20) ta’ Novembru tas-sena elfejn u tmintax (2018), tilqa’ t-talba u tiddikjara l-erba’ (4) stqarrijiet rilaxxati mill-imputat ossia tnejn rilaxxati nhar il-hdax (11) ta’ Awwissu tas-sena elfejn u ghaxra (2010) u tnejn rilaxxati fil-wiehed u tletin (31) ta’ Awwissu tas-sena elfejn u ghaxra (2010) bhala inammissibli u qieghda ghalhekk tordna l-isfilz tal-istqarrijiet rilaxxati millimputat. Konsegwentement tiddikjara li kwalunkwe prova u partijiet ta’ xhieda inkluz dik tal-imputat fejn issir referenza ghal dawn l-istqarrijiet hija wkoll inammissibli u ghalhekk sejrjn jigu skartati”. [emphasis by Court]*

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<sup>31</sup> Vide judgment of the Criminal Court in the names *Republic of Malta vs Marti Aiello* dated 9<sup>th</sup> May 2017 and *Police vs Aldo Pistella* decided by the First Hall Civil Court (Constitutional) on the 27<sup>th</sup> June 2017.

The Court notes that what has just been quoted above applies *mutatis mutandis* to the proceedings against the accused Harish Daswani as also reiterated in the case **Police vs. Simona Ortansa Bostan**<sup>32</sup>

This Court further notes that there do not exist nor did exist any valid and compelling reasons that could have justified the absence of providing legal assistance before and/or during the interrogation of the accused.

To the contrary, this Court considers that the only reason for such shortcoming amounts to the fact that our legislative framework regulating the rights of the accused in criminal matters had not been revised in this sense.

Therefore, for the above stated reasons, and in the light of the recent judicial pronouncements connected to such matters, and in the light of Directive 2013/48/EU of the European Parliament and of the Council, this Court, whilst declaring that it shall not be delving into the constitutionality of the said statement, declares the statement of the accused at folio 52-62 of the records of the case dated 28<sup>th</sup> July 2014 as inadmissible and consequently refrains from considering its contents and any references made to it for its final consideration.

## **Considerations**

### ***II Standard of proof***

Before delving into the elements of Article 248A, this Court cannot but note that the prosecution is basing its case primarily on the evidence given by the alleged

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<sup>32</sup> Judgment delivered 28<sup>th</sup> February 2019, Magistrate Dr. Neville Camilleri

victim Oriance Kelin apart from other circumstantial evidence which intends to corroborate the evidence given by Oriance Kelin.

The Court is faced with two conflicting versions as to what actually happened between June 2013 and June 2014. In the version of events as presented by Oriance Kelin, she presents herself as a victim of human trafficking whilst the version of events as expressed by the accused is one whereby he claims not to be the employer nor to have engaged her services, but that in actual fact he was merely assisting his father in procuring her services as a live-in carer.

The Court of Criminal Appeal in its recent judgment in the names **The Police (Inspector Michael Mallia) vs Yilmaz Aslan**<sup>33</sup> makes reference to the severity of the phenomenon of human trafficking and the need that the provisions of such offence are revised from time to time in order to adapt them to developing or changing social and cultural developments:

*“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*

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<sup>33</sup> Appeal No. 438/2014, decided by the Court of Criminal Appeal

*order to make the necessary amendments and take the necessary steps to keep in line with its modification and development...*

*...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.”<sup>34</sup>*

Having established this, the Court has to see what other evidence has been brought forward by the prosecution which on the basis of this other evidence achieves the standard of a proof beyond reasonable doubt to find the guilt of both the accused.

As explained in the clearly outlined Constitutional Court in its judgment of the 1st of April 2005 in the case **The Republic of Malta vs. Gregory Robert Eyre et**, with regards to the standard that must be applied:

*“(i) it is for the Prosecution to prove the guilt of the accused beyond reasonable doubt; (ii) if the accused is called upon, either by law or by the need to rebut the*

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<sup>34</sup> Citation Maltese Criminal Law on Human Trafficking – Dr. Lara Lanfranco



*evidence adduced against him by the Prosecution, to prove or disprove certain facts, he need only prove or disprove that fact or those facts on a balance of probabilities; (iii) if the accused proves on a balance of probabilities a fact that he has been called upon to prove, and if that fact is decisive as to the question of guilt, then he is entitled to be acquitted; (iv) to determine whether the Prosecution has proved a fact beyond reasonable doubt or whether the accused has proved a fact on a balance of probabilities, account must be taken of all the evidence and of all the circumstances of the case; (v) before the accused can be found guilty, whoever has to judge must be satisfied beyond reasonable doubt, after weighing all the evidence, of the existence of both the material and the formal element of the offence.”*

The court further refers to **The Police vs Yilmaz Azlan**<sup>35</sup> wherein it was stated that:

*“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 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 behaviour 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”.*

## **Considered**

### **III *The charge of human trafficking***

The first charge brought against the accused is that contemplated under article 248A of Chapter 9 of the Laws of Malta. In order to properly determine whether the crime contemplated under the aforesaid provision results, it is pertinent to analyse and identify the specific elements under the said provision.

The section in our Criminal Code dealing with the trafficking of persons of age for a purpose of exploitation in the production of goods or services is found in article 248A of the Criminal Code. This provision was introduced by Act III of 2002 and was subsequently amended by Act VII of 2010, again by Act XVIII of 2013 and once again by Act XIII of 2018.

According to the same parliamentary debates prior to the introduction of Act III of 2002, the intention behind introducing this legislation was, during those debates, declared as follows:

*“Mr Chairman, din il-klawsola ġdida qiegħda tiġi ntrodotta minħabba l-Konvenzjoni ta’ Palermo u ż-żewġ protokolli tagħha. Fil-15 ta’ Dicembru tas-sena 2000 il-gvern iffirma l-Konvenzjoni ta’ Palermo tal-United Nations kontra t-transnational organised crime kif ukoll iż-żewġ protokolli li hemm magħha. L-ewwel protokoll huwa kontra t-traffikar tan-nisa u tfal għal skopijiet ta’ prostituzzjoni, skjavitù jew trasferiment ta’ organi, u t-tieni protokoll kontra l-immigrazzjoni illegali u l-isfruttament ta’ l-immigranti illegali.”<sup>36</sup>*

The provision introduced by virtue of Act III of 2002 provided as follows:

*248A. (1) Whosoever, by any means mentioned in sub article (2) of this article, traffics a person of age for the purpose of exploiting the person in the production of goods or provision of services shall, on conviction be liable to the punishment of imprisonment for a term from two to nine years.*

*For the purposes of this sub article, exploitation includes requiring a person to produce goods and provide services under conditions and in circumstances which infringe labour standards governing working conditions, salaries and health and safety.*

*(2) The means referred to in sub article (1) are the following:*

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<sup>36</sup> Page 10 of the same parliamentary debates Act III of 2002, Kumitat Permanenti Ghall-Konsiderazzjoni ta’ Abbozzi ta’ Ligi, Laqgħa Nru 131, 6 ta’ Marzu 2002

- (a) violence or threats, including abduction;*
- (b) deceit or fraud;*
- (c) misuse of authority, influence or pressure;*
- (d) the giving or receiving of payments or benefits to achieve the consent of the person having control over another person.*

Moreover, article 248E introduced a definition of the phrase 'traffics a person' and states:

*(1) In this sub-title, the phrase "traffic's a person" or "traffics a minor" means the recruitment, transportation or transfer of a person, or of a minor, as the case may be, including the harbouring and subsequent reception and exchange of control over that person, or minor, and includes any behaviour which facilitates the entry into, transit through, residence in or exit from the territory of any country for any of the purposes mentioned in the preceding articles of this sub-title, as the case may be.*

Article 248A (1) was substituted entirely in virtue of Act VII of 2010 which came into force on the 22<sup>nd</sup> June 2010, whereby it then read:

*(1) Whosoever, by any means mentioned in sub-article (2), traffics a person of age for the purpose of exploiting that person in:*

- (a) the production of goods or provision of services; or*
- (b) slavery or practices similar to slavery; or*
- (c) servitude; or*

*(d) activities associated with begging; or*

*(e) any other unlawful activities not specifically provided for elsewhere under this sub- title,*

*shall, on conviction, be liable to the punishment of imprisonment from two to nine years.*

It is interesting to note that although the ‘clarification’ or ‘definition’ offered by the original Article 248A (1) relating to the meaning of the word “exploitation” was, in terms of the Act itself, removed by virtue of Act VII of 2010, it appears that the said definition was still present in the amended Criminal Code, following the introduction of Act VII of 2010.

