



**COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE**

MAGISTRATE NATASHA GALEA SCIBERRAS B.A., LL.D.

Case Number: 1051/2012

27th November 2019

**The Police
(Inspector Trevor Micallef)**

vs

**Cosmin Liviu Balan
(Romanian Passport Number: 050412631)**

The Court,

Having seen the charges brought against the accused, **Cosmin Liviu Balan**, son of Nicolai and Maria nee` Mandache, born on 12th October 1983 in Romania and residing at 36A, Flat 2, Old Trafford, Swieqi Road, Swieqi, holder of Romanian passport number 050412631:

Accused of having on 8th October 2012 at about 10:40p.m. in Main Street, St. Julians and/or in the vicinity:

1. Through imprudence, negligence or unskillfulness in his trade or profession, or through non-observance of any regulation, caused involuntarily grievous bodily harm on the body of Brigitte Georgina Meining as certified by Dr. Agnes Portelli of Mater Dei Hospital;

2. Accused further of having on the same date, time, place and circumstances drove vehicle registration number BT 20 PNZ¹ make BMW in a reckless manner.

The Prosecution requested the Court to disqualify the accused from having any driving licence for a period deemed fit by the Court.

Having seen the records of the case and the evidence tendered before it;

Having seen that during his examination in terms of Section 390(1) and 392 of Chapter 9 of the Laws of Malta, the accused pleaded not guilty to the charges brought against him;²

Having seen the note of the Attorney General of 3rd August 2015, from which it results that the said Attorney General has determined that from the preliminary investigation conducted by this Court as a Court of Criminal Inquiry against Cosmin Liviu Balan, there might result an offence (or offences) under the provisions of:

- i. Sections 17, 31, 533 of the Criminal Code (Chapter 9 of the Laws of Malta);
- ii. Section 226(1)(a), 226(1)(b) of the Criminal Code (Chapter 9 of the Laws of Malta);
- iii. Section 15(1)(a), 15(3), 32 of Chapter 65 of the Laws of Malta.

And the decision of the Attorney General in terms of Section 370(3)(a) of the Criminal Code (Chapter 9 of the Laws of Malta) to send the accused for trial by the said Court;³

Having heard the accused declare, during the sitting of 20th January 2016, that he had no objection to him being tried by this Court as a Court of Criminal Judicature;⁴

Having seen that the Prosecution had no submissions to make and having heard oral submissions by the defence.

Considered that:

¹ This correction, requested by the Prosecution, was acceded to by the Court by its decree of 30th September 2013 (a fol. 45 of the records).

² A fol. 100 of the records of the case.

³ A fol. 199 of the records.

⁴ A fol. 207 of the records.

The circumstances which gave rise to the present criminal proceedings against the accused may be summarily set out as follows: On 8th October 2012 at around 10:40pm in Main Street, St. Julians, an Italian national with the name of Brigitta Georgina Meining suffered injuries when she was run over by a vehicle of make BMW with registration number BT20PNZ, which was being driven by the accused. At the time, she was in the company of her husband, Duilio Magrini.

The substantive evidence brought before this Court and on the basis of which this Court is being requested to adjudicate the innocence or guilt of the accused is made up largely of the version of events tendered by the victim Brigitta Georgina Meining and her husband Duilio Magrini on the one hand, and the accused, on the other hand. Other witnesses brought to testify before this Court by the Prosecution are (i) PS 928 Ramon Mifsud Grech, who had acceded on the site of the accident following its occurrence and who, in the course of his deposition, exhibited a copy of the report which he had drawn up, indicating therein the version given to him by the accused about the accident; and (ii) Inspector Trevor Micallef who interrogated the accused on 11th October 2012, after he cautioned him in terms of law and after he was given the right to seek legal advice, which right he refused to exercise. A copy of the accused's statement is exhibited in the records of these proceedings.⁵

Preliminarily, the Court observes that the accused was, prior to his interrogation, afforded the right to consult a lawyer or legal procurator of his choice for a maximum period of one hour. The accused declined to exercise this right, as evidenced by the declaration exhibited at folio 13 of the records of these proceedings. The rights then afforded to the accused, at the time a suspect, were in line with the legislative requirements in force at the time of the investigation. At the time, the right to be legally assisted during the course of the interrogation, now enshrined in domestic legislation, was not a right afforded to a suspect or an arrested person. Such right or the absence thereof has been the subject of numerous judgements delivered both by the national Courts and the European Court of Human Rights, some of which have not always been consistent in their conclusion as to whether a person's right to a fair hearing is breached in the absence of legal assistance prior to or during interrogation by the police. This notwithstanding, according to this Court, a determining factor in such decisions is as to whether the contents of accused's statement constitute the sole probative evidence to secure a conviction or whether the contents thereof are otherwise determining of the accused's guilt, in which case, the statement of the accused should be set aside.⁶

⁵ A fol. 9 to 11 of the records of the case.

⁶ *Vide Mario Borg v. Malta* (European Court of Human Rights, 12th January 2016); *Christopher Bartolo vs Avukat Ġenerali et* (Constitutional Court, 5th October 2018); *II-Pulizija vs Claire Farrugia* (Court of Criminal Appeal, 20th November 2018); *II-Pulizija vs Emad Masoud* (Court of Criminal Appeal, 16th May 2019); *II-*

The Court here also refers to one of the more recent judgements delivered by the Constitutional Court, in the names **Graziella Attard vs Avukat Ġenerali** decided on 27th September 2019. In that judgement, the Constitutional Court referred to the decision of the Grand Chamber in the case of **Beuze v. Belgium**, wherein it was noted that on various occasions the European Court of Human Rights has opted for a less absolute approach and conducted instead an examination of the overall fairness of the proceedings, further noting that where there were no compelling reasons to preclude the suspect from being assisted by a lawyer of his or her choice throughout the interrogation, the Court was to assess the overall fairness of the proceedings with strict scrutiny. In this case, the Constitutional Court concluded as follows:

10. Madanakollu, billi ċ-ċirkostanzi fejn il-persuna interrogata tista' ma tithalliex tkellem avukat huma l-eċċezzjoni aktar milli r-regola, u din il-qorti għandha s-setgħa li tagħti rimedju fejn issib li disposizzjoni li tħares dritt fundamentali mhux biss “qiegħda tiġi” iżda wkoll meta “tkun x’aktarx sejra tiġi miksura”, din il-qorti hija tal-fehma, kif osservat fis-sentenza mogħtija fl-24 ta’ Ġunju 2016 fl-ismijiet **Malcolm Said v. Avukat Ġenerali, illi ma jkunx għaqli** – partikolarment fid-dawl ta’ inkonsistenzi fis-sentenzi tal-Qorti Ewropea li johloq element ta’ imprevedibilità, kif jixhdu l-posizzjonijiet konfligġenti li ħadet fil-każ ta’ Borg u f’dak ta’ Beuze – **illi l-proċess kriminali jithalla jtkompla bil-produzzjoni tal-istqarrija mogħtija mill-attriċi lill-pulizija** għaliex tqis illi, fiċ-ċirkostanzi, in-nuqqas ta’ għajjuna ta’ avukat ma kienx nuqqas li ma jista’ jkollu ebda konsegwenza ta’ preġudizzju għall-attriċi, aktar u aktar meta fl-istqarrija ammettiet sehma fir-reat. [emphasis of this Court]

In the present case, whilst replying to the questions put to him during the interrogation, the accused did not assume responsibility for the accident in issue. He nonetheless provided a degree of detail, which was not furnished by the Prosecution through the rest of the evidence adduced. Since the detail afforded by the accused himself, whilst not legally assisted, may in certain aspects operate as to prejudice or jeopardise his position at law, this Court considers it appropriate, in the light of its considerations above, to set aside his statement of 11th October 2012. This applies also to the version provided by the accused, as noted in the report drawn up by PS 928 Ramon Mifsud Grech, from which it does not even result that the accused was cautioned in terms of law prior to giving his version of events.

Pulizija vs Sandro Spiteri (Court of Criminal Appeal, 18th June 2019); **Il-Pulizija vs Aldo Pistella** (Constitutional Court, 14th December 2018); **Philip Beuze v. Belgium** (Grand Chamber, European Court of Human Rights, 9th November 2018); **Paul Anthony Caruana vs Avukat Ġenerali et** (Constitutional Court, 31st May 2019), and the judgements therein referred to.

Considered further that:

The road accident victim, Brigitta Georgina Meining testified, by means of letters rogatory, that together with her husband and a group of Italian tourists, she arrived in Malta on 8th October 2012. She recounts how following dinner at Hotel Le Meridien, where they were lodging, the group decided to take a stroll on the seafront. The victim states that later, her husband and herself decided to proceed to the hotel as both were tired, and hence went to cross the road from the pavement opposite the hotel's entrance. In her own words:

“Proprio di fronte all'albergo abbiamo nuovamente attraversato la strada, io prima di mio marito. Ho guardato a destra e a sinistra e sicura della possibilita` di poter attraversare, ho iniziato l'attraversamento Ho cercato di attraversare la strada velocemente e di fronte all'ingresso dell'albergo. Ho guardato a destra e a sinistra. Dalla destra erano molto lontane delle macchine. Dalla sinistra non veniva nessuno.”⁷

This was translated by the Court-appointed translator as follows:

“Exactly in front of the hotel we again crossed the road, I before my husband. I looked right and left and at ease that I could cross the road, I started to cross the road...I tried to cross the road quickly and in front of the hotel. I looked right and left. On the right hand side the cars were very far away. No one was coming from the left hand side.”⁸
[emphasis of the Court]

The victim's husband, Duilio Magrini testified, also by means of letters rogatory, that on their return to the hotel, his wife was walking approximately seven to eight metres ahead of him. He states that whilst his wife started to cross the road, he followed her, but had to wait a while, since cars were approaching from his right. Whilst crossing, he heard the impact and realised that his wife had been run over by a car. With regards to the vehicle involved in the accident, the witness states as follows:

“Non ho ben capito da dove provenisse la macchina che ha investito mia moglie. La posizione finale sulla strada indicava che la macchina proveniva da sinistra.”⁹

This was translated by the Court-appointed translator as follows:

⁷ A fol. 116 of the records.

⁸ A fol. 172 of the records.

⁹ A fol. 132 of the records.

“I did not really understand from where the car that ran over my wife came. The final position on the road indicated that the car was coming from the right¹⁰ [sic].”¹¹

Likewise, the victim stated the vehicle that ran her over came from the left, although she further stated that she never saw it coming, and that she suddenly found herself on the car’s hood.

It also results from the testimony of the victim and her husband that at the time of the accident, the weather conditions were good, as was the visibility, and that although it was dark, the road was well lit and furthermore, there were no vehicles parked on either side of the road from where she crossed.

Considered further that:

It is the opinion of this Court that the precise dynamics of the accident cannot be established on the basis of the lean evidence brought before it. No site plan or sketch, which would have assisted the Court to understand the position of the car and the position of the victim on the road, as well as their respective positions in relation to one another, are to be found in the records of these proceedings. The Court may at best consider proven, on the basis of the indications given by the victim and her husband in their testimony, that the vehicle involved in the accident was proceeding from the direction of Sliema and was being driven in the direction of St. Julians. PS 928 was not questioned about these facts, despite having confirmed that he had visited the site of the accident at the time when the victim was still lying on the ground and no such details were voluntarily tendered by the witness in the course of his deposition.

The Court deems, in line with the considerations made by the Court of Criminal Appeal in its judgement in the names **Il-Pulizija vs Richard Grech**, dated 21st March 1996, that it may only declare the accused guilty as charged, if the evidence before it demonstrates:

“kondotta volontarja negligenti konsistenti generikament f’nuqqas ta’ hsieb (imprudenza), negligenza, traskuragni, jew ta’ hila (imperizja) fl-arti jew professjoni, jew konsistenti specifikatament fin-nuqqas ta’ osservanza tal-Ligijiet, regolamenti u ordnijiet li tkun segwieta b’ness ta’ kawzalita minn akkadut dannuz involontarju.”

¹⁰ Translated from Italian, ‘sinistra’ is left, not right.

¹¹ A fol. 180 of the records.

In other words, the alleged culpable behaviour of the accused must be positively proved to the satisfaction of the Court.

Having examined the records of the case, and having set aside the accused's statement and his version of events on site, the Court observes that the said records yield no direct evidence of the direction of travel of the vehicle involved in the accident. Nor has evidence been tendered on the basis of which certain conclusions may be drawn, in particular relating to the accused's regard or disregard to the laws regulating the use of vehicles on the road or his culpability in relation to the accident in issue. Suffice it to say that both the victim and her husband do not refer to having seen or witnessed the offending car's movements or manouvers. In the absence of tangible evidence, this Court is not in a position to assume or presume, purely on the basis of the victim having suffered grievous bodily harm, that the accused made use of the offending vehicle with disregard to any laws, rules or regulations in force or that the said accident was imputable to him.

Consequently, the Court considers that the Prosecution has not proved its case against the accused.

Conclusion

For the above-stated reasons, the Court finds the accused **Cosmin Liviu Balan** not guilty of the charges brought against him and acquits him thereof.

Dr Natasha Sciberras
Magistrate