



COURT OF CRIMINAL APPEAL

Judge Hon. Dr. Consuelo Scerri Herrera, LL.D., Dip Matr., (Can)

Appeal no. 315 / 2019

**The Police
(Inspector Sylvana Gafa')**

vs

Harish Daswani

Today the, 1st September 2020

The Court,

Having seen the charges brought against 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, accused before the Court of Magistrates (Malta):

With having on the 08th 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 the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 11th November, 2019, by which, the Court, after having seen the formal accusatory document wherein the accused was charged with the following articles of law:

- (a) Articles 248 A (1) (2) (3), 248 E (1) and 18 of Chapter 9 of the Laws of Malta;
- (b) Articles 251 B, 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 382 A, 383, 384, 386 & 412 C of Chapter 9 of the Laws of Malta;
- (e) Articles 17, 18, 23 A, 23 B, 31 and 533 of Chapter 9 of the Laws of Malta & article 5 of Chapter 373 of the Laws of Malta.

The Court found the accused Harish Daswani:

- Guilty of the first charge,
- Guilty of the second charge,
- Not guilty of the third charge and hence acquitted him from the said charge;
- Not guilty of the fourth charge and hence acquitted 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 was 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 condemned 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 412 C of Chapter 9 of the Laws of Malta, provided 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 23 A and 23 B of Chapter 9 of the Laws of Malta, this Court did 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 ordered 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 ordered that a copy of this judgement be communicated to the Registrar of Courts.

Having seen the application of the appellant Harish Daswani filed on the 26th November, 2019, wherein he humbly requests that this Honourable Court to vary the said judgment by confirming the acquittal of the third and fourth charge and reversing the finding of guilt and consequent punishment with regard to the first and second charge or, alternatively, varying the judgment with regard to the punishment.

That the grounds of appeal of the appellant Harish Daswani consist of the following:

That the first grievance consists of the fact that the Court of Magistrates ignored a preliminary plea put forward by applicant regarding the fact that the prosecution had failed to prove that the allegations regarding human trafficking had taken place in the period mentioned in the summons.

That the prosecution alleged that this offence was committed "on the 8th June, 2014 and in the preceding months". It goes without saying that the only acts that should have been considered by the Court were those allegedly committed between the 8th June, 2013 and the 8th June, 2014. Had the prosecution wanted to charge applicant with acts committed before that period it should have stated

“on the 8th June, 2014 and in the preceding months and years” or some other similar formula.

That in the course of the proceedings before the Court of Magistrates, no correction to the charges was ever requested by the prosecution notwithstanding that the evidence produced showed that all acts intended to bring Oriance Kelin over to Malta were carried out prior to the 8th June, 2013. Suffice to say that Kelin arrived in Malta on the 6th June, 2013.

That on page 64 of the appealed judgment the Court of Magistrates stated that “[f]rom 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” (emphasis added). These considerations were being made to establish whether the amendments introduced to article 248A of the Criminal Code by Act XVIII of 2013, which came into force on the 6th December, 2013, were applicable to the case. The Court of Magistrates concluded – correctly – that the first charge must be examined under the law prior to the introduction of the above-mentioned amendment.

That, as a consequence of the fact that the complaint referred “to a period of time which commenced shortly after her arrival in Malta in June 2013”, the prosecution charged applicant with various offences, including that of human trafficking, that allegedly took place “on the 8th June, 2014 and in the preceding months”.

That according to subarticle (1) of article 248E as it stood at the time of the alleged acts, trafficking a person means “the recruitment, transportation, sale or transfer of a person ... including harbouring and subsequent reception and exchange of control over that person ... and includes any behaviour which facilitates the entry into, transit through, residence in or exit from the territory of

any country...". It is particularly evident from the wording of this provision that the relative constituent element [the first element] of the offence of human trafficking is not the entry into, transit through, residence in or exit from the territory of any country; the operative phrase is the "behaviour which facilitates" any of the above. It is thus clear, also in view of the technical definition of the offence "recruitment, transportation, sale or transfer" and the logical sequence of events, that this behaviour must precede the said acts.

That, therefore, the alleged and highly contested ill-treatment of Oriance Kelin cannot, by any stretch of the imagination, amount to trafficking as defined by the said subarticle (1) of article 248E of the Criminal Code. Thus, the alleged acts covered by this provision did not occur in the period mentioned in the summons preferred against applicant.

That according to established case-law, the Attorney General's note of remittal must be read in conjunction with the facts mentioned in the summons (vide, inter alia, the Court of Criminal Appeal's judgment in the names *Il-Pulizija v omissis, Francesco sive Godwin Scerri* (18.04.2012)). In this case, as stated, it is evident that the alleged act of trafficking does not fall within the time-frame mentioned in the summons since no reference to the previous year is made. Moreover, no correction to the summons was ever requested by the prosecution. Therefore applicant should be acquitted of the first charge on this ground alone.

That the second grievance consists of the fact that, without prejudice to the previous grievance, the Court of Magistrates erroneously applied the constituent elements of the offence of human trafficking contemplated in article 248A of the Criminal Code to the facts of the case.

That it is an accepted fact that, for the purposes of this case, one has to look at this provision as it stood following the amendments introduced by Act VII of

2010 and prior to those introduced by Act XVIII of 2013. This was correctly accepted by the Court of Magistrates in the appealed judgment (p. 64). For clarity's sake, applicant will reproduce the provision as applicable to this case:

(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
- 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 for a term from two to nine years.

For the purposes of this subarticle 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 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.

That it is evident from this provision that the constituent elements of this offence are the following: (i) trafficking a person of age; (ii) by any of the means mentioned in subarticle (2) of article 248A; and (iii) for the purpose of exploiting that person. The first two elements constitute the material element of the offence whereas the third element constitutes the formal element of the offence. With regard to the first element, article 248E gives a detailed definition of the phrase “traffics a person”. With regard to the second element, subarticle (2) provides an exhaustive list of the means that should be used for this offence to arise. With regard to the third element, the law requires a specific intention defined as “the purpose of exploiting that person”. Subarticle (1) provides a non-exhaustive list of what exploitation could consist of.

That the Court of Magistrates listed these constituent elements in a different manner and order. Nevertheless there is agreement on the fact that the above are the elements that need to be proved by the prosecution.

That, with regard to the first element – trafficking a person of age – the Court of Magistrates stated that whereas the element of “recruitment” had not been properly satisfied, the same could not be said of the last scenario of “trafficking”. The Court went on to quote the part of subarticle (1) of article 248E where reference is made to: “...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” (emphasis added by the Court). The Court then stated that this element of the offence had been proved.

That, in order to avoid repetition, applicant refers to what has been stated in his first grievance. It is evident from the wording of this provision that the entry into, transit through, residence in, or exit from do not constitute this element of the offence of human trafficking. The operative phrase is obviously the

“behaviour which facilitates”. It is clear that the “recruitment, transportation, sale or transfer” must precede the said acts. From the emphasis (underlining) made by the Court of Magistrates, it is evident that no distinction was made between behaviour which facilitates residence and actual residence. As stated in the said first grievance, the behaviour facilitating residence – which is a perfectly legitimate act if unconnected to all the other elements of the offence – took place before the period mentioned in the summons.

That, with regard to the second element of the offence – by any of the means mentioned in subarticle (2) of article 248A – applicant humbly submits that the Court of Magistrates made a gross misinterpretation of the law. It is evident from its wording that this provision provides an exhaustive list of the means that should be used for this offence to arise – [t]he means referred to in subarticle (1) are the following. The legislator does not use the term “include” or some other similar term. There can be no doubt that the list is exhaustive and, as a provision of substantive criminal law, must be interpreted restrictively.

That in the appealed judgment the Court of Magistrates stated the following:

“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, there is a material difference in the punishment...” (emphasis added).

That applicant is in total disagreement with this declaration. The amendments introduced by Act XVIII of 2013 had an enormous impact on this second element. This Act introduced a new paragraph (e) to subsection (2) together with a proviso as well as a new subsection (3). Subsection (2) reads as follows:

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.

That being a part of the definition of the substantive offence, this method – abuse of power or of a position of vulnerability – cannot be taken into consideration in this case because it was not included in the exhaustive list mentioned above. The Court of Magistrates, however, in its considerations leading to its decision that the second element of the offence had been satisfied, relied specifically on paragraph (e) of subsection (2) (vide, for example, the considerations made on p. 84 of the appealed judgment). In doing so it applied the a law that was not into force at the time of the alleged acts thus violated the principle *nullum crimen sine lege* enshrined in the Constitution of Malta and in the European Convention on Human Rights.

That, by way of example, the Court relied heavily on the passport matter that had been harped upon heavily by the prosecution and the parte civile in their submissions. A proper reading of applicant’s version of this matter and Kelin’s version of the same matter shows how their versions are uncannily similar. In cross-examination applicant stated the following:

“When she arrived and my wife and me received her at the airport and took her home, I asked her do you have any valuables, valuables could have meant jewellery, cash, what ever for safe keeping, she said no I have nothing, I just have my passport and I said would you like to keep it or would you like me to keep it for you and she said you can keep it and the only thing which is going through my mind at that point was if I lose a passport, excuse my saying, but if you lose a passport, we just go to the passport office and in twenty four hours we will get a

new passport, if she were to misplace her passport or lose it, her work permit, her residential permit is based on that passport, it is a big deal.”

That Oriance Kelin stated the following regarding her passport:

“I arrived in Malta at 6th June, 2013, Harry and his wife went to fetch me from airport and they bring me, go to their house in Dingli Street, Sliema and when I go into their house they showed me my room. They said this is your room and then Harry asking me where is your passport and you have any things that need to save it and as and I take my passport and I give him and he telling me that my passport is to save, give me your passport to keep in a safe place. He took it at the same time.”

That there is no real discrepancy in these facts. The problem lies with the twist that the prosecution and parte civile gave to this matter with the ulterior motive of conjecturing the element of “means” relating to vulnerability which, as stated, was not part of our law at the time of the alleged acts.

That, nevertheless, the idea that this act was done by applicant in furtherance of the alleged offence is negated by all the evidence in the case. The passport was never under lock and key. Moreover Kelin was often in the Daswani’s apartment alone, particularly when they went for a long holiday at the end of the year 2013. On another occasion, when applicant’s wife Jyoti Khemchand Daswani took the witness stand and was asked about the matter in cross-examination, she explained that the passport was not under lock and key and, so much so, was taken by Kelin when she wanted to apply for a Social Security number. This episode fully corroborates applicant’s assertion that if her passport was lost “it is a big deal”.

That it must necessarily be spelt out that Oriance Kelin did not say that her passport was taken away from her. She confirmed that her passport was kept in

a safe place. Her passport was not hidden and it certainly was not taken against her will. Moreover, at no point did she state that after being in physical possession of her passport for Social Security purposes, she was ordered or compelled by applicant to return it. It is evident that this passport issue is mere conjecture intended to create an aura of vulnerability that is otherwise excluded by the evidence.

That, moreover, after Oriance Kelin left the apartment in June of the year 2014, applicant send her the following message: "Oriance come and collect your things and your passport". This message is dated 9th June, 2014 and, contrary to what the Court stated (on p. 87 of the appealed judgment), forms part of the evidence together with all the other messages contained in the Court expert's report.

That, unfortunately, the Court of Magistrates conjectured that Kelin did not have access to her passport when all evidence showed that this was not the case.

That the Court of Magistrates, presumably in the light of the element of "means", made ample reference to the fact that Oriance Kelin did not have any financial means. The Court was of the conjectured opinion that the reason for withholding her salary was to ensure that she was under applicant's complete control and dependence. Apart from the fact that the salary was owed by Bhagwan Rupchand Daswani and not by applicant, there seems to be a certain amount of dangerous confusion in the Court's considerations regarding what is being stated. If these considerations were made in the light of what is stated in paragraph (e) of subarticle (2) of article 248A of the Criminal Code, then, for reasons stated above and directly accepted by the same Court, they are to be discarded. If, on the other hand, they refer to paragraph (b) of the said subarticle - deceit and fraud - then these means are excluded by the evidence, including the testimony of Oriance Kelin and by other independent evidence. It must be pointed out that upon her arrival to Malta, Kelin found exactly what she had

been promised when still in her home country. The wages due remained unchanged. No allegations of any alteration to the agreement were made. The reason for them having not been paid are not contested and will be explained shortly. Her accommodation was comfortable and her privacy was secured. The Daswani family even converted a utility room into a bathroom for her convenience. She was never asked to pay for her accommodation. She was never asked to pay for her food, drink and medication. She was free to choose anything she needed which would be paid for by applicant's father. She could contact her family whenever she wished. She lived in an apartment that was never locked and had free access to the outside world. She actually had her own set of house-keys. She was encouraged to leave the apartment and enjoy the promenade. She could freely leave the apartment in her own free time.

That in his testimony applicant explained that his father had proposed a monthly salary of around € 420. This excluded accommodation, food and drink, medicines and anything else that she would need when in Malta. In other words, the amount agreed to by the parties took all the above expenses that had to be incurred by Bhagwan Rupchand Daswani into consideration. Applicant also explained that it was agreed with Oriance Kelin before her arrival in Malta that the first three months salary would be used to cover a loan that she had with Home Maid Agency Pte Ltd., whereas the next three months salary would be kept as a security and given to her at the end of her stay. The said loan was unrelated to Bhagwan Rupchand Daswani and had to be reimbursed by Kelin. This was confirmed by Kelin in her testimony and an email exchange with the Agency also attests to this. It was also agreed, after her arrival in Malta and in view of a large phone bill racked up by her, that another two months salary would be directed at settling the bill. This is also confirmed by Kelin in her testimony. From then onwards, applicant constantly asked Kelin to pass on a Swift Code because she wanted the money to be sent directly to her family. This

payment could not materialise because of the eventual unfolding of events. There was no deceit and there was no fraud.

That it could possibly be argued that there would have been deceit had applicant's father offered the minimum wage and then, upon her arrival in Malta, deducted expenses from the minimum wage without prior agreement and without her prior approval. Deceit means deceit and, as in the case of the alleged hidden passport, cannot be conjectured for the purposes of satisfying one of the constituent ingredients of the offence of human trafficking.

That, with regard to the Swift Code matter, this is not contested by Oriance Kelin. In his statement to the Police – wrongly excluded from the evidence by the Court of Magistrates – applicant stated the following:

“She had asked for her monthly wage to be remitted to her family, but she never came forward with her complete bank details which would have enabled me to remit the funds for her, and neither did she ever ask for the funds to be paid to her locally here”.

That in his testimony before the Court he stated the following:

“She started in June, three months were the deposit as proposed by my Dad and three months were the loan payment which I had to send back to the Agency again from her salary or wages so that brought us to December, January and February were the phone bill which she said retain my wages for two months to offset and reimburse me for the phone bill, that brought us to the end of February, March was actually as when it was due for her payment for the agreement so in March, I asked her I told her, you know your payment is due later on this month that is, what are we going to do, so how do you want it? She said, send it to my family, I said ok, give me the bank details and in fact in the

terms and conditions which were given to her initially through the agency it is clearly stated there that it is her choice if she wants her salary there and then, I mean cash in Malta it is fine, if she wants it sent to her family abroad it is her choice so she said send it to my family, I asked her for the bank details, a few days pass, nothing, I asked her again, I told her you want me to send it, the bank details please, a few days passed, she gives me these bank details on a scrap of paper, the first thing I noticed was that there was not a swift code.”

That applicant went on to explain that he asked for the Swift Code many times to no avail. This is confirmed by an exchange with his wife in March, 2014. On the 20th March Nikita (Jyoti Khemchand Daswani) asked applicant “Hi can you please send Orience’s salary?”. Harry (applicant) answered “Ok this afternoon”. On the 22nd March Nikita said “Also pls get the maid’s phone at home .. So she can get the swift code ..”. Harry replied “Ok”. For some inexplicable reason this exchange was completely overlooked by the Court of Magistrates in its considerations.

That, as results from the evidence, applicant’s father Bhagwan Rupchand Daswani received criminal charges for potential violations of the Employment and Industrial Relations Act. Dr. Roselyn Borg Knight was asked to intervene. She testified that, upon a report by Oriance Kelin, she corresponded with the Department of Industrial and Employment Relations because “it was clear that there was money owed from both ends so it obviously made sense that there would be a set off”. It is evident that Dr. Roselyn Borg Knight was right in her claims and the Department’s stand was also, to a certain extent, legally correct. In these situations, when common sense prevails, discussions are commenced with a view of finding a solution to the benefit of all parties. An amicable settlement could easily have been reached in this case but the Department was not interested in a set-off. It must also be pointed out that the email exchange produced by Dr. Roselyn Borg Knight is evidence of the fact that she is correct in

stating that the Oriance Kelin was employed on a three year definite contract. Annex 2 to her letter dated 2nd October, 2014 is testament to this. Their claim for a refund was based on solid documentation which could have very easily been discussed. This again shows that there was no deceit and there was no fraud and it was always Bhagwan Rupchand Daswani's intention to settle all outstanding debts.

That, on a final note in this regard, the Court of Magistrates also gave consideration to the fact that Oriance Kelin allegedly worked for more than forty hours a week. Reference is made to applicant's testimony where he, when cross-examined by the prosecuting officer, stated the following:

"Pros.: Ok, do you remember the working hours which she had to work according to this ETC form?

"HD: I believe it is a normal 40 hours and post that there is an overtime rate.

"Pros.: Ok and did you ever pay her for overtime?

"HD: To my knowledge she never worked forty hours, not even forty hours.

"Pros.: So at what time did she start working in the morning?

"HD: Her duties were 8 am to serve my Dad breakfast, 1 pm lunch, 7.30 dinner, in between she had these chores of preparing, cleaning his bedroom, his bathroom, the areas which he frequented but it doesn't mean she was working from 8 am till 1 pm and then from what ever time till seven, she was only working when she completely [recte: completed] those duties and just to give the Court an idea, once she had left we got services through a cleaning company, a local cleaning company, in 4 hours that person would clean the whole house, this is an apartment, the whole house, cook a meal for my Dad, serve him another meal and this was all in four hours where this lady had only to do things for my father so quantifying it.

"Pros.: Did she have a break?

"HD: Once she completed the chores which she had to, there was no one there overseeing, she was many a time, she would just lounge in the kitchen, it was never told to her that sitting in the kitchen means you are working, she had wi-fi, she would do as she please.

"Pros.: So she used to start working at 8 o'clock in the morning yes, because she served breakfast to your father at 8 o'clock in the morning?

"HD: Yes.

"Pros.: But she had to start before to cook it no am I right?

"HD: Just the toast.

"Pros.: I don't know what breakfast he take?

"HD: Just the toast. I could make it, a toast or an egg, make it in 10 minutes myself.

"Pros.: Yes and for the cooking?

"HD: The cooking as well it was minimal cooking, alright, the lunch thing would, when my wife cooks something and she asks me what are you going to eat and I tell her in an hour or less it is ready, at night most times the supper or the evening meal, dinner which he would have at 7 pm was most times a plate of pasta, I make it myself sometimes 10 minutes in boiling the pasta and 5 minutes for the sauce.

"Pros.: So she was used to work in gaps, breakfast then she used to have a break, then lunch, an hour break dinner?

"HD: The breaks were at her discretion, she could take the break when ever she wanted just so long as she gave my Dad because my Dad because of his age, he needed everything, he was used to ... everything at a time so 8 o'clock his breakfast, after that between 9 and noon he would come to my office so there would be no one at home.

"Pros.: And when was her day off during the week?

"HD: Apart from the time she took off at her own discretion when ever she wanted from Monday till Saturday, Sunday from the hours of two till seven even she was not bound to do anything at all so apart from the time she had from

Monday till Saturday, Sunday from two onwards even if she just wanted to sit there, that was totally off time.

“Pros.: So she didn’t have an actual total day off?”

“HD: No.

“Pros.: Am I correct?”

“HD: No. On Sunday it was from two to seven.”

That Oriance Kelin worked less than forty hours a week. It transpires from the evidence that she wanted to stay in the house even when she was not working. She was encouraged to go out. She was free to leave the house when she was not working. She had her own house-keys. She actually went out on more than one occasion to meet friends. Kelin, who hardly ever wanted to leave the house notwithstanding her being encouraged to do so, was sometimes asked to boil some extra rice or cook something extra. As stated previously, industrial issues could have been resolved with her employer Bhagwan Rupchand Daswani. However arguing that infractions of a technical nature – notwithstanding that Kelin never worked for more than forty hours a week – amount to the offence of human trafficking is, with all due respect, absurd.

That at this juncture, in the light of the Court of Magistrates’ comment that he attempts to place responsibility on his father (p. 76 of the appealed judgment), applicant hurtfully and strongly contests such an unfounded consideration. Applicant would rather shoulder responsibility for his late father’s alleged wrongdoings than cast doubts on his integrity. Nevertheless, given that his submissions are many times purely of a legal nature prepared by his lawyer, certain glaring omissions by the prosecution and parte civile had to be pointed out. Suffice to say that, on the basis of these legally founded submissions, applicant was acquitted of the fourth charge.

That the Court of Magistrates also refers to alleged mistreatment of Oriance Kelin. Apart from the fact that any alleged mistreatment is ex post facto and can never be deemed to be a constituent element of the offence of human trafficking, applicant strongly contests these facts but for one single episode that, a tempo vergine, was admitted and explained to the Police in his statement. In its judgment the Court stated that applicant confirmed that he had, at least once, hit Oriance Kelin (p. 93 of the judgment). This is incorrect since, as stated, applicant stated that he slapped her once and not at least once.

That, with regard to the third element of the offence – for the purpose of exploiting that person – this is also manifestly excluded by the evidence brought by the prosecution and parte civile. The formal element of the offence contemplated in article 248A consists in the specific intention of exploiting the person being trafficked. It goes without saying that this intention must exist at the time of the trafficking.

That the definition of human trafficking given in subarticle (1) of article 248E refers to acts carried out in pursuance of the recruitment, transportation, sale or transfer of the person, that is prior to such recruitment, transportation, sale or transfer. Any acts carried out after the trafficking do not fall within this definition and cannot form part of the material element of the offence. It is, without prejudice to what has been stated in the first grievance, nevertheless conceded that any subsequent acts may be taken into consideration in establishing whether there was the prior intention, on the part of applicant, to exploit Oriance Kelin. Conversely, the subsequent acts may also highlight the absence of such prior intention. However, it is being reiterated that in a case of human trafficking the prosecution must prove, beyond reasonable doubt, that the formal element existed at the time of the material element.

That Oriance Kelin's own evidence to the effect that her initial period with the Daswani family was a happy one and that she had written letters to her family stating that she was happy in her new job and that the Daswani's were nice people was completely overlooked and/or ignored by the Court of Magistrates. This is, with all due respect, a serious shortcoming. Even if one had to ignore all the evidence brought forward by the defence - as the Court in fact did - and believe that Oriance Kelin was an extremely reliable witness, this evidence alone negatives the formal element of the offence of human trafficking. It is amply clear from all the evidence that the situation between the Daswani family and complainant deteriorated after a period of time where it transpired that her behaviour was not only inappropriate to her employer's requirements but was also such which could potentially endanger his life. Any alleged change in attitude towards her took place several weeks after her arrival in Malta. This alone shows that what is being interpreted by the Court as the purpose of exploitation - the formal element of the offence - took place way after the alleged material element of the same offence. This means that the alleged formal element of the offence certainly did not exist at the time of the alleged material element. This should have led to applicant's acquittal.

That, in its judgment, the Court of Magistrates also made ample reference to the working conditions of Oriance Kelin. According to article 248A of the Criminal Code 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. Apart from the fact that applicant did not require Kelin to provide services under conditions and in circumstances which infringe labour standards governing working conditions, this element is a formal and not material condition of the offence. In other words, if it established that Kelin's conditions infringed labour standards governing working conditions, it is still necessary, for the purposes of this constituent ingredient, for the prosecution to prove that there existed the prior

intention on the part of applicant - who was correctly acquitted of the relative offence - to infringe such standards.

That the Court of Magistrates, after referring to the Domestic Service Wages Council Order and the Domestic Service Wages Council Wage Regulation Order, stated that “this alone (sic!) is sufficient to satisfy the definition of ‘exploitation’ as presented in our Criminal Code...”. With all due respect such a statement is evidence of the fact that the Court failed to distinguish the formal element from the material element of the offence. The offence of human trafficking is not an offence of strict liability where the act alone is sufficient to create criminal responsibility. This statement clearly indicates that the Court failed to examine applicant’s intentions at the various stages of the case.

That applicant reiterates that Bhagwan Rupchand Daswani had proposed a monthly salary of around € 420 which excluded accommodation, food and drink, medicines and anything else that she would need when in Malta. The amount agreed to between the parties took all the above expenses that had to be incurred into consideration. Moreover it was agreed with Oriance Kelin before her arrival in Malta that the first three months salary would be used to cover a loan that she had with Home Maid Agency Pte Ltd., which was to be reimbursed by him on behalf of his father, whereas the next three months salary would be kept as a security and given to her at the end of her stay. It was also agreed, after her arrival in Malta and in view of a large phone bill racked up by her, that another two months salary would be directed at settling the bill.

That it is evident from the fact that charges were preferred against Bhagwan Rupchand Daswani that this mutual agreement was not acceptable to the Department of Industrial and Employment Relations. It is, nevertheless, also evident that Kelin owed money to the Daswani’s.

That it is clear from the evidence that Bhagwan Rupchand Daswani, with the assistance of his son who engaged a lawyer to this effect, tried to rectify this situation. All this shows that there was never any intention on the part of applicant or his father to infringe labour standards governing working conditions. Unfortunately the Court of Magistrates completely overlooked this fundamental fact and failed to distinguish between the material and the formal element of the offence of human trafficking.

That, by way of conclusion on this grievance, as explained above, every single one of the constituent elements of the offence of human trafficking is missing in this case. It goes without saying that even if only one of these elements is found to be missing, applicant should be acquitted of this charge.

That the third grievance consists of the fact that, without prejudice to the previous grievances, the Court of Magistrates made a highly partial evaluation of the evidence and ignored the submissions made by applicant in rebuttal of a large number of false allegations in his regard. It is also being submitted, for all intents and purposes, that all the witnesses in this case were not heard by the Honourable Magistrate who determined the case. This necessarily means that their credibility could not be fully examined in terms of the criteria mentioned in article 637 of the Criminal Code.

That in the appealed judgment, prior to the summary of the evidence and the factual and legal considerations, the Court of Magistrates briefly summarised the facts of the case (pp. 5-7 of the judgment) accepting Oriance Kelin's version of the facts as gospel truth and completely ignoring the version giving by the defence. The fact that this version was accepted by the Court prior to the evaluation of the evidence and relative considerations is particularly worrying.

That it is necessary to point out that the Court of Magistrates wrongly discarded the statement given by applicant to the Police on the 28th July, 2014 due to the fact that he was not assisted by a lawyer during the relative interrogation. With all due respect to the Court, applicant did not at any point contest the validity or admissibility of his statement. Such statement, which was given by him without any prior disclosure of the evidence available and without the benefit of the assistance of a lawyer informed of the evidence available, is relevant to highlight the credibility of his version of the facts. It is being submitted that his statement should not have been excluded from the evidence by the Court ex officio. Its exclusion highlights the scarce consideration given by the Court to the elaborate submissions made by applicant, which submissions did not include any request for his statement to be discarded.

That, as stated previously, when Oriance Kelin left the Daswani home, she was put in contact with the Jesuit Refugee Service. Initially she did not want to initiate criminal proceedings but, after a two month "reflection period", she had a change of heart and it was decided to throw the book at the family. This "reflection period" is, with all due respect, highly suspicious and the Court of Magistrates was specifically requested by applicant to examine all the evidence available together with the evidence excluded to determine the veracity of the allegations being made by the prosecution and the parte civile. Unfortunately this request was not entertained and the case was determined on the basis of laconic statements regarding Kelin's credibility and applicant's lack of credibility.

That Oriance Kelin was the main witness for the prosecution and parte civile. She testified at length on the 13th August, 2014 and a proper reading of her testimony makes it seem that her examination-in-chief and her cross-examination emerge from different cases. Throughout her testimony, she constantly repeated that applicant and his wife were violent with her. By way of

corroboration she produced two photos of alleged injuries that are incompatible with her allegations. One photo shows a mark on her lip and another shows a mark on her neck. Kelin alleges that applicant, inter alia, poked her with a knife, hit her on her ear, her hands and her head, punched her and kicked her on the face and also kicked her on her neck.

That these photos are dated 5th and 23th October, 2012. This means that they pre-date her stay in Malta with the Daswani family. No effort was made and no questions were put to the court expert to explain this and therefore, according to basic rules of evidence, should have been discarded from the evidence. This is being stated independently from the fact that applicant is not charged with causing bodily harm to Oriance Kelin.

That the prosecution and parte civile produced a few witnesses in an attempt to substantiate or corroborate Oriance Kelin's allegations. Dr. Catherine [recte: Katrine] Camilleri and Alexia Rossi, both from the Jesuit Refugee Service, shed very little light on the matter. Other than some repetition of what was alleged by Oriance Kelin during her "reflection period" and opinions about her state of mind, these two witnesses added very little to the substance of the case. Alexia Rossi did however make it clear that she has no idea of Kelin's character prior to her arrival in Malta and therefore could not make comparisons. Naturally, this evidence should also have been excluded since it is either hearsay evidence or based on opinions given by an ordinary witness. Unfortunately the Court of Magistrates did not seem to share the same legal opinion.

That another witness produced by the prosecution and parte civile was Anita Kobacs from Jehova's Witnesses. Reading between the lines of her testimony is rather enlightening. She mechanically repeated that she was told by Kelin that her "employer" did not like her to stay at the door for a long time. This witness did not state that her "employer" had problems with her attending sessions of

her religious group. Moreover, this witness, in order to throw in evidence that Kelin was “scared and terrified”, clearly states that “she showed us the photos that she took the day she was hit”. This witness clearly refers to one single incident and this fully corroborates the testimony given by applicant.

That the prosecution and parte civile also produced another witness from Jehova’s Witnesses, a certain Josephine Sutter. This witness made hardly any mention of Kelin’s alleged ordeal. She testified that her “employer” stated that Kelin could not speak to her. It goes without saying that such a reaction is very common in such instances with members of this particular religious group and no inference may be drawn from this encounter with the unidentified “employer”. It is amply clear that her testimony, particularly her cross-examination, is in stark conflict with the story Oriance Kelin tried to portray. Sutter stated that she met Kelin at Kingdom Hall in Marsa. She was not in the company of applicant or any other member of his family. She was free to move around and leave the place. She was there on a Sunday morning on three occasions. This evidence also corroborates applicant’s evidence as well as his wife’s evidence that Kelin was actually encouraged to leave the house in her free time.

That it is evident that Oriance Kelin’s version of the facts to confidants prior to her “reflection period” is very different to that allegedly given to the Jesuit Refugee Service. For all intents and purposes applicant refers to the judgment in the names *Il-Pulizija v. Karen Mercieca* (25.01.2017) where the Court of Criminal Appeal stated the following:

“Izda, f’ materja bhal din, u fic-cirkostanzi partikolari ta’ dan il-kaz, il-valur li jista’ jinghata lil dak li s-social workers imsemmija jirrakkontaw li semghu minn ghand il-minuri ~ omissis ~ huwa wiehed relattiv ferm jekk il-Qorti ma jkollhiex quddiemha id-domandi li saru lill-minuri u kif saru l-istess domandi, kienux

domandi diretti, ripetuti, tendenzjuzi, u xort'ohra peress li l-mod kif tigi formulata domanda tista' facilment, anki inkonxjament jew involontarjament, tistieden risposta partikolari jew tikkondizzjona konsiderevolment ir-risposta li tinghata. Minghajr audio recording ta' l-intervisti li saru lill-minuri u lil persuni l-ohra intervistati jew ta' l-anqas traskrizzjoni fidila tad-domandi u risposti, din il-Qorti qajla tista' tigbed konkluzjonijiet definitivi dwar il-konsistenza o meno tal-minuri ~ omissis ~ minn dak rapportat mix-xhieda msemija."

That in this judgment the Court of Criminal Appeal made reference to the particular circumstances of the case where it had been established that the alleged victim could be easily induced to vary her reply according to the type of question asked. The situation here is different although not dissimilar. The Court of Magistrates claimed that Oriance Kelin is a vulnerable person. Applicant disagrees. However, given that there is absolutely no record of what went on during this so-called "reflection period", given that the version given by her originally to her confidants varies from that given to the Jesuit Refugee Service and given that the prosecution was conducted in an extremely partial manner with the omission of certain key witnesses as will be explained shortly, the testimony of those connected to the Jesuit Refugee Service should be looked upon with extreme circumspection. This is being stated on point of principle rather than to eliminate their evidence since, as stated before, such evidence is heavily based on hearsay and opinion.

That applicant will not, as he always did unless specifically asked, speculate as to the reason for this discrepancy. Each and every person has a mind of his own and may reach his own conclusions. However, given that the Court of Magistrates was specifically asked - not that a request was necessary - to examine all evidence also in the light of the "reflection period", the manifest failure to do so was highly prejudicial to applicant's case in that it led to a partial evaluation of the evidence.

That in the appealed judgment the Court of Magistrates referred “to the testimony of Alexia Rossi, a psychologist, the impact of the accused’s or “Sir”’s behaviour upon the complainant was such as to have left symptoms of post-traumatic stress disorder.” (p. 83). Apart from the defiance of the rules of evidence regarding opinions given by ordinary witnesses, the Court failed to note that in her testimony Oriance Kelin constantly referred to applicant and his wife by their first names, Harry and Nikita. This is because she was not at all afraid of them and was treated with respect and as an equal. It is hardly likely that one would refer to his alleged oppressors by their first name.

That this is also confirmed by an incident that took place in around April of the year 2017. Jyoti Khemchand Daswani stated the following:

“... I was at the swings with my daughter and I saw her [Oriance Kelin] with a kid who looked a lot like her, I believe it was her kid and she saw me and she is coming and trying to talk to me, she is coming and say hello Nikita. At that time I freaked out when I saw her, you know I was literally just like ... myself, I just walked off literally and I was thinking to myself, I mean she’s gone and she made all these false allegations against us, my father in law, me, my husband, serious charges and now she is coming and talk to me, she told the police that she was scared of us and now she is coming in front of and try to talk to me.”

That this testimony does not warrant any further comment.

That, moreover, contrary to the clear word of the law (article 346(1) of the Criminal Code), the prosecution and parte civile failed to provide certain evidence with the clear intention of not putting Oriance Kelin’s testimony in doubt.

That Kelin claimed that, with the exception of the initial period, she was maltreated by applicant throughout her stay with his family. She went a step further and actually stated that she spoke to at least three persons at the time all this was meant to be happening. These persons were Anita Kobacs, a certain Melinda who was a friend of hers of Filipino nationality and somebody from Home Maid Agency Pte Ltd. Needless to say evidence by these persons, or at least by any one of these persons, could have easily corroborated her allegations.

That, as explained previously, Anita Kobacs spoke of an isolated incident. The other two persons are conspicuous by their absence. What stopped the prosecution and parte civile from producing this evidence? It was known from the initial stages of the investigation (vide, for example, statement by applicant) that Oriance Kelin's allegations were being strongly refuted. It is evident that this entire case was built on these strongly contested allegations.

That, with regard to the Agency Home Maid Agency Pte Ltd, reference is made to the minutes of the sitting held on the 24th February, 2015. The parties agreed that its role was not being contested and any communication with the Agency did not require verification. In actual fact the communication between the Agency and applicant makes absolutely no mention of Kelin's allegations regarding her complaints to them.

That it must also be stated, for all intents and purposes, that no evidence was brought, or could ever be brought, of any wrongdoing on the part of the said Agency. All negotiations were carried out legally and in good faith by all the parties as may be seen from the relative documentation.

That in his submissions applicant also requested the Court of Magistrates to look into the failure by the prosecution and parte civile to abide by the rules laid

down in article 346(1) of the Criminal Code. Unfortunately, once again, such a request was completely overlooked.

That it is being submitted with respect that the Court of Magistrates adopted a different measure with the evidence that was purportedly meant to be produced by the defence and, in doing so, actually committed a couple of glaring errors of its own when evaluating the evidence. For example, the Court rejected applicant's assumption that Kelin left the family household when she came across papers on the dining room table relating to the employment of a new carer to replace her on the basis of the fact that "such paperwork, which should have been easily obtainable, was not exhibited" (p. 74 of the judgment). The paperwork was actually exhibited and is found a fol. 184 of the acts of the proceedings. Kelin was confronted with this paperwork. Therefore, apart from the fact that applicant's credibility goes beyond the exhibiting of this documentation, such documentation does form part of the acts of the proceedings.

That, moreover, the fact that the Daswani's brought another person, a certain Rahima of Indian nationality, to cook for Bhagwan Rupchand Daswani was also a clear indication that they were not satisfied with her services and that she was fully aware of this.

That, in another part of the judgment (pp. 86-87), the Court of Magistrates attacks applicant's credibility on the basis of the fact that the message sent by him in June 2014 asking Oriance Kelin to collect her passport was not formally presented to the Court. Again this is not correct. This message forms part of the acts of the proceedings in that it is mentioned specifically in the Court expert's report.

That it is also ironic that after referring to a judgment by the Court of Magistrates (pp. 77-82) at considerable length, the Court stated that “[i]n 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” (emphasis added). A reading of this judgment shows that that Court had conducted a thorough examination of the evidence in the case and concluded that the complainants were not credible. The Court had concluded that the mere fact that the accused had got them to Malta for work was not enough. With all due respect, this is what is expected from a Court in that when evidence brought by the complainant/s is contested, a thorough examination of such evidence must be carried out. Unfortunately, for the reasons stated above, this was not done in the appealed judgment where the Court simply discarded glaring evidence contrasting complainant’s version and corroborating applicant’s version of the events.

That by way of conclusion on this grievance, it is evident from the acts of the proceedings that, inter alia, (i) all negotiations with the Agency Home Maid Agency Pte Ltd were carried out transparently; (ii) his father was owed money by Kelin which debt was uncontested by her; (iii) when the set-off was settled applicant asked for her Swift Code which was not given to him; (iv) Kelin had free access to her passport; (v) Kelin had free access to the outside world; and (vi) Kelin wanted to stay at the Daswani residence when she was not working; and (vii) Kelin was asked to leave if she wasn’t happy working there. Applicant sincerely fails to understand that, notwithstanding all the evidence to the contrary, the Court of Magistrates concluded that she was kept prisoner in his family’s residence and that he never intended to pay her wages. Applicant also fails to understand how the Court’s evaluation could run counter to the evidence produced.

That it is humbly submitted that applicant and his family are no guinea pigs to be used in experimenting the boundaries of human trafficking. Common decency requires that outstanding issues be resolved with appropriate tones in appropriate fora. It is evident that the facts of this case are diametrically opposed to what the prosecution and parte civile tried to portray. Applicant was publicly humiliated for some potential labour law infringements committed by his father who was Oriance Kelin's employer. His responsibilities lie in the fact that, when requested, he assisted his father who sadly passed away without ever knowing his son's fate. This is not right. Charging innocent persons with trafficking in human beings on the basis of uncorroborated evidence tendered after a nebulous period of reflection with motives that are unclear to say the least is a practice that should certainly be reviewed. Moreover, in such case, it is being humbly submitted that it is incumbent on the Court determining the merits of the case to examine all the evidence thoroughly and impartially.

That, without prejudice to the previous grievances, applicant requests this Honourable Court to carefully examine all the evidence brought by the parties with a view of acquiring a detached and complete picture of the events that led to this prosecution and of consequently acquitting him of the charge of human trafficking.

That the fourth grievance consists of the fact that the Court of Magistrates wrongly found applicant guilty of the second charge contemplated in article 251B of the Criminal Code.

That the Court of Magistrates referred to its previous factual considerations regarding the offence of human trafficking and, once again, laconically claimed that Oriance Kelin's evidence was credible. The Court made absolutely no reference to the fact that applicant strongly rebutted Kelin's claims both with evidence as well as with well-founded submissions.

That the offence contemplated in article 251B of the Criminal Code is committed by any 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) ... if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions”.

That by its reference to the factual considerations regarding the offence of human trafficking, it is evident that the Court of Magistrates failed to consider that the facts relating to the offence of human trafficking and those relating to the offence contemplated in the said article 251B are distinguishable, in this case, by the period in which they were allegedly committed. It goes without saying that the acts leading to the offence of human trafficking precede the passive subject’s arrival in Malta whereas those leading to the latter offence allegedly took place after Kelin’s arrival in Malta. This submission is also pertinent to the grievances relating to the finding of guilt in the offence of human trafficking.

That although jurisprudence regarding the similar yet distinct offences contemplated in articles 251A and 251B abounds in explaining the necessity of a course of conduct, very little has been said to clarify the uncertainties in the application of these provisions. These uncertainties were first highlighted by the Court of Criminal Appeal in the judgment in the names *Il-Pulizija v Omissis* (1) (21.06.2007). In that judgment the Court had also pointed out that the perpetrator’s actions must be calculated to create fear in a manner as to cause a sensation on the part of the victim of being followed and placed under unjust pressure.

That in the judgment in the names *Il-Pulizija v Raymond Parnis* (24.04.2009), the Court of Criminal Appeal held that the violence referred to in article 251B is not

actual violence but fear of future violence. Actual violence is punished under other provisions of the law. This was reiterated in the judgment in the names *Il-Pulizija v Lydon Cutajar* (06.02.2013) where the Court of Criminal Appeal acquitted the appellant because actual violence, not perceived violence, had in fact resulted.

That in the judgment in the names *Il-Pulizija v Carmelo Vella* (14.05.2012), the Court of Criminal Appeal referred to the UK judgment *Thomas v. News Group Newspapers Ltd, The Times, July 25, 2001, CA (Civ. Div)* where it was held that the Protection of Harassment Act, 1997, on which our law is closely modelled, is concerned with conduct targeted at an individual which was calculated to produce alarm or distress and which was oppressive and unreasonable. This judgment dealt with the offence contemplated in article 251A of the Criminal Code. In the judgment in the names *Il-Pulizija v Raymond Spiteri* (26.05.2016), which also dealt with article 251A, the Court of Criminal Appeal stated that for a finding of guilt the perpetrator's intention to create in the victim the sensation contemplated in the law is required.

That these last two judgments are being referred to because it is evident that for a finding of guilt in the offence contemplated in article 251B of the Criminal Code, the material element alone will not suffice. The formal element, as in all crimes, must also result from the evidence. In this case the intention on the part of applicant to cause Oriance Kelin to fear that violence will be used against her or her property must be proved. In other words any perception of fear on her part does not suffice. It is the alleged perpetrator's intention that is to be taken into consideration.

That applicant vehemently denied any wrongdoing on his part other than the incident of the slap on the face, which, as stated by our Courts, can never give rise to this offence. Should Oriance Kelin's testimony, or at least part of it, be

deemed credible, it is being submitted that it is evident from the evidence produced that applicant never intended to cause her to fear that violence will be used against her or her property. His intentions were always and exclusively directed, together with his wife's, at guiding her to carry out her duties in a proper manner without negligence and without endangering his father's life. For these reasons, whilst refuting the allegations made against him, it is being humbly submitted that applicant should have been acquitted of this charge.

That the fifth and final grievance consists of the fact that, without prejudice to the previous grievances, the punishment of effective imprisonment for two years is way too harsh given the very particular circumstances of this case.

That it is being humbly submitted that the Court of Magistrates failed to take a number of circumstances in consideration. In fact the only consideration made by the Court in favour of applicant was that his conduct sheet was clean.

That applicant is a Maltese law-abiding citizen who never in his life, previously or subsequently, had any brushes with the law. He is a humble family man who is married and has one five-year old child. He runs his own business and works hard for it as may be seen from his many trips abroad to the Far East with long periods away from his family.

That if this Honourable Court had to discard all the submissions made by applicant regarding the true nature of the offence of human trafficking, it is being submitted that exploitation for the production of services is by far the least serious of the activities specifically mentioned in subarticle (1) of article 248A of the Criminal Code. Moreover, if the Court is of the opinion that applicant's actions were aimed at exploiting Oriance Kelin, a fact which he denies, consideration must be given to the fact that she was given her own room and, after a couple of months, a utility room was converted into a bathroom for her

complete privacy. During her stay with the Daswani family, she was taken care of in every possible manner, be it accomodation, privacy, choice of food, clothing, medication etc.

That it is also humbly submitted that should the Court be of the opinion that his actions were aimed at exploiting Oriance Kelin, consideration must also be given to the fact that this was a single isolated case where applicant was seeking to assist his father in the best possible manner in the final years of his life. This is not a case of organised international crime aimed at the unjustified enrichment of its perpetrators. In fact, as stated previously, no bad light was shed by the prosecution on the services rendered by the Agency Home Maid Agency Pte Ltd and no evidence was brought of any wrongdoing on the part of the said Agency. Negotiations by applicant were carried out, on behalf of his father, legally and in good faith. This may be seen from the documentation in the acts of the proceedings.

That in the eventuality of a confirmation of guilt, it is being submitted that the particular circumstances of this case clearly do not warrant retribution as the sole factor to be considered in the awarding of punishment.

Having heard the parties make the parties make their oral submissions limitedly in regard to the first aggrievance the court went on to give judgment in relation to the first aggravation as requested in the courts verbal dated 28th July 2020

Considers;

That briefly, the facts of the case are the following:

1. That on the sixth (6th) of June of the year two thousand and thirteen (2013), the complainant Oriance Kelin arrived in Malta and started residing in the residence of the accused together with his wife and his father;
2. Oriance Kelin was employed as a carer of the father of the accused and was recruited through an agency in Singapore with the name 'Home Maid' where it results that arrangements were made by the accused with this agency in order for the complainant to be employed as the personal carer of the father of the accused;
3. That the complainant alleged that a month after her arrival in Malta, the accused together with his wife started ill treating her and was subjecting her to both physical assaults as well as insults. Several allegations of violence were made by the complainant and it was also alleged that she also worked long hours without a day off per week;
4. The complainant also alleged that she never received remuneration except for six euros (€6) from the accused which she was given spread out on two occasions, that is two euros (€2) on one occasion and four euros (€4) on another occasion. This was not part of the salary but which were given to her since she had no money to go out. She also testified that she received some money, twenty five euros (€25) from the cousin of the accused;
5. It was also alleged that the accused asked for the passport of the complainant when she arrived and therefore took her passport. Furthermore, even though it was agreed that she would start being paid after six months of employment and therefore from the seventh (7th) month, she did not receive any salary;
6. The complainant fled the home of the accused on the 8th (eight) of June of the year two thousand and fourteen (2014);

7. The accused was therefore charged in Court with the charges brought against him;

8. The First Court found the accused guilty of the first (1st) and second (2nd) charge and acquitted him from the third (3rd) and fourth (4th) charge.

That the Court before considering the first ground of appeal brought forward by the appellant in his appeal, makes reference to a submission made by the appellant in his third ground of appeal where he stated that the Court had wrongly discarded the statement given by the applicant to the police on the twenty eight (28th) of July of the year two thousand and fourteen (2014) due to the fact that he was not assisted by a lawyer during the relative interrogation. The applicant did not at any point contest the validity or admissibility of his statement. He submits that such statement was given by him without any prior disclosure of the evidence available and without the benefit of the assistance of a lawyer informed of the evidence available, which is relevant to highlight the credibility of his version of the facts. The accused therefore submitted that his statement should not have been excluded from the evidence by the Court *ex officio*. He submits that its exclusion highlights the scarce consideration given by the Court to the elaborate submissions made by the applicant, which submissions did not include any request for his statement to be discarded.

From the acts of the proceedings it results that the accused had released his statement on the twenty eight (28th) of July of the year two thousand and fourteen (2014) and that according to to the testimony of Police Inspector Sylvana Briffa dated sixth (6th) of August of the year two thousand and fourteen (2014) the accused '*was given the usual caution and including his right to spak to a lawyer of his choice where he spoketo Dr. Robert Montalto.*' It however does not result

whether the accused was given the right to be assisted by a lawyer. The caution as laid down in the statement provides:

"You do not have to say anything unless you wish to do so, but what you may say may be given in evidence. However, should you refuse to say anything or omit to state some fact, a rule of inference amounting to corroborative evidence may be drawn by the Court or any other adjudicator if during the trial you will put forward any defence based on the fact which you did not state during the interrogation."

This statement ends with the following:

'This statement was done by myself after I was cautioned without any threats or promises what so ever and after I have read this myself I confirm that this is the truth and I choose to sign it. Time 22:15hrs.'

This statement is therefore also signed by the accused.

The law in Malta as it stood at the time when this statement was released did not provide the suspect or the accused with the right to have a lawyer present during the interrogation. The Court without going into whether it results that the accused was not given prior disclosure of evidence available since the accused fails to state which evidence was not disclosed to him and notwithstanding the fact that the decision of the Court to discard the statement of the accused was based on the subsequent transposition of Directive 2013/48/EU of the European Parliament and of the Council, in view of the fact that the accused in his appeal declared that the statement should not have been excluded from the evidence by the Court, this Court is revoking where the Court declared the statement of the accused dated 28th of July 2014 as inadmissible and where it consequently refrained from considering its contents and any reference made to it. The Court

shall therefore consider this statement and any reference to its contents as forming part of admissible evidence brought before the Court.

That the first grievance consists of the fact that the Court of Magistrates ignored a preliminary plea put forward by applicant regarding the fact that the prosecution had failed to prove that the allegations regarding human trafficking had taken place in the period mentioned in the summons. That the prosecution alleged that this offence was committed '*on the 8th June 2014 and in the preceding months*', that the only acts that should have been considered by the Court were those allegedly committed between the 8th of June 2013 and 8th of June 2014. The appellant submits that had the prosecution wanted to charge the applicant with acts committed before that period it should have stated "*on the 8th June, 2014 and in the preceding months and years*" or some other similar formula. That in the course of the proceedings before the Court of Magistrates, no correction to the charges was ever requested by the prosecution notwithstanding that the evidence produced showed that all acts intended to bring Oriance Kelin over to Malta were carried out prior to the 8th of June 2013. Kelin arrived in Malta on the 6th of June 2013. The appellant submits that according to subarticle (1) of article 248E as it stood at the time of the alleged acts, trafficking a person means "*the recruitment, transportation, sale or transfer of a person ... including harbouring and subsequent reception and exchange of control over that person ... and includes any behaviour which facilitate the entry into, transit through, residence in or exit from the territory of any country...*" The appellant submits that from the wording of this provision, the relative constituent element of the offence of human trafficking is not the entry into, transit through, residence in or exit from the territory of any country, but the operative phrase is the behaviour which facilitates any of the above. In view of the technical definition of the offence "*recruitment, transportation, sale or transfer*" and the logical sequence of events, that this behaviour must precede the said acts. That according to the accused, the alleged and highly contested ill-treatment of Oriance Kelin cannot, by any stretch of the imagination, amount to

trafficking as defined by the said subarticle (1) of article 248E of the Criminal Code. Thus, according to the appellant the alleged acts covered by this provision did not occur in the period mentioned in the summons preferred against applicant. No correction to the summons was ever requested by the prosecution. Therefore, the appellant should be acquitted of the first charge on this ground alone.

The First charge reads *'By means of violence or threats, including abduction, deceit or fraude, 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;'*

Police Inspector Sylvana Briffa testified on the 6th of August 2014 that *'Dr. Catherine Camilleri explained that this person is a certain Orience Kelin, an Indonesian National who came to Malta on the 6th of June, 2013 to work as a carer for an indian family in Sliema.'* She explained that *'Orience told us that she intitially came to Malta around one year ago, precisely on the 6th 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 Homemade, it is based in Singapore and I am exhibiting a copy of the company name which we found through the internet and confirmed that it was the company that employed her.'* At fol 35 et sequitur a deal confirmation through Western Union dated thirteenth (30th) of May of the year two thousand and thirteen (2013) was also presented. Bank of Valletta p.l.c transaction details printed on 04/06/2013¹ was also filed at fol 37.

Orience Kelin testified via video conferencing on the 13th of August 2014 where she stated that *'I arrive in Malta at 6th June, 2013. I have come to Malta from an*

¹ The date indicated at the bottom right of the document is '6/4/2013'

agency in Singapore that arrange from Indonesia looking for overseas jobs like housekeeper or nunny or carer in overseas and I have a contact with an agency in Singapore and I work in Singapore for two (2) years and after that I go back to Indonesia. I come back again the second job is not finished just three months only and then I go back to the agency and the agency look for me another job and I have a contact with Harry Daswani in Malta, I have a job in Malta as a carer.' She explained that she had an interview with Harry Daswani on the phone and agreed that she would receive 450 Dollars US as salary every month. The call was made between March and April of the year two thousand and thirteen (2013) 'then after that he say we have an agreement and then he apply the visa and for the work permit and then I wait for three (3) months in agency house and then I come on the 6th June, 2013. I arrived in Malta on the 6th June.' (Underlining added by this Court.)

She explained that 'He is telling me that your salary is 400 Dollars Singapore every month and then he said that I for the first three (3) months I will like you not finish your contract I will buy ticket and send you back and three (3) months I have to pay to the agency so total six (6) months this I no salary and then he telling me that my off day is on Sunday but I go out after lunch because I have to cook for lunch and I come back before six o'clock, that on the phone and then he is telling me that you work is to look after my father, do the cooking and cleaning. This is my duties, my job in Malta.' She stated that 'First he contact the agency and then when I talked to him he asked for my mobile number so sometime he is calling agency and sometime he is call me directly through my phone.' She states that Harry was in charge of preparing documents and papers for her to come to Malta, she knows this from the agency. She explained that 'I arrived in Malta at 6th June, 2013, Harry and his wife went to fetch me from airport and they bring me, go to their house in Dingli Street, Sliema..' She continued explaining what took place during her stay in Malta. Amongst other facts, in cross examination she explained that she was shown a document with pictures of personnel from the agency. She confirmed that she was in contact with the three of them before she came to Malta. Asked 'Were you informed by these people or

anyone of them as to what needed to be done in order for you to be able to come and work in Malta? Were you informed by these people as to what needed to be done, what work needed to be done, what procedures needed to be carried out in order for you to be able to come from Singapore to work to Malta?' replied 'Yes. Like i renew my passport and check of my health, sorry check up, they asking me that I have to wait for my visa and work permit and all that, when I have that things already then I can come to Malta.'

Asked what she paid the agency for their services, she replied 'I paid the agency from my salary. Like I work they will cut my salary, first on 11 I come at nine months and then after that when I change employer the cut and then I go back to Indonesia and I come back again and then they cut five months but that I only working for three months so they cut, they take some more salary of the come to Malta and so they come together, they become three months because they say that Dollar US is more than Dollar Singapore. So they come together and they cut three months of my salary in Malta for three months.'

She confirmed that the employer was obliged to pass three months of her salary to the agency. She explained that 'Harry Dawani has to pay three months for them but they complained to me when I called back they always complain to me that you are not doing your work well and Harry want to pay your loan. They always complain to me like that and they say that if they contact Harry, Harry never answer like that. Gerry always tell me that was.'

She confirmed that regarding the first three months as the fee being due to the agency, she agreed with the agency to Harry retaining the next three months salary by way of security. She agreed also regarding the retention of the salary because Harry told her that if she finishes three years he will give her the money back. She confirmed that in Singapore she had already agreed that she will receive her first salary after the lapse of the seventh month.

Joseph Saliba testified on the 2nd of November 2014 and presented the employment history of Oriance Kelin which provides that she was employed between the third (3rd) of May of the year two thousand and thirteen (2013) and the ninth (9th) of June of the year two thousand and fourteen (2014). This is

presented at fol 221. A covering letter dated eight (8th) of April of the year two thousand and thirteen (2013) was also presented through which B.R.Daswani was applying for a working permit for Ms. Oriance Kelin. this is filed at fol 224. A termination form was filed at the back of fol 222 where the dates of employment inserted in this document are indicated from '10 06 2013 to 09 06 2014.' This was not signed by the employee. On the seventh (7th) of November of the year two thousand and fourteen (2014), Joseph Saliba presented a copy of the employment history file. It results that the the approval of the employment licence application subject to certain conditions was approved by virtue of the letter dated twelfth (12th) of April of the year two thousand and thirteen (2013) according to fol 271. While according to fol 266 et sequitur the letter through which the employment licence was issued is dated third (3rd) May of the year two thousand and thirteen (2013), the said letter provided that '*MS KELIN is required to apply to the Director, Department of Citizenship and Expatriate Affairs, 3, Castille Place, Valletta CMR 02, (Tel. No. 22001800) in order that a permit authorising her to reside in Malta is issued in her respect. Failure to do so within three months from the date of this letter or three months from the date of entry into Malta, in the case where the foreign national is still abroad, shall entail the revocation of the above-mentioned licence.*' The licence was issued under certain conditions such as the completion of medical health checks. It subsequently results that on twenty seventh (27th) of March of the year two thousand and fourteen (2014) as evidenced at fol 262, B. R. Daswani requested the renewal of the employment licence of Oriance Kelin. This authorisation to act as personal carer was issued on the sixteenth (16th) of April of the year two thousand and fourteen (2014) according to fol 252 et sequitur which also provided that one had to subsequently apply for a permit authorising her to reside in Malta within one month from the date of the letter or in cases where the foreign national is abroad, within one month from the date of entry. Oriance Kelin was still residing with the accused at the time of the renewal of the work permit.

Maria Anthea Bonnici during the sitting dated the 6th of January 2015 explained that '*She worked, she took an affidavit and worked from the 6th June of 2013 till the 8th June, 2014.*' A statement of Account issued by the Department of Industrial and Employment Relations was filed by this witness at fol 336 et sequitur apart from other documentation. During the sitting dated 15th January 2015 Police inspector Busuttill filed a true copy of the residence permit of the complainant. This was valid till the 2nd of May 2014 and was issued on the 4th of September 2013.

The accused in his statement dated 28th of July 2014 at fol 52 et sequitur explained that '*I seeked her employment as a carer for my father through an agency in Singapore, namely 'Home Maid'. My cousin who lives in Singapore got to know about this agency and since he knew that I was looking for someone to take care of my father, he suggested that I will speak to them. I made contact with them over the phone and they gave me Orience's details. A few days after I spoke to Orience on the phone and gave her an overview of what would her role be in Malta. After that I kept in contact with her through the phone and since she was interested in the job I applied for her working permit in Malta. I explained to her that Malta was far away, and it was like any European city, but just smaller. Most of our conversations where just to keep her informed about her work permit and told her not to worry as it would take quite some time to process the papers. In fact because it was taking a bit of time, I sent the agent a payment on to hand over to her so that whilst she was waiting she would have something in hand. I remember the agency telling me that Orience had to fund her own accomodation in Singapore whilst waiting for the work permit and the fund which I sent her was to cover those expenses, but I do not recall how much money I sent her. As soon as I had her work permit in hand, she applied for her Visa through the Maltese High Commissioner in Beijing, and when that came about, her agent paid for her flight and then I reimbursed them. Also, the agent explained to me that Orience had to pay some loan amount which was due to the government or to the labour department, and that I had to pay that to him first and then I would recover that from Orience's wages. She arrived in Malta in the beginning of June 2013, I picked her up from the airport and took her home, she got*

settled in and I explained to her what her duties entailed, and then two or three days after she started working for us.' Asked if there are other persons involved in her recruitment, he replied 'No it was just the agent and myself. I informed my dad about her before she came to Malta but I took care of all the papers and made all the arrangements as my dad is not in a good condition to do so.' Asked 'What was the agreement with Orience regarding her working conditions before she came to Malta?' she replied 'Our agreement was that her working conditions were as applicable in Malta, I informed her that she was going to reside with us and that she was going to have a separate room.' He explained that 'I explain to her what the minimum wage in Malta and explained to her that her working hours were from approximately 08:00hrs in the morning and would revolve around his timings. I also told her that ideally she would stay for 3 years and would work from Monday to Saturday and then Sunday half day. I also told her that she could take her time off on Sunday afternoon. When I say time off I am referring to the time when she could go out.' Asked 'Did you speak to her about that when she came to Malta?' replied 'No because she just started working and she was quite flexible in that way'. Asked 'Did she sign any contract about these working conditions?' replied 'I am not sure but I did email it to her and she did confirm it verbally on the phone.' He explained that 'The contract I sent her did not mention the hours per week probably and I think that I mentioned to her that it was for 3 years.' He is not sure if the recruitment agency had a copy of the contract. He explained that 'I did a lot of communication with her over the phone but I did have her email address so I could have sent her some correspondence by email but I am not sure about it.'

The accused **Harish Daswani** on the 9th of January 2017 testified that 'Ms. Orian Scaline is the individual who was hired by my dad, this is going back to February, around March of 2013 when my dad was in need of a carer and at that point in time he was visiting my brother in Indonesia and he discussed it with my brother that he was in need of a carer and my brother came about to know about Home Made, he came to know that they are an agency in Singapore and they frequently place and recruit Indonesian nationals in various duties amongst which personal carers also.' He testified regarding

his father that 'he ran everything through me, he told me that these are the terms and conditions which he propose and I put them forward to Home Made and to Ms. Caline, at that point she confirmed that she understood and that she was in acceptance of all these proposed terms and conditons, it was about seven / eight days after that and Home Made again via email communicated to me to relate my Dad and yes we were to proceed, Ms. Caline and both me find the terms and conditions acceptable and how do we go forward, I informed my Dad accordingly and my Dad then told me fine now help me out with paperwork with regards to the ETC, the work permit and other formalities, in fact that is a letter where ETC required it and he authorized me to hand over everything to the ETC pertaining to her application so I was the liaise at that point between Home Made and him and once the papers and the documents came, I submitted them to the ETC, they then went about checking and they processed the application as was the regulation at that point in time, even though the work permit was issued she still needed an entry visa based on the work permit so I facilitated that between Home Made and the embassy which had to issue that visa and after that all her paperwork was in order and then she flew here on the 6th of June, 2013.' (Underlining added by the Court.)

Apart from other documentation, the accused presented email correspondence with Garry Seah from Homemaide Agency dated 18th March 2013 and other emails dated in May 2013 including the 29th of May 2013 at fol 667 et sequitur. The accused also filed a fol 660 a deal confirmation of a transcation through Western Union dated 30th of May 2013, another deal confirmation through Western Union is also dated 11th of June 2013. This is found at fol 661 et sequitur. Rosalyn Borg Knight testified on the 15th of February 2017 where amongst other documents presented, she presented copies of email correspondence bwteen Harry Daswani and Garry Seah from homemaide. This is found at fol 695 et sequitur.

According to the appellant as submitted in his appeal, the alleged act of trafficking does not fall within the time frame mentioned in the summons since

no reference to the previous year is made. He referred to subarticle (1) of article 248E of Chapter 9 of the Laws of Malta and states that the operative phrase is the '*behaviour which facilitates*' any of the above and therefore the entry into, transit through, residence in or exit from the territory of any country.

It results that while Orience Kelin arrived in Malta on the 6th of June 2013, the arrangements for her travel to and work in Malta were made in the preceding weeks and months. The date in the charge sheet is '*the 08th 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 proviision of the law, committed in pursuance of the same design*'. Therefore the period covered in the charge sheet is the eight (8th) of June of the year two thousand and fourteen (2014) and the months before but not years before. Therefore the act of human trafficking and all the elements making up the offence of human trafficking had to take place not more than a year before the date mentioned in the charge and therefore between is the 8th June 2013 till the 8th of June 2014.

The phrase "*trafficks a person*" under article 248E(1) of Chapter 9 of the Laws of Malta before the amendments introduced to this article by Act XVIII of 2013 was defined as follows:

'the recruitment, transportation, sale 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, 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.'

Trafficking of persons is therefore made up of any one of the above mentioned acts and therefore '*the recruitment, transportation, sale or transfer of a person*', '*including harbouring and subsequent reception and exchange of control over that person*' and '*includes any behaviour which facilitates the entry into, transit through,*

residence in or exit from the territory of any country'.

Article 3 of the 'Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000' also known as the Palermo Protocol 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;'

Dr Lara Lanfranco in her dissertation entitled '**Maltese Criminal Law on Human Trafficking Recent Legislative Developments in the International Context**'² explained that:

'When one analyses the above definition we can identify three main elements:

(a) The act

(b) The means

(c) The purpose

(a) The first part of the definition indicates a variety of acts of which one, some or all

² Dissertation submitted in fulfilment of the Master of Arts in Law (M.A. Law) at the University of Malta in 2011.

must be performed at some point of the process of human trafficking. The definition indicates the 'recruitment, transportation, transfer, harbouring or receipt of persons'. The 'recruitment' referred to here can be carried out by whatever means so as to cater for any form available e.g. orally, through internet technology or through the media or otherwise. 'Transportation' can be carried out nationally as well as in a transnational manner and hence does not apply only to transportation from one country to another. In other words a border need not be crossed for human trafficking to subsist. Of course these acts in their own right and whilst standing alone without any other circumstances attached thereto, such as the harbouring of a criminal or a fugitive, are not illegal, which is why in order to establish whether a human trafficking offence was carried out these acts need to be seen in the light of the other elements of the offence.

(b) The means are indicated in the second part of the definition of Article 3 as above quoted and refers to the 'threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim'¹³. Fraud and deception are frequently used by traffickers in order to lure victims of human trafficking into the trap. They could generally be fooled into thinking that attractive job prospects await them only to realise that this is not so when it is too late for them to turn back. The abuse of a vulnerable position arises when the victim of such abuse has no real and acceptable alternative but to submit to it. The abuse per se may take various forms and may range from the most personal to an economical one. In other words the trafficker abuses of the vulnerable position of the victim which could be one of health, financial situation or disability in order to impel these victims to accept the exploitation they are subjected to⁴. The nature of the means which qualify the conduct is what characterizes the acts as of a general criminal character. The special purpose behind

³ Vide supra n. 11 (This reference is found in footnote 16 of Dr Lara Lanfranco's dissertation entitled '**Maltese Criminal Law on Human Trafficking Recent Legislative Developments in the International Context**')

⁴ Council of Europe Convention on Action against Trafficking in Human Beings, Explanatory Report (CETS 197) available at <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> (This reference is found in footnote 17 of Dr Lara Lanfranco's dissertation entitled '**Maltese Criminal Law on Human Trafficking Recent Legislative Developments in the International Context**')

the means used, lend specificity to the conduct criminalised. This is why it is fundamental to observe the "means" quoted together with the "acts" and of course the purpose which in itself is what completes the elements of human trafficking.

(c) The purpose refers to the objective behind the act and means used. Basically the purpose represents the end of the means adopted. The purpose gives the true character to the offence of human trafficking which is the exploitation of the persons or victims concerned. The forms of exploitation vary so as to include prostitution, sexual exploitation, forced labour, slavery or organ removal. The definition in Article 3 does not limit the exploitation to these forms in that the word "includes" is used in the text. The open-ended scope of trafficking is therefore essential since it caters for the development of further trends of human trafficking which may not currently exist or which are still being developed. This is certainly wise and takes account of the constant evaluation and adaptation of the offence in the light of today's changing developments. Therefore the offence of human trafficking must itself be capable of making allowance for changes in the phenomenon. The more the world progresses, the more the human trafficking adapts accordingly to prevent being detected. Likewise the laws and tools intended to fight this phenomenon must keep developing and changing in order to address and adapt to the varying forms and trends of human trafficking as well as the means used to perform them.

Although it is necessary for all three elements to concur, for the completion of the offence as defined, it is not necessary that a victim of human trafficking is actually exploited since it is enough that one has been subjected to any one of the actions referred to in the definition by any one of the means intended for the purpose of exploitation. In other words, trafficking ensues even before the exploitation is actually effected and hence it is punishable at that stage also. Moreover another exception to the rule that all three elements must concur arises with regards to children since, as will be seen in further detail below, in the case of minors the means referred to in the definition above need not result for there to be human trafficking due to the fact that there is a presumption that the action alone for the purpose of exploitation gives rise to the offence.'

Article 248A of Chapter 9 of the Laws of Malta as amended by Act VII of 2010 provided that:

"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

(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 for a term from two to nine years."

Subarticle (2) of article 248A of Chapter 9 of the Laws of Malta by means of the amendments by Act VII of 2010 read as follows:

'(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;'

By means of Act XVIII of 2013, apart from an increase in punishment, after the word 'servitude' in paragraph (c) of subarticle (1) of article 248A of Chapter 9 of the Laws of Malta, the words "*or forced labour*" were added. Furthermore under subarticle (2) the a new paragraph that reads "*(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.' was added.

Another important amendment by virtue of Act XVIII of 2013 was the introduction of subarticle (3). This read:

'(3) The consent of a victim of trafficking to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in sub-article (2) has been used.'

Apart from other amendments, by means of Act XVIII of 2013 the words "exchange of control" in subarticle 1 of article 248E of Chapter 9 of the Laws of Malta were substituted with the words "exchange or transfer of control".

However since the charges refer to a period which commenced prior to the coming into force of Act XVIII of 2013 which entered into force on sixth (6th) December of the year two thousand and thirteen (2013), the applicable law in the case under examination is as it stood by virtue of amendments made by Act VII of 2010 and therefore prior to the amendments made by Act XVIII of 2013.

In the judgment in the names **'Il-Pulizija v. ...omissis ... Paul Ellul ... omissis ...'**⁵, where the law applicable at the time was not the same as the law applicable in this case, the Court considered that:

'Is-subartikolu (1) ta' l-artikolu 248E tal-Kap. 9 jipprovi testwalment hekk:

"F'dan is-sub-titolu, l-espressjoni 'jittraffika persuna' jew 'jittraffika minuri' tfisser ir-reklutagg, trasport jew trasferiment ta' persuna, jew ta' minuri, skond kif jista' jkun il-kaz, inkluz il-habi ta' dik il-persuna, jew tal-minuri, li wara tigi ricevuta u jkun hemm bdil ta' kontroll fuq dik il-persuna, jew fuq il-minuri, u tinkludi kull ghemil li jiffacilita d-dhul, transitu, residenza fi jew hrug mit-territorju ta' xi pajjiz ghal xi wiehed mill-

⁵ Decided by the Court of Criminal Appeal on 19th September, 2006 (Criminal Appeal number: 346/2005)

ghanijiet imsemmija fl-artikoli precedenti ta' dan is- sub-titolu, skond kif jista' jkun il-kaz."

Sabiex jissussisti l-element ta' "traffikar" huwa ghalhekk sufficjenti mqar att wiehed minn dawk elenkati fis- subartikolu appena citata. U hawn irid jigi osservat, kuntrarjament ghal dak li gie sottomess mill-appellant, illi l- frazi "li wara tigi ricevuta u jkun hemm bdil ta' kontroll fuq dik il-persuna" tikkwalifika l-att ta' "habi" tal-persuna sfruttata u ma tikkwalifikax l-att ta' "habi" tal-persuna sfruttata u ma tikkwalifikax l-atti ta' "reklutagg, trasport jew trasferiment" (fit-test Ingliz: "including harbouring and subsequent reception and exchange of control of that person, or minor"). Mix-xiehma ta' Yeogeniya Khonakhbeyeva kif ukoll minn dik ta' Tatiana Parisheva, din il-Qorti m'ghandha l-ebda dubju li dawn iz-zewg persuni mhux biss gew reklutati izda anke giet facilitata r- residenza taghhom f'Malta bil-ghan li jigu sfruttati ghall- prostituzzjoni. F'dan, l-appellant kellu sehem dirett.'

The First Court in the appealed judgment considered that:

'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...'

At this stage without entering into the merits of the case and into the other elements of the offence of human trafficking, the Court will consider whether the *'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'* took place in the time period indicated in the charge sheet, that is the eight (8th) of June of the year two thousand and fourteen (2014) and the preceding months. The Prosecution did not charge the accused with human trafficking committed also in the preceding year but only charged him with human trafficking committed on the eight (8th) of June of the year two thousand and fourteen (2014) and the preceding months which would as considered earlier on in this judgment covers the period between the eight (8th) of June of the year two thousand and thirteen (2013) till the eight (8th) of June of the year two thousand and fourteen (2014) but not earlier than the eight (8th) of June of the

year two thousand and thirteen (2013). The law uses the phrase '*behaviour which facilitates*', therefore the Court is of the view that these acts have to precede the actual entry into, transit, residence or exit from the territory. From the acts it results that the communication with the agency in question, that is 'Home maid' took place before the time period indicated in the charge sheet, such communication from documentation presented took place between March and the end of May of the year two thousand and thirteen (2013). It also results that the complainant arrived in Malta on the sixth (6th) of June of the year two thousand and thirteen (2013). The arrangements made by the accused for the complainant to come in Malta were therefore made prior to the eight (8th) of June of the year two thousand and thirteen (2013). Payments to Home Maid Agency PTE Ltd via Western Union also according to documentation presented by the accused were made on thirty (30) May of the year two thousand and thirteen (2013) according to the document filed at fol 660 and another payment transaction via Western Union to Home Maid Agency PTE Ltd was made on eleventh (11th) of June of the year two thousand and thirteen (2013) according to a document filed at fol 661. Therefore it results that even though one of the payment transactions towards Home Maid Agency PTE Ltd took place while the complainant was already in Malta and therefore during the period mentioned in the charge sheet, arrangements and therefore **behaviour facilitating the entry as well as the residence** into Malta were made prior to the period indicated in the charge sheet, in fact the complainant arrived in Malta on the sixth (6th) of June of the year two thousand and thirteen (2013).

Article 360(2) of Chapter 9 of the Laws of Malta provides that:

'The summons shall contain a clear designation of the person summoned and a brief statement of the facts of the charge together with such particulars as to time and place as it may be necessary or practicable to give. It shall also contain an intimation that, in default of appearance, the person summoned shall be arrested by warrant of the court and arraigned on such day as maybe stated in the warrant.'

In the judgment in the names **'Il-Pulizija (Spettur Pierre Micellef Grimaud) vs Christopher Ryan iben Mark, imwieled Pieta', fit-12 ta' Gunju, 1994, detentur tal-karta ta' l-identita' numru 297494(M) U Joshua Xerri iben Gaetano, imwieled Pieta', fid-19 ta' Otturbru, 1991, detentur tal-karta ta' l-identita' numru 571991(M)**⁶ the Court considered:

'Illi l-appellati gew imressqa quddiem il-Qorti tal-Magistrati taht arrest fis-seduta tat-3 ta' Dicembru, 2011 akkuzat b'diversi reati li allegatament sehew fit-12 ta' Dicembru, 2011. Illi l-provi bdew jinstemghu u l-ewwel Qorti fis-7 ta' Dicembru, 2011 rat illi hemm ragunijiet bizzejjed biex l-imputati jitqieghdu taht att ta' akkuza u irrinojat l-atti lill-Avukat Generali skont il-ligi.

Illi minn dak in-nhar sal-4 ta' Ottubru, 2012 kien hemm hames okkazzjonijiet fejn l-atti tal- kawza gew rinojati lill-Avukat Generali. Minbarra, dan fis-seduta tad-19 ta' Lulju, 2012 il- Prosekuzzjoni ipprezentat mill-gdid l-akkuzi. Fil-fatt, dawn kienu jirrigwardaw akkuzi specifiki lill-appellat Christopher Ryan, wahda li tirrigwarda r-recidiva u ohra dwar ksur ta' sentenza sospiza. Ghandu jinghad li l-akkuzi tar-recidiva ma ssibx ruhha fil-korp tas- sentenza. Dawn l-akkuzi godda wkoll jirreferu ghad-data tat-12 ta' Dicembru, 2011.

Illi l-Avukat Generali appellant iddikjara li l-Prosekuzzjoni talbet il-korrezzjoni tad-data. Din id-dikjarazzjoni ma tirrizulta minn ebda verbal u kieku l-prosekuzzjoni talbet tali korrezzjoni u l-Qorti ma laqtax tali talba l-prassi dejjem segwita hi li titlob lill-Qorti biex tivverbalizza t- talba tieghek u il-Qorti tiehu provvediment in materja. Minn dan kollu ma hemm xejn.

Illi hu car li hemm zball fid-data ta' meta graw il-fatti kif intqal fuq. Ghall-korrettezza ghandu jinghad li kemm il-prosekuzzjoni f' darbtejn, kif ukoll l-Avukat Generali matul il-kors kollu tal-kawza flew kemm il-darba l-inkartament. Din il-Qorti ssibha ferm stramba kifhadd ma nduna bi zball ta' tali proporzjoni.

⁶ Decided by the Court of Criminal Appeal on 10th April 2014 (Criminal Appeal number: 477/2012)

Illi l-Avukat Generali hu tal-fehma li l-ewwel Qorti zbaljat meta helset lill-appellati mill-osservanza tal-gudizzju a bazi ta' zball ta' data meta gew kommessi l-allegat reati. Fil-korp tar-rikors tieghu ghamel referenza ghall-zewg sentenzi li javallaw it-tezi tieghu. Min-naha tal-appellati l-abbli difensuri ndikaw lill-Qorti giurisprudenza aktar recenti ta' din il-Qorti, diversament presjeduta, li jimmilataw favur l-argumenti taghhom li kien hemm l-opportunita' biex dan l-izball jigi sanat izda la l-prosekuzzjoni u lanqas l-Avukat Generali ma talbu sanatorja ghalhekk l-ewwel Qorti kienet korretta fid-decizjoni taghha. Hawnehkk, ghandha ssir referenza ghall-zewg appelli decizi t-tnejn fid-19 ta' Ottubru, 2011 fl-ismijiet Il-Pulizija v. Warren Piscopo u Il-Pulizija v. Ruth Theuma (it-tnejn per Imhallel David Scicluna). F'dawn iz-zewg sentenzi l-meritu kien il-hin u l-Qorti laqghet it-talba li kien hemm hinijiet differenti minn meta allegatament sar ir-reat ghal meta fil-fatt realment sar l-allegat reat.

Illi f'dan il-kawza, hawnhekk qed nitkellmu dwar avarija ta' ghaxar tijem u f'dan il-process kien hemm wisq opportunitajiet biex jigi senat tali zball.

Illi din il-Qorti taqbel perfettament mal-ewwel Qorti li lahqet tali decizjoni anki fuq l-iskorta tas-sentenzi hawn fuq indikati.'

In the judgment in the names **Il-Pulizija [Spettur Gabriel Micallef] Vs Andre' Falzon**⁷ the Court considered that:

'Illi fil-kaz in dizamina ma jistax jinghad illi l-appellanti qieghed jallega illi huwa ma fehemx in-natura ta'l-akkuzi migjuba fil-konfront tieghu, jew inkella li ma kenitx l-inetnzjoni tieghu li jammetti, izda jirrizulta mill-atti illi abbazi tal-fatti tal-kaz kif esposti, l-Ewwel Qorti ma setatx issib htija ghal tali akkuzi billi ma kenux jissussistu fid-data indikata fl-akkuzi. Issa l-kodici penali taghna jimponi l-obbligu fuq il-Qorti Kriminali taht l-artikolu 436(3)(c) li ghandha taghmel dak kollu li m'huwiex projbit jew mhux ordnat mill-ligi taht piena ta' nullita, kull meta l-Qorti fid-diskrezzjoni taghha jidhirlha li hu hekk mehtieg ghat-tikxif tal-verita.' Illi l-appellanti allura ghandu ragun u din il-Qorti ma tistax taghlaq ghajnejha ghal dan in-nuqqas procedurali daqslikieku ma

⁷ Decided by the Court of Criminal Appeal on 19th November, 2015 (Appeal number: 385/2013)

kienx jezisti u dan ghaliex is-sentenza impunjata tirrifletti fatti li mhumieq sostanzjati bil-provi li hemm fl-atti, ghalkemm l-appellanti ammetta ghalihom. Kwindi din il-Qorti ma ghandhiex trqi ohra hlief li tghaddi sabiex tannulla id-decizjoni appellata u dan billi tirrizulta decizjoni hazina fuq il- mertu u dan kif previst fl-artikolu 428(5) tal-Kapitolu 9 tal-Ligijiet ta' Malta. Illi affermat dan allura din il-Qorti bis-setgha moghtija lilha fl-artikolu 428(6) ser tghaddi sabiex titratta l-mertu ta' dan il-kaz daqslikieku ma kienx hemm ammissjoni minn naha ta'l-appellanti.

Illi s-subartikolu (2) ta' l-artikolu 360 tal-Kapitolu 9 tal-Ligijiet ta' Malta jipprovdi li:

"Ic-citazzjoni ghandha ssemmi car il-persuna mharrka, u ghandu jkun fiha, fil-qosor, il-fatti ta' l-akkuza, bil-partikularitajiet ta' zmien u ta' lok li jkunu jinhtiegu jew li jkunu jistghu jinghataw....."

Illi fis-sentenza mghotija fit-18 ta' Ottubru 2005 mill-Qorti ta'l-Appell Kriminali fil-kawza f'l-ismijiet Pulizija vs John Mary Briffa, fejn l-appellant f'dik il-kawza gie akkuzat b'reati li allegatament sehheq "ghall-habta tas-7.30 p.m." mentri l-provi kienu jirrigwardaw incident li sehheq "ghall-habta tas-7.30 a.m.", intqal li:

"L-imputazzjoni ghalhekk kif impostata qed tirreferi ghal xi haga li allegatament grat tnax-il siegha wara u l-ewwel Qorti hekk sabet lill-appellant hati. Mill-provi ma jirrizultax li gara xi incident fil-hin indikat f'l-imputazzjoni u ghalhekk l-appellant ma setax jinsab hati kif fil-fatt insab. Il-frazi "ghall-habta ta' tindika hin approssimattiv u tinkludi hin vicin dak imsemmi f'l-imputazzjoni izda zgur mhux tnax-il siegha wara. Il-prosekuzzjoni qalet li huwa ovojju li dan kien zball dattilografu. Jekk inhuwa hekk, il-prosekuzzjoni kellha tiehu hsieb taghmel jew titlob il-korrezzjoni opportuna tempestivament"

Illi dan l-istess principju gie riaffermat mill-istess Qorti ta'l-Appell Kriminali f'diversi kawzi ohra inkluz dawok fl-ismijiet Il-Pulizija vs Warren Piscopo u Pulizija vs Rita Thuema, it-tnejn decizi fid-19 ta' Ottubru 2011.

Stabbiliti dawn il-principji dottrinali u applikati ghall-kaz in ezami huwa car allura illi l-

appellanti kellu jigi illiberat mill-akkuza kif dedotti kontra tieghu billi dawn jirreferu ghal perijodu ta' zmien differenti minn dak li fih sehew l-allegati fatti li wasslu ghall-imputazzjoni odjerna. Illi allura billi l-Prosekuzzjoni naqqset milli tinduna b'dan l-izball u tirrettifikah fil-hin opportun, u billi l-Avukat Generali huwa issa fi stadju ta' appell prekluz milli jitlob il-korrezzjoni mehtiega biex tigi sanata l- akkuza, ma hemmx dubbju illi l-imputazzjonijiet kif dedotti kontra l-appellanti ma jistghux jissussitu billi fid-data indikata fl-akkuza l-appellanti ma ikkommettiex ir-reati lilu addebitati.'

In the judgment in the names **'Il-Pulizija v. ... omissis ... Francesco sive Godwin Scerri'**⁸ the Court considered that:

'8. Jekk tul il-kumpilazzjoni Leonard Camilleri qal li kien seh stupru fl-Istitut ta' San Guzepp, il-prosekuzzjoni setghet taghmel dak li solitament isir, u cioe` li tintalab korrezzjoni fic-citazzjoni. Meta l-Avukat Generali rrinvoja l- atti ghall-gudizzju minghajr ma talab li ssir korrezzjoni fit- tieni imputazzjoni, kien qieghed jintrabat "mal-fatti" kif espressi fl-imputazzjonijiet originali. Il-provi li ressqet il- prosekuzzjoni kienu dwar allegat stupru li seh fl-Istitut ta' San Guzepp. L-appellat gie akkuzat li kkommetta stupru fil-Marfa. Dawn huma postijiet f'inhawi ghal kollox differenti f'Malta.'

In the judgment in the names **'Il-Pulizija (Spettur Angelo Gafa) vs EMANUEL ELLUL (ID: 24564M)'**⁹, the Court considered:

'Kif inghad, l-imputat gie mixli illi kkommetta r-reat tal-uzurija "fl-20 ta' Marzu 2012 jew fix-xhur ta' qabel". Isegwi ghalhekk illi kif impostata, l-imputazzjoni tirreferi ghal fatti li graw fl-20 ta' Marzu jew fix-xhur vicini ta' dik id-data. Ghalkemm l-imputazzjoni giet dedotta bhala reat kontinwat, il-Qorti ma tqisx illi l-kuncett legali tal-kontinwita` a tenur tal-Artikolu 18 tal-Kodici Kriminali jista' jestendi oltre l-parametri temporali espressament dedotti fl-akkuza, ghaliex l- Qorti ma tista' qatt issib htija ghal xi reat li jkun seh fi zmien iehor jew f'hin iehor u mhux dak indikat fl-akkuza.

⁸ Decided by the Court of Criminal Appeal on 18th April 2012 (Criminal Appeal number: 355/2011)

⁹ Decided by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 10th April 2019 (Compilation: 885/12)

L-Artikolu 360 tal-Kapitolu 9 ifisser kif ghandha tigi redatta ic-citazzjoni u liema huma dawk l-indikazzjonijiet mehtiega sabiex il-persuna imharrka tkun tista' thejji d-difiza taghha tajjeb u dan bic-cirkostanzi materjali indikati lilha f'dik ic-citazzjoni. Is-subartikolu (2) tal-Artikolu 360 tal-Kapitolu 9 tal-Ligijiet ta' Malta jipprovi li:-

Ic-citazzjoni ghandha ssemmi car il-persuna mharrka, u ghandu jkun fiha, fil-qosor, il-fatti ta' l-akkuza, bil-partikularitajiet ta' zmien u ta' lok li jkunu jinhtiegu jew li jkunu jistghu jinghataw. Ghandu jkun fiha wkoll it-twissija li, jekk il-persuna mharrka tonqos li tidher, hija tigi arrestata b'mandat tal-qorti u mressqa quddiem l-istess qorti fil-jum li jkun imsemmi fil-mandat."

Huwa rikonoxxut illi z-zmien huwa cirkostanza materjali u sostanzjali tal-kaz tal-Prosekuzzjoni, b'dan illi jekk il-parametru taz-zmien ikun gie indikat hazin, allura l-binarji tal-azzjoni wkoll jitqiesu li huma hazin. Ghalkemm m'huwiex rikjest mil-ligi li fl-