Article 16 of Act XVII of 2010 clearly states that “*For sub article (1) of article 248A of the Code there shall be substituted the following...*” The Maltese text is even clearer: “*Is-sub artikolu (1) tal-artikolu 248A tal-Kodici ghandu jigi sostitwit b’dan li gej...*” [emphasis by Court]. Nowhere in the said article 16 is there a reservation of the aforementioned definition of the word ‘exploitation’.

Furthermore, the 2010 amending Act did not make any changes to the wording of sub article (2) of Article 248A.

It is pertinent to note that all charges with which the accused Daswani is being accused are limited to the period of time of the “8<sup>th</sup> June 2014 and in the preceding months”<sup>37</sup> [emphasis by Court].

The Court further considers that although there is not much difference in the substance of Article 248A as it stood in 2010 and as subsequently amended by virtue of Act XVIII of 2013<sup>38</sup>, there is a material difference in the punishment since by virtue of the 2013 Act, the minimum punishment was increased to four years imprisonment.

Furthermore, Act XVIII of 2013 also introduced the words “*or forced labour*” to paragraph (c) of Article 248A (1) thus clarifying the applicability of the crime contemplated under this provision to situations of forced labour. Nevertheless, this Court is of the opinion that this introduction was merely a clarification, and changed very little from the substantial position which existed after the 2010 amending Act.

The 2013 amending Act also introduced a new paragraph under sub article (2), that is “*(e) abuse of power or of a position of vulnerability: Provided that in this paragraph ‘position of vulnerability’ means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved*”.

In 2010, the means under Article 248A (2) read as follows:

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<sup>37</sup> Emphasis by this Court

<sup>38</sup> Which came into force on the 6<sup>th</sup> December 2013

*(2) The means referred to in sub-article (1) are the following:*

*(a) violence or threats, including abduction;*

*(b) deceit or fraud;*

*(c) misuse of authority, influence or pressure;*

*(d) the giving or receiving of payments or benefits to achieve the consent of the person having control over another person;*

This Court must now establish the period of the offences with which the accused is charged. From the evidence brought forward in these proceedings it clearly results that the complaint refers to a period of time which commenced shortly after her arrival in Malta in June 2013.

In fact, the complainant recounts incidents that occurred in September 2013, at which point in time, in her words, the situation had already precipitated to one of verbal and physical abuse. Moreover, this Court notes that the witness Anita Kobacs, a member of the Jehovah's Witnesses, had made a first contact with the complainant in December 2013, where, according to the witness, she was told that Ms Oriance Kelin was not allowed to leave the Daswani's residence, also indicating that by that time, Ms Kelin was allegedly already a victim of the restraints imposed by the Daswani family.

Irrespective of the veracity or otherwise of Ms Oriance Kelin's allegations, it is therefore clear that charges refer to a period of time that commenced *before* the coming into force of Act XVIII of 2013.

In view of the fact that the accused is being charged under Article 248A as a continuous offence in terms of Article 18 of the Criminal Code, and in view of the fact that it is abundantly clear that the allegations refer to a period of time *prior* to December 2013, this Court considers that the first charge must be examined under the law as it stood by virtue of Act VII of 2010.

## **Considered**

### ***IV Elements of human trafficking***

In order to establish guilt under Article 248A all the elements of this crime must subsist cumulatively and therefore what the Court will now outline are the elements of this crime namely:

**1. Any person whoever they may be;**

**2. Using any of the following means:**

*(a) violence or threats, including abduction;*

*(b) deceit or fraud;*

*(c) misuse of authority, influence or pressure;*

*(d) the giving or receiving of payments or benefits to achieve the consent of the person having control over another person;*



### 3. Traffics a person;

In accordance with Article 248E of the Criminal Code, trafficking is defined as the 'recruitment', 'transportation', 'transfer of a person', 'harbouring and subsequent reception and exchange or transfer of control over that person', 'any behaviour which facilitates entry, transit, residence or exit in relation to a territory for any of the purposes mentioned in Article 248A.

In the **Council of Europe Convention on Action against Trafficking in Human Beings** (Warsaw, 16.V.2005), and, before it, the **Palermo Protocol** (15.XI.2000), duly ratified by Malta, the definition of "trafficking in human beings" was stated to be:

*'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'*

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, was adopted by the United Nations General Assembly in 2000 and entered into force on 25 December 2003.

The Trafficking Protocol, which supplements the United Nations Convention against Transnational Organized Crime, is the only international legal instrument addressing human trafficking as a crime.

Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons defines Trafficking in Persons as:

*“the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”*

#### **4. Using any of the Means indicated at law**

Article 248A (2) (as per Act VII of 2010) indicates the means that *should* be used for conviction under Article 248A. The said sub article indicates four alternative scenarios of (a) Threat or use of force, coercion, or abduction, (b) fraud or deception, (c) misuse of power, influence or pressure, (d) or the

giving or receiving of payments or benefits to a person in control of the victim.

When introducing this legislation, the legislator clarified the following:

“Xi tfisser il-frazi “li wara tigi rċevuta”? Il-verżjoni Ingliża tgħid hekk:

*“In this sub-title, the phrase “trafficks a person” or “trafficks a minor” means the recruitment, transportation or transfer of a person, or of a minor, as the case may be, including harbouring and subsequent reception and exchange of control over that person.”*

*Bil-Malti “harbouring and subsequent reception” għamilnieha biss “li wara tigi riċevuta”. Naħseb li hemm xi haġa nieqsa. “Harbouring” tfisser taċċetta u taħbi. (Interruzzjonijiet) Il-“ħabi” inkludejnha qabel. Infatti għedna li tfisser “reklutaġġ, trasport jew trasferiment ta’ persuna, jew ta’ minuri, skond kif ikun il-każ, inkluż il-ħabi ta’ din il-persuna, jew tal-minuri, li wara tigi riċevuta ...”.<sup>39</sup>*

*DR SILVIO CAMILLERI: Il-ħabi waħdu m’huwiex traffikar. F’każ li gie xi ħadd bil-vittma u żammajtha moħbija għandi, hemmhekk m’hemmx traffikar. It-traffikar qiegħed proprju x’hin ittraffikajt lil dik il-persuna. Allura wara li jien inkun ħbejtu għaddejtu lil ħaddieħor u kien hemm bdil ... Għalhekk għandek l-element ta’ traffikar.*

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<sup>39</sup> Hon. Tonio Borg, Page 11, Parliamentary debates Act III of 2002, Kumitat Permanenti Għall-Konsiderazzjoni ta’ Abbozzi ta’ Ligi, Laqgħa Nru 131, 6 ta’ Marzu 2002

In our legislation, the accused under article 248A, must have committed the recruitment, transportation, sale or transfer of an adult person which includes the 'harbouring' (or concealment) of such person. It appears that our law requires one of these 'actions' as an element for the successful conviction of the accused under Article 249A of the Criminal Code.

Over and above, article 248E goes on to say that, in addition to such actions, such person must be so received, and there is an *exchange* or *transfer* of control over that person. The definition goes on to state that it includes such behaviour that facilitates the entry or exit from the territory of a country for any of the purposes mentioned in (in this case) Article 248A (1).

## **5. The Purpose**

The purpose of human trafficking under Article 248A must always be one of 'exploitation' but such must be linked with any of the purposes indicated under Article 248A (1) already reproduced above.

Similarly as under our Criminal Code, the UNODC Issue Paper titled "The concept of 'Exploitation' in the trafficking of persons protocol" published in Vienna in 2015 clarifies that there is no one set definition of the term 'exploitation' but rather it is considered as a concept within the parameters

of article 3 whereby exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Under article 248A (1) of the Criminal, exploitation is given a non-exhaustive definition stating that it includes *“requiring a person to produce goods and provide services under conditions and in circumstances which infringe labour standards governing working conditions, salaries and health and safety”*.

## **6. The victim can be of age or a minor**

There is no doubt that in this case, the analysis will be limited to the offence in relation to an adult victim. The complainant was born on the 10<sup>th</sup> October 1984<sup>40</sup> and was therefore an adult at the time of the alleged offence.

It is now this Court’s role to determine whether the evidence brought before it is sufficient to satisfy all the cumulative elements of the offence contemplated in article 248A.

## **Considered**

### ***V Analysis of evidence***

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<sup>40</sup> ETC application, folio 48 act of proceedings

The Court therefore must analyse all the evidence brought forward and determine of all the elements above beyond reasonable doubt.

In this case the prosecution brought forward the Indonesian national Oriance Kelin who explained in detail her version of events. In her evidence, both that given to the police *a tempo vergine* and later on during these proceedings in court, she explains that she was engaged to provide the services of a live-in home carer in the accused's household.

From the evidence produced the Court notes the following facts:

- Mr Daswani had paid the complainant's flight ticket to come to Malta and as soon as she arrived in Malta he took her passport from her on the pretext that he was going to keep it himself for safe keeping. However, according to Oriance Kelin, she did not know where this passport was held and only retrieved it under police escort when, after, leaving the household she returned with the police to collect her possessions.
- Oriance Kelin states that whilst she was still in Singapore she used to make contact with Mr Daswani over the phone where he had informed her that in Malta she was going to work from Monday to Saturday on a full time basis but that instead when she came to Malta the agreement changed such that she was working from Monday to Saturday from 5.30am in the morning till late at night.

- On the other hand the accused states that her working hours were from eight in the morning to one thirty in the afternoon and then she would start her work again from four thirty in the afternoon to eight in the evening from Monday to Saturday and then on Sunday from eight o'clock in the morning to one thirty in the afternoon. She would work these particular hours as these were the hours his father used to be awake in during the day.
- With regards to her wages, Oriance Kelin claims that the accused or any members of his family had never paid her any money apart from a cumulative sum of six euro (€6) pocket money in total given to her by the accused. She also states that she had agreed that the first three months' salary would set off the agency loan, whilst the second three months' salary would set off costs incurred by Daswani to bring her to Malta. Moreover, the complainant also explains that further months' worth of salary were set off with a hefty phone bill which she agrees to have been her doing.
- The accused also confirms under oath that during the twelve to thirteen months that Oriance Kelin worked for them she was never paid any wages. He states that on the one hand, he effected payments to Home Maid agency in order to settle Oriance's Kelin's loan back in Singapore and, on the other hand, he set off other amounts he had paid himself for costs related to Ms Kelin, including her flight to Malta.

- In her testimony, Oriance Kelin states that she was mistreated, used to receive beatings to the extent that she had even bled from her ear in one instance and was repeatedly ill-treated. She recounts incidents of having her head bashed against the wall, and of being kicked, hit, held down, forced to eat a spoonful of salt as punishment, as well as threatened with a knife. Furthermore, in addition to the physical abuse, she confirms that the accused, who she refers to as 'Sir', constantly threatened her and intimidated her by telling her that if she tried to leave his place, he would report her to the Police alleging that she had stolen things from them and also that she would end up in prison or at best, as a prostitute.
- Ms Kelin was confirmed to have said that she didn't have access to food, at times did not eat, that the kitchen was locked and that she would try and take bread from somewhere to eat.<sup>41</sup>
- The complainant alleged that she had no freedom of movement and was not allowed to go out of the house except to the shop in the area and on a few occasions for a walk along the Sliema promenade.

The accused confirmed that he was responsible for Oriance Kelin's recruitment to come to Malta and that he took care of all the paperwork and

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<sup>41</sup> Evidence Alexia Rossi, page 92 act of proceedings



made all the arrangements for his father since his father was not able to do so personally himself. Furthermore, he facilitated her entry and organised her residence in their household.

However, he claims to have always done so on behalf of his father, and not in his personal capacity. The accused also confirms that he had taken care of all applications with the ETC including Oriance Kelin's work permit's renewal and its termination after she had left the residence. He also confirms to have personally dealt with the Singaporean recruitment agency and to have taken care of Ms Kelin's travel arrangements and other financial arrangements.

The accused also puts forward the explanation that the motivation for Oriance Kelin leaving the household in the manner that she did was not because of any abuse exerted by him or his family, but because she had come across papers on the dining table relating to the employment of a new carer and thus, Oriance Kelin's replacement.

This Court does not uphold this argument firstly because it does not annihilate any of the allegations made by the complainant, and secondly because such paperwork, which should have been easily obtainable, was not exhibited.

With respect to the very act of trafficking, as defined under Article 248E(1) of the Criminal Code, in this case it does not appear, nor does it result that the accused committed the actual transportation, or transfer of

the complainant. It also does not result that the accused harboured or concealed the complainant so much so that the complainant had a number of contacts and third parties, who also testified in these proceedings and were well aware of her whereabouts.

This Court cannot but express doubts as to whether the accused can be said to have 'recruited' the complainant. Recruitment is defined in the Oxford Dictionary as the '*act or process of finding new people to join a company, an organisation, the armed forces, etc.*'. It is not contested that the complainant was identified by a foreign third- party agency named "Home Maid". In fact, it can be stated that at best, the accused, through the assistance of an agency, requested for *a person* to be employed as a live-in carer.

The accused cannot be found responsible for having acted to find the complainant. In fact, he had engaged someone else to do this. Even in this case, the material element of 'recruitment' has not been properly satisfied.

The same however, cannot be said of the last scenario of 'trafficking' as defined in our law. Article 248E (1) states that any '*behaviour which facilitates the entry into, transit through, residence in, or exit from the territory of any country for any of the purposes mentioned in the preceding articles of this sub-title*' is tantamount to trafficking [emphasis by Court].

There is no doubt that the accused paid for the recruitment of the complainant which was done by a foreign third-party agency. There is also no doubt that the accused made several arrangements in order for the complainant to come to Malta, including dealing with paperwork relating to

her work permit (and residence permit), its renewal, her travelling to Malta and other arrangements.

This Court is compelled to point out that the fact that the accused claims to have done all such things on behalf of his father, who was unable to do so on account of his elderly age, is not sufficient to exonerate the accused from any criminal liability with respect to this charge. The Court finds the accused's attempted argument to 'place responsibility' on his late father unfounded. All the arrangements which the accused made for the purposes of bringing Ms Oriance Kelin to Malta, including all arrangements for her stay in Malta, amount to a facilitation of her entry and residence in this territory.

It is now essential to examine whether the accused did so for any of the purposes indicated in Article 248A(1).

As already stated above, for the offence of human trafficking to result, the purpose must be one of exploitation. Under article 248A (1) of the Criminal, exploitation is given a non-exhaustive definition stating that it includes *"requiring a person to produce goods and provide services under conditions and in circumstances which infringe labour standards governing working conditions, salaries and health and safety"* [emphasis by Court].

In this case, the complainant is classified as a domestic service worker and the relevant legislation is the Subsidiary Legislation 452.22 (Domestic Service Wages Council Order) and Subsidiary Legislation 452.40 (Domestic Service Wages Council Wage Regulation Order).

The applicable Order as at 1<sup>st</sup> January 2013 (as per Legal Notice 334 of 2013) indicates that the minimum wage for workers as was the complainant was that of €724.97 per month. As at 1<sup>st</sup> January 2014, the minimum wage was of €740.09 (as per Legal Notice 444 of 2013).

This alone is sufficient to satisfy the definition of ‘exploitation’ as presented in our Criminal Code, in that the accused had requested that the complainant comes to Malta to provide services under conditions that infringe the applicable labour standards and regulations in force at the time. The accused and the complainant both agree that the remuneration promised to the complainant was that of *circa* €420 monthly.

From the documents produced it is clear throughout that the accused was negotiating and bartering terms and conditions which led to the exploitation of Oriance Kelin with the Singaporean agency and that in one instance the same recruitment agency refers to Oriance Kelin as an ‘investment’ for the accused to be safeguarded.<sup>42</sup>

In the judgement **The Police (Inspector Melvyn Camilleri and Inspector Nikolai Sant) vs Mario Pace et** (decided by the Court of Magistrates as a Court of Criminal Judicature on the 17<sup>th</sup> October 2016) the Court had decided that bringing foreign nationals to Malta, for the purposes of work,

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<sup>42</sup> Doc MAB1 exhibited at page 339 act of proceedings

is not enough. It thus follows that the element of exploitation must necessarily be satisfied. This Court will now reproduce a substantial quotation from the said judgement for a better understanding of the decision delivered by this Court<sup>43</sup> in October 2016:

*“Charges under Articles 248A and 248B of Chapter 9 of the Laws of Malta*

As referred before this Court is only going to quote and examine the sub-articles quoted by the Attorney General in his note.

Article 248A of Chapter 9 states the following:

*(1) Whosoever, by any means mentioned in subarticle (2), traffics a person of age for the purpose of exploiting that person in:*

*(a) the production of goods or provision of services; or*

*(e) any other unlawful activities not specifically provided for elsewhere under this sub-title,*

*shall, on conviction, be liable to the punishment of imprisonment from four to twelve years.*

*For the purposes of this subarticle exploitation includes requiring a person to produce goods and provide services under conditions and in circumstances which*

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<sup>43</sup> Differently presided

*infringe labour standards governing working conditions, salaries and health and safety.*

*(2) The means referred to in subarticle (1) are the following:*

*(a) violence or threats, including abduction;*

*(b) deceit or fraud;*

*(c) misuse of authority, influence or pressure;*

*(d) the giving or receiving of payments or benefits to achieve the consent of the person having control over another person;*

*Article 248B then provides the following:*

*Whosoever, by any means mentioned in article 248A(2), trafficks a person of age for the purpose of exploiting that person in prostitution or in pornographic performances or in the production of pornographic material or other forms of sexual exploitation shall, on conviction, be liable to the punishment laid down in article 248A(1).*

*Article 248E also provides that:*

*(1) In this sub-title, the phrase "trafficks a person" or "trafficks a minor" means the recruitment, transportation, sale or transfer of a person, or of a minor, as the case may be, including harboring and subsequent reception and exchange or transfer of control over that person, or minor, and includes any behavior which facilitates the*

*entry into, transit through, residence in or exit from the territory of any country for any of the purposes mentioned in the preceding articles of this sub-title, as the case may be.*

*In that these proceedings were instigated by a report made by two women of foreign nationality namely Ana Maria Dimitrescu and Virginia Pope that they were brought from Greece to work for Mario Pace and Denisa Pirlici but then they found another reality where they stated that they were taken hostage by these two in an apartment in St Julians and they were only let out by permission and with the company of one of them.*

*The Court had the chance to hear these witnesses together with another witness namely Florian Tanasu who happened to be the boyfriend of one of the girls and they in fact related how they were brought by Mario Pace and Denisa from Greece and were immediately escorted to the apartment in St. Julians where they weren't allowed to go out except to work accompanied by one of them. They in fact started working at the club Black and White administered by Charles Sciberras and his partner Stefania Iordache as dancers. They seemed that they were surprised and somewhat insulted by this job but it transpired after counter-examination and after evidence of Dr. Martin Bajada who examined the mobile phones of everyone involved in these proceedings, that these two women were in fact working as dancers in Greece and often rendered sexual services in a club therein.*

*In fact Dr. Martin Bajada in his testimony dated the twenty ninth (29) of August two thousand and eleven (2011) at folio two hundred and fourteen (214) states that*

*when he examined the contents of mobile phone of Ana Dimistrescu he discovered that all the contents were deleted except from the contact list referring to a certain Manoli (which later came to the knowledge of the court that he was the employer of the two girls back in Greece before they arrived in Malta).*

*As regards the alleged restraintment of the girls in question from the apartment, the witness stated on oath that:*

*“As far as the CCTV footage which I examined regarding other CCTV recorder given to me by the police there is the activity of the in-going and out-going of the party which are three (3) females and a male. In it I also recognize Mario Pace who is one of the accused and I can say that from the footage I viewed there is no form of restraintment on any of those persons. In fact there are instances when the male person, part of the group of four (4), is seen going in and out of the apartment on his own. There are instances where Denisa is also in and out on her own and there are other instances where one of the party stayed behind.*

*You can see that they enter at night, at five o'clock in the morning (5.00 a.m.) at night, on their own without the assistance of Mario Pace. There are instances where Mario Pace calls, but there are other instances where they leave and come in on their own.”*

*Then he continues:*



*“You can see all the footage but you obviously there are particular days – for example on the first day of their arrival, yes, Mario Pace helped them. There was another guy who helped them take the luggage up. They you can see in the footage that they went out to have a pizza and Cokes and they came in again. Then they changed and went out in the evening but it was normal. Then, if you look at even the mobile phones you will find that there are photos taken by the girls when they were at Barrakka or in other places in Sliema. They are just like normal tourists.”*

*It is evident therefore that this court cannot rely on the evidence tendered by the two women so much so that the best evidence against their testimony was presented by the prosecution itself showing the exact opposite to what the girls had said. One possible motive would have been because the girls were asked to leave the club and therefore they wanted some kind of revenge or some other benefit but instead the CCTV of the apartment in St Julians and their mobile phones show otherwise.*

*Therefore the accused especially Mario Pace and Denisa Pirlici cannot be held responsible criminally under these dispositions of the law relating to human trafficking for illicit persons. The mere fact that they got them to Malta for work is not enough. [emphasis by the Court].”*

In the light of the above, this Court is morally convinced that the accused can be deemed to have facilitated the entry in and residence of the complainant Oriance Kelin in Malta, with the purpose of exploiting Oriance Kelin to render services in favour of his elderly father.

Finally, this Court must also determine whether the accused has used any of the means indicated in Article 248A (2) of the Criminal Code. This requirement is also cumulative and not alternative to the others mentioned above.

The said sub article requires that the acts exercised by the accused, in this case, the facilitation of her entry and her residence in Malta, would have used any one of the means indicated in Article 248A (2) that is, *violence or threats, including abduction; deceit or fraud; misuse of authority, influence or pressure; or the giving or receiving of payments or benefits to achieve the consent of the person having control over another person.*

According to Oriance Kelin's testimony, the accused not only threatened her and misused his authority (such as when he concealed her travelling documents, including her passport), but he also used violence against her. According to the testimony of Alexia Rossi, a psychologist, the impact of the accused's or "Sir"'s behaviour upon the complainant was such to have left symptoms of post-traumatic stress disorder. The complainant also confirms that the fear of the Daswani's had instilled in her a feeling of inferiority that she was not able to overcome until she received help from third parties in June 2014.

This Court is thus convinced, that whilst it may have been true that the complainant was not 'locked' in the Daswani's residence, and that she had the keys to the said apartment, this does not exonerate the accused from his

responsibility of having placed Ms Kelin in systematic exploitation, which together with the threats, insults and violence, made the victim powerless to overcome the situation.

In fact the victim was able to leave through the assistance she sought of others who helped her escape and put her up in a shelter. The accused claims that once she had access to the household key, she was free to go wherever she wanted. The Court dismisses this argument since the complainant was unable to go anywhere without any money or her passport.

It transpires that ultimately the complainant was bound to the household and the conditions and restrictions that came with it. This Court reasonably believes that the victim was placed in a vulnerable position where she had no real or acceptable alternative but to submit to the abuse and conditions involved, making her livelihood dependent on the Daswani's. This was such to the extent that even for medical care, she depended on them including to pay for her dentist and to purchase antibiotics.

In the situation the victim was placed in she had no viable option to change job or find alternative work, no sufficient means to maintain regular contact with her family or friends, had been restricted of her social and community ties, had no means of ensuring due and timely payment of her wages and was at the mercy of the accused's household in terms of options, such that her only way out of her situation was to escape and seek refuge in a shelter. Her escape was also able to take place due to the help she received from a

fellow domestic worker she met on errands who was able to find her help through the Director of the Jesuit Refugee Services.

This Court is also convinced of the complainant's version of events in relation to the retention of her passport.

Whilst this Court notes that despite Ms Kelin's complaint that her passport was taken and withheld by the accused without her knowledge as to its location, no charges were pressed in violation of article 3(b) of the Passport Ordinance, Chapter 61 of the Laws of Malta, such facts also satisfies further the 'means' as listed under Article 248A (2) of the Criminal Code.

Although the accused claims that Ms Kelin never asked him for her passport back, this Court is also convinced that the deposition given by the complainant, wherein she states that Mr Daswani repeatedly threatened her that he would burn or destroy her passport and immigration documents, is true.

Not only did the accused have no right to retain Ms Kelin's passport, but this is also deemed to be a criminal offence under Chapter 61 of the Laws of Malta. The accused's argument that the passport was never held under lock and key and that, at times, Oriance Kelin was left unattended inside the apartment where the passport was being held is not sufficient to tilt the scales of responsibility.

In fact, the complainant testifies that she did not know where her passport was and that when the accused and his wife travelled to India he informed her that he would be taking it with him to burn:

*“I don’t know because when they left to India, he is telling me that I bring your passport to burn it, I bring it to India so that you will not find it and I will burn it and he is telling me that they are always screaming, the wife always screaming I will make your life miserable then some more Harry and say I will not pay I will burn your passport, they were always telling me that.”<sup>44</sup>*

The victim furthermore confirms that along with her passport, the accused also took her immigration papers.

*Court: “So both the passport as well as this immigration paper?”*

*Witness: “Yes.”<sup>45</sup>*

In his note of submissions, the accused states that a message was sent to Oriance Kelin in June of 2014 stating *“Oriance come and collect your things and your passport”*.<sup>46</sup> However, no evidence of this message was formally

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<sup>44</sup> Evidence of Oriance Kelin, folio 128 act of proceedings.

<sup>45</sup> Evidence of Oriance Kelin folio 130 act of proceedings

<sup>46</sup> Note of submission of Harish Daswani, page 18; page 861 act of proceedings

presented to the Court and thus, the accused failed to provide the best (albeit simple) evidence to substantiate his version.

Furthermore, the system adopted by the accused for the 'setting-off' of Ms Kelin's loan with her wages is a typical situation of 'modern bondage'.

In modern bondage, a person is indebted by means of loan repayments to cover flights, agency fees and other expenses. This effectively traps the person in such a situation whereby he/she would be effectively deprived of wages on the grounds that they owe monies to their recruiters and/or employers.

The United Nations position on human rights and human trafficking with specific reference to debt bondage outlaws the practice.

*“Many of the practices associated with modern-day trafficking are clearly prohibited under international human rights law. For instance, human rights law forbids debt bondage: the pledging of personal services as security for a debt where the value of those services is not applied towards the liquidation of the debt or their length or nature is not limited and defined. Many trafficked persons who enter into a debt with their exploiters (relating to, for example, placement or transport fees) find themselves in a situation of debt bondage; the debt is used as a means of controlling and exploiting them. Human rights law also prohibits forced labour, defined by Convention No. 29 concerning Forced or Compulsory Labour of the International Labour Organization (ILO) as: “all work or service which is exacted from*

*any person under the menace of any penalty and for which the said person has not offered himself [herself] voluntarily". Slavery, servitude, child sexual exploitation, forced marriage, servile forms of marriage, child marriage, enforced prostitution and the exploitation of prostitution are also trafficking-related practices that are prohibited under international human rights law."*<sup>47</sup>

The Court is morally convinced that the accused intentionally abused from his position to exploit the complainant by forcing her to work and provide services for his family with no intention of remunerating her. The accused took all the preparatory and necessary steps to facilitate and bring the victim to Malta, by providing inaccurate and highly optimistic descriptions of her work conditions, including a safe and reasonable environment to work in.

Instead the victim found herself effectively trapped in a form of debt bondage, working under the direction and instructions of the accused who had confiscated her only means of escape (her passport), had failed to pay her any monies since she commenced rendering services in June 2013 and at times, abused of his position by verbally and physically assaulting her into submission.

Finally, and from the testimonies brought in this case, this Court reasonably deems that the accused was well aware of the situation which he had created

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<sup>47</sup> United Nations Human Rights and Human Trafficking Fact Sheet 36

- that is - a situation wherein the residence given to Ms Kelin, became a place of exploitation and rendered her trapped.

This Court further notes that the accused, despite claiming that, from the very beginning, Ms Kelin proved incapable of performing her work, so much so that she was a peril to the safety of his elderly father and pregnant wife, he retained her at his house until it was *her* who managed to break the 'trap' and find refuge at a shelter. It was only *then*, that Mr Daswani terminated her employment with the ETC's records. It is this Court's consideration, that the behaviour exhibited by the accused indicates that he not only was well aware of the consequences of his actions, but that, despite such awareness, persisted in his conduct.

For the abovementioned reasons, this Court deems that the prosecution has sufficiently proven the necessary elements of the first charge and is therefore convinced that the accused is guilty thereof.

**Considered**



## **VI. *Fear that Violence will be used***

The accused is also charged under Article 251B of the Criminal Code which states:

*251B. (1) A person whose course of conduct causes another to fear that violence will be used against him or his property or against the person or property of any of his ascendants, descendants, brothers or sisters or any person mentioned in article 222(1) shall be guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions, and shall be liable to the punishment of imprisonment for a term from three to six months or to a fine (multa) of not less than four thousand and six hundred and fifty-eight euro and seventy-five cents (4658.75) and not more than eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87), or to both such fine and imprisonment.*

*(2) For the purpose of this article, the person whose course of conduct is in question ought to know that it will cause another person to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.*

*(3) It is a defence for a person charged with an offence under this article to show that:*

*(a) his course of conduct was pursued in the circumstances mentioned in article 251A(3)(a) or (b);*

*or*

*(b) the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his or another's property.*

In relation to this provision, this Court cannot but make ample reference to that decided in the judgement in the names **Il-Pulizija vs Raymond Parnis** wherein it was stated:

*Dan kollu – u cioe` dawn l-affarijiet kollha li sehew fil-kuntest ta' incident wiehed – ma jistghu qatt jammontaw ghar-reat kontemplat fl-Artikolu 251B imsemmi. Dan ir-reat gie evidentement ispirat mill-Artikolu 4(1) tal-Protection from Harassment Act, 1997 tal-Ingilterra, liema artikolu jipprovi testwalment hekk: “A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.” L-Artikolu 251B taghna – u hawn il-Qorti ser tuza t-test Ingliz proprju biex wiehed ikun jista' jara x-xebh u fejn saru t-tibdiliet – jipprovi, fis-subartikolu (1) tieghu, hekk: “A person whose course of conduct causes another to fear that violence will be used against him or his property or against the person or*

*property of any of his ascendants, descendants, brothers or sisters or any person mentioned in sub-article (1) of article 222 shall be guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions...*" (sottolinear ta' din il-Qorti). Il-kliem "on each of those occasions" huma indikattivi li l-att materjali ma jistax isehh f'okkazjoni wahda izda jrid ikun hemm għall-anqas zewg okkazjonijiet – proprju kif jinghad fil-matrici Ingliza, "on at least two occasions". Għal xi raguni – fil-fehma ta' din il-Qorti kompletament illogika – il-kliem "on at least two occasions thallew barra". Fi kliem l-edituri ta' Blackstone's *Criminal Practice*, 2008:

*'How separate the two occasions must be remains to be seen. The nature of stalking, the activity which primarily created the need for the new offences, might mean that the occasions are likely to be on separate days, although it may be possible to differentiate activities on one day where they can be viewed as not being continuous. The further apart the incidents, the less likely it is that they will be regarded as a course of conduct...It was recognised, however that circumstances can be conceived 'where incidents, as far apart as a year, could constitute a course of conduct'. The type of incidents would be those intended to occur on an annual event such as a religious festival or a birthday...'*

Moreover, in relation to this offence **Blackstone** states:

*D's conduct must cause the complainant to fear that violence will be used against him; it is not sufficient for it to frighten the complainant as to what*

*might happen (Henley (2000) Crim LR 582; Caurti v DPP (2002) Crim LR 131). It is always a question of act (Caurti and R (Simon Howard) v DPP (2001) EWHC Admin 17) and, whilst it can sometimes be inferred from the evidence, there should, if possible, be direct evidence from the complainant (R vs DPP (2001) Crim LR 396; Cuarti)....the prosecution must prove that the conduct in question was targeted at an individual, that it was calculated to produce the consequences described in s 7 of the Act (alarming the person or causing the person distress) and that it was both oppressive and unreasonable (see Haque at (70)-(73))'<sup>48</sup>*

In order to find guilt under Article 251B of the Criminal Code, this Court must necessarily examine what the alleged complainant felt as a result of the accused's behaviour.

In this case, this Court has already made ample reference to the accused's behaviour vis-à-vis the complainant. In brief, this Court is convinced that the accused had repeatedly insulted, threatened, and even physically assaulted Ms Kelin. The accused himself confirmed that he had, at least once, hit her.

The prosecution put forward instances of actual violence committed by the accused against the complainant. The complainant in her evidence confirms instances of actual violence and relates her fears of perceived and future violence that could take place against her. The complainant in her evidence also refers to the fear that her passport, being her property, would be burnt and destroyed. The court finds this evidence to be credible.

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<sup>48</sup> Blackstone Criminal Practice, 2015, Oxford, Section B2.186, p. 297

This Court further refers to case **The Police vs Yilmaz Azlan**<sup>49</sup> wherein it was stated that:

*“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 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 behaviour 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”.*

This Court declares that it is satisfied that the version of events given by the complainant is credible.

The Court is also satisfied that there exists a clear course of conduct of the accused’s behaviour.

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<sup>49</sup> Decided by the Court of Criminal Appeal on the 18<sup>th</sup> June 2019 – Appeal No. 438/2014

For completeness's sake, this Court is also reproducing the possible defences which the accused may bring at law, being those indicated under Article 251B (3).

This provision makes reference to the defences listed under Article 251A (3) (a) and (b) which state:

*(3) It is a defence for a person charged with an offence under this article to show that:*

*(a) his course of conduct was pursued for the purpose of preventing or detecting crime; or*

*(b) his course of conduct was pursued under any enactment, regulation or rule, or to comply with any condition or requirement imposed by any person under any enactment;*

Furthermore, Article 251B (3) (b) also states that it is a defence to state that the pursuit of such course of conduct was reasonable for the protection of the accused or another or for the protection of his or another's property.

There is no doubt that the course of conduct of the accused was not pursued in order to prevent or detect a crime, nor was it pursued under any law or regulation. Moreover, and for the same factual observations made above, this Court further deems that the accused's conduct cannot be classified as

'reasonable' for his own protection, for the protection of his property, or for the protection of anyone else.

For these reasons, this court also deems the accused to be guilty of the second charge.

## **Considered**

### **VII. *Contraventional Insults and Threats***

The accused was also charged with the contravention under Article 339(1)(e) of Chapter 9 of the Laws of Malta:

*(1) Every person is guilty of a contravention against the person who utters insults or threats not otherwise provided for in this Code, or being provoked, carries his insult beyond the limit warranted by the provocation;*

Although the complainant Oriance Kelin throughout her evidence makes reference to numerous insults and threats received by the accused and in spite of the fact that the prosecution in its citation put forward the charge under article 339(1)(e) of the Criminal Code, the Court notes however, that

the Attorney General in its note of remittal did not make reference to this charge.

Therefore this Court cannot take any further cognisance of the same.

## **Considered**

### ***VIII. Breach of Employment Regulations***

The fourth and last charge refers to the accused, in his capacity as ‘employer’, for having contravened or failed to comply with any recognised conditions of employment prescribed by the relevant national standard order, regulation, collective agreement, or any provisions under Chapter 452 of the Laws of Malta or any regulations made thereunder.

Whilst the definition of ‘conditions of employment’ is clear under Article 2 of Chapter 452 of the Laws of Malta, which is defined as “*wages, the period of employment, the hours of work and leave and includes any conditions related to the employment of any employee under a contract of service including any benefits arising therefrom, terms of engagement, terms of work participation, manner of termination of any employment agreement and the mode of settling any differences which may arise between the parties to the agreement...*” the same cannot be said of the definition of ‘employer’, which under the same Article 2 of Chapter



452 of the Laws of Malta, is given a *non-exhaustive* definition merely indicating that an employer **includes** “*a partnership, company, association or other body of persons, whether vested with legal personality or not*”.

If the accused can be classified as an ‘employer’, and in view of his active participation in the arrangements made for the complainant finding guilt under article 45 of the Employment and Industrial Relations Act would be clear.

The accused’s agreement (and admission in Court) to pay the complainant the sum of circa €420 monthly, is sufficient as a breach of the conditions of employment in the light of Legal Notice 334 of 2013 and 444 of 2014 which establishes the minimum wage due for workers in a similar category of Ms Kelin.

In this case, this Court notes that at no point was a contract presented delineating the victim’s relationship with the accused or with his father. Similarly, no document was filed indicating the complainant’s acceptance to these conditions. However, the documentary evidence establishes the recruitment process undertaken to remove Oriance Kelin from her home country of Indonesia and bring her to Malta on the pretext of set working conditions which, after she arrived in Malta, did not result. Even the accused, at the stand, confirms that he had undertaken all necessary steps to have Ms Oriance Kelin recruited and brought to Malta, with the intention

that she would be travelling here to care for his elderly father for agreed wages, hours and conditions.

In relation to this charge, this Court notes that Oriance Kelin arrived in Malta on the 6<sup>th</sup> June 2013. From the documents exhibited it transpires that the accused was the person involved in the recruitment of the complainant. The accused made the payments necessary via Western Union to Home Maid Agency PTE Ltd on the 30<sup>th</sup> May 2013<sup>50</sup>. In the payments made to Western Union and via Bank of Valletta, the accused is listed as the person responsible for the transactions along with other personal details such as addresses, telephone and fax numbers.

Documents consisting of emails and correspondence between the accused and Home Maid Agency establish that it is the accused who acted as the person responsible for bringing the complainant to Malta and making all necessary arrangements for her residence and work in the country<sup>51</sup>.

Moreover, it results, even from the accused's confirmation on the stand, that it was *him* who decided to set-off the complainant's loan with three months' salary, and the costs *he* had incurred with an additional three months' salary. It was also confirmed by him (including by the exhibiting of a telephone bill) that it was *him* who put in place the allegedly-agreed set-off of the said bill with additional months' off the complainant's salary. Furthermore in substantiating the fact that the complainant owed money for having racked

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<sup>50</sup> Folio 35-37 act of proceedings

<sup>51</sup> Folio 667-675 act of proceedings

up a telephony bill without the family's consent, the accused presented a Go Mobile telephony bill in his name and appertaining to him<sup>52</sup>.

This seems to give the accused a level of control over the complainant. The Court is hereby making reference to the relevant tests at UK law which determine whether the person concerned is indeed an 'employer' or otherwise.

In **Jowitt's 1977 Dictionary of English Law**, employer is defined as follows:

*"The test ... seems to be ... that the servant is bound to obey the reasonable commands of his master to do all acts falling within the scope of his employment and secondly, that the master has the power of dismissing the servant on neglecting his duty, or for incompetence or gross misconduct or on giving notice of dismissal in accordance with the express or implied terms of the contract."*

Furthermore, in **Mersey Docks vs Coggins and Griffiths (1947 AC 1)**, the Appeals Court stated:

*"Many factors have a bearing on the result... Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed*

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<sup>52</sup> Folio 38-43 act of proceedings

*-- all these questions have to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject matter under discussion, but among the many tests suggested I think that the most satisfactory by which to ascertain who is the employer at any particular time is to ask **who is entitled to tell the employee the way in which he is to do the work upon which he is engaged.***

*... It is true that in most cases no orders as to how a job should be done are given or required. The man is left to do his own work in his own way, but the ultimate question is not what specific orders, or whether any specific orders, were given, **but who is entitled to give the orders as to how the work should be done.**" [emphasis by this Court]*

The accused puts forward his defence that, in relation to Ms Oriance Kelin, he was acting on his father's behalf, and was merely assisting him to employ the complainant since his father was elderly and was not able to take care of such matters. In this regard the accused exhibited Document HD3, being an authorisation letter signed by Bhagwan Rupchand Daswani authorising his son Harish Daswani, the accused, to apply for a working permit for Oriance Kelin the complainant<sup>53</sup>.

The application setting forth the Position Description to recruit a personal carer is exhibited as Document SB5 where one finds that this document sets out the requisites for employment and recruitment to be signed by the father

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<sup>53</sup>Folio 663 act of proceedings

of the accused with the initials B.R. Daswani. Furthermore, whilst both application and termination in relation to Ms Oriance Kelin's employment with the Employment and Training Corporation (ETC) is in the name of Bhagwan Rupchand Daswani, it is confirmed (including by the accused himself) that it had been signed by the accused on his father's behalf<sup>54</sup>.

The renewal application submitted on the 16<sup>th</sup> April 2014, was addressed to the accused's father<sup>55</sup>. The accused's father is listed as the employer of the complainant along with PE No: 505797 for purposes of the declaration regarding social security contributions and income tax payments in respect of employment licences holders<sup>56</sup>.

When it came to the issue concerning the complainant's employment Maria Anthea Bonnici on behalf of the Department of Industrial and Employments Relations submitted a Statement of Account indicating Mr Bhagwan Rupchand Daswani as the employer and the outstanding wages allegedly due<sup>57</sup>.

The police consequently issued charges against Bhagwan Rupchand Daswani in his capacity as *employer* in court on the 9<sup>th</sup> April 2015 for breach of various employment regulations in connection with the complainant's employed and against him as her registered employer<sup>58</sup>.

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<sup>54</sup> Folio 44-51, 222-227 act of proceedings

<sup>55</sup> Folio 252-307 act of proceedings

<sup>56</sup> Folio 264 act of proceedings

<sup>57</sup> Folio 336-342 act of proceedings

<sup>58</sup> Folio 676-679 act of proceedings

The Court further notes though, and this following the evidence by Dr. Roslyn Borg Knight, that it was the accused once again having discussions with the Department of Employment and Industrial Relations in order to try and reach a final agreement and settlement concerning the outstanding wages and statutory claims.

The accused Harish Daswani when tendering evidence explains that he was acting on his father's behalf from whom he acquired a written authorisation allowing him to act in his stead.<sup>59</sup> His father, Bhagwan Daswani also confirmed the same in a letter to a Ms Sammut at the ETC Department allowing him to conduct all matters on his behalf with regards to the application process<sup>60</sup>.

The accused in his defence explains that sums of money were paid to cover the recruitment agency fee, costs of flights and travel, ad hoc loan expenses of the victim. Furthermore, the accused stated that Oriance Kelin had racked up a telephone mobile and by mutual agreement with her was to be deducted from her salary. Finally, she was required to provide a three (3) month salary security to ensure her tenure - all these had to be off set and settled by Oriance Kelin before her salaries could be paid to her or family.

The accused also explains that the reason why Oriance Kelin's salary was not directly paid to her in cash was because she requested for it to be passed on to her family, however, this was not done since she did not provide the necessary banking information in order for any transaction to be effected.

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<sup>59</sup> Evidence of Harish Daswani, pages 639-640 act of proceedings.

<sup>60</sup> Page 307 act of proceedings

The above are the reasons put forward by the accused justifying, why during the complainant's employment, she did not receive any remuneration.

The accused also puts forward that Oriance Kelin was given free accommodation in the form of a private bedroom and toilet room, toiletries and food, access to sifa phone cards, was invited out to eat with them, brought her take away food with them, brought her clothes, provided her with medicinals and access to healthcare when required and furthermore, when she accompanied them to the supermarket she was free to pick items she wanted to eat for herself as a form of monetary compensation for remuneration.

The accused also explains that he did not affect any payments to her because he was awaiting bank details to effect a transfer and when they did come they lacked a swift code which was necessary for him to effect the payment. Furthermore, since they intended to replace her at some point, they withheld wages so that they could deduct the three (3) month loan amount, settle outstanding dues and then the agency can handle the rest.<sup>61</sup> Having said that, it transpired that Oriance Kelin was never replaced and after one year an application was submitted to renew her work permit.

The accused's wife Jyoti Khemchand Daswani in her evidence explained that they offered her to leave on numerous occasions but she would plead to be kept in their employment.<sup>62</sup>

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<sup>61</sup> Evidence of Harish Daswani, page 647 act of proceedings.

<sup>62</sup> Evidence of Jyoti Khemchand Daswani, page 736 act of proceedings.

Finally, he also confirms that Oriance Kelin never had a full day off, but was allowed off every Sunday from 2.00pm-7.00pm.<sup>63</sup>

Everything seems to indicate that the accused *was* in effect, the person exercising all employer-rights and obligations upon the 'employee' Oriance Kelin.

According to the Employment and Training Corporation's (ETC) records<sup>64</sup>, it is established that Oriance Kelin was employed as a personal carer for Bhagwan Rupchand Daswani on the 3<sup>rd</sup> May 2013 and that such employment was terminated on the 9<sup>th</sup> June 2014. Furthermore, the application and covering letter submitted to the ETC were submitted in the name of B.R. Daswani as well as the renewal application dated 27<sup>th</sup> March 2014.<sup>65</sup> By renewing the application, the intention was clear that the Oriance Kelin was intended to stay on with the family for a second year.

The witness Maria Anthea Bonnici acting as a representative of the Department of Industrial and Employment Relations (DIER) stated that according to their calculations the amount owed in wages, bonuses and leave amount to €9,623.14<sup>66</sup>. However, it results that whilst this amount was claimed from Bhagwan Rupchand Daswani in virtue of proceedings instituted against him before this Court (differently presided), Mr Bhagwan

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<sup>63</sup> Evidence of Harish Daswani, page 643 act of proceedings.

<sup>64</sup> Doc JS1 JS2, Page 221 act of proceedings

<sup>65</sup> Doc JS4, page 224-227 and Doc JS5 page 262 act of proceedings

<sup>66</sup> Evidence tendered on the 6<sup>th</sup> January 2015, page 328 act of proceedings



Rupchand Daswani passed away before such were concluded and the proceedings consequently extinguished.

However, the Court needs to determine at this juncture who was the rightful employer of Oriance Kelin at the time and therefore should respond to the allegations raised.

Although it is clear that it was the accused that was taking the relevant decisions with respect to the complainant's employment, he claims to have been doing so *on behalf of his father*, and as duly authorised. Whilst this defence could not have applied with respect to the other charges brought against the accused, with respect to this charge, insofar as it is dependent upon the capacity of the 'employer', this Court cannot simply ignore the identity of registered employer with the relative authorities. Moreover, it does not appear that the prosecution or the complainant is contesting the fact that Mr Daswani was doing everything in the interest and on behalf of his father.

Maltese labour law is essentially based on the contractual agreement entered into between employer and employee, provided that the statutory conditions of employment are respected. Thus, whereas certain conditions of employment are strictly regulated as a matter of law, other conditions are left entirely up to the parties to agree upon, as long as these are also considered to be objectively reasonable. Where the minimum conditions of employment are established by law or regulation, only those provisions that are more favourable to the employee are considered as being legally valid and enforceable.

Thus, despite the fact that this court notes that the behaviour of the accused corresponds to that of an employer, it cannot overlook the registration of the accused's father as the actual employer, and it cannot be morally convinced, to the degree required in such proceedings, that the accused is indeed the actual employer required for the purposes of conviction under article 45 of Chapter 452 of the Laws of Malta.

As explained by **Manzini** in his book entitled **Diritto Penale**<sup>67</sup>:- "*il cosi' detto onero della prova, cioe' il carico di fornire, spetta a chi accusa - onus probandi incumbit qui osseruit*".

The Court also makes reference to another judgment in the names **Il-Pulizija vs Martin Mark Ciappara**<sup>68</sup> 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 demeanour, 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.

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 is made to the learned judgment in the names **II-Pulizija v Peter Ebejer**<sup>69</sup>, 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 reason and not that level of evidence that leaves no shadow of doubt. Shadowy doubts cannot be considered as being doubts dictated by reason. Therefore the Court 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**<sup>70</sup> 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**<sup>71</sup> 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**<sup>72</sup> 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 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.

The Court therefore finds that in relation to this charge, the prosecution has not proven its case to a level beyond reasonable doubt and cannot find the accused of this charged.

## **Considered**

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## **IX. Final considerations**

In analysing the provision of the law including the amending legislations updating the same law on human trafficking the Court notes that the intention of the legislator has always been to classify and tackle human trafficking as a most serious crime.

To this extent the punishment for the crime of human trafficking has steadily increased over the years and this in part in reflection to the steady and detrimental increase of human trafficking globally. From the onset the legislator has in setting out the parameters of the punishment indicated that a term of custodial imprisonment to be a sufficient punishment for the crime.

### *Decide*

Therefore, after having seen the formal accusatory document wherein the accused was charged with the following articles of law:

- (a) Articles 248A(1)(2)(3), 248E(1) and 18 of Chapter 9 of the Laws of Malta;
- (b) Articles 251B, 222(1)(a), 202(h)(v) and 18 of Chapter 9 of the Laws of Malta;
- (c) Article 2, Part II of Title I, 45(1)(2), 47 and 18 of Chapter 452 (Employment and Industrial Relations Act) of the Laws of Malta;

(d) Articles 382A, 383, 384, 386 & 412C of Chapter 9 of the Laws of Malta;

(e) Articles 17, 18, 23A, 23B, 31 and 533 of Chapter 9 of the Laws of Malta  
& article 5 of Chapter 373 of the Laws of Malta.

The Court finds the accused Harish Daswani:

- Guilty of the first charge,
- Guilty of the second charge,
- Not guilty of the third charge and hence acquits him from the said charge;
- Not guilty of the fourth charge and hence acquits him from the same charge.

Whilst the Court notes that the accused has a clean conduct sheet the court cannot disregard the fact that the offences he is found guilty of are serious crimes aimed at taking advantage of a foreign national placed in a vulnerable position for the purposes of exploiting her.

Many times carers travel across continents and leave their homes and family behind with the scope of working abroad to earn money to return to their families to help them improve their economic situation.

Therefore, the Court condemns the accused Harish Daswani to a two (2) year term of imprisonment and a fine of five thousand euros (€5,000).

The Court, in order to provide for the security of Oriance Kelin, and after having seen article 412C of Chapter 9 of the Laws of Malta, provides for a Protection Order against the accused in favour of Oriance Kelin and this for a period of three (3) years from the date of judgment.

With reference to the prosecution's request in terms of the provisions of Chapter 373 of the Laws of Malta and articles 23A and 23B of Chapter 9 of the Laws of Malta, this Court does not deem that the prosecution managed to prove the amount representing the proceeds of the crimes of which the accused has been found guilty by virtue of this judgment. For this reason the Court is rejecting this request.

Furthermore, in terms of Article 533 of Chapter 9 of the Laws of Malta, the Court orders the offender Harish Daswani to pay to the Registrar, the following sums:

- a. the sum of €730.00 representing costs incurred for the report 'Regarding two cellular smart phones' (document SFS1 at folio 231); and;
- b. the sum of €612.14 representing costs incurred for the report 'Computer Forensic Expert's Report' (document KM1 at folio 521).

The Court orders that a copy of this judgement be communicated to the Registrar of Courts.

Delivered today the 11<sup>th</sup> November 2019 at the Courts of Justice in Valletta, Malta.

**Dr. Nadine Lia**

**Magistrate**

**Lorianne Spiteri**

**Deputy Registrar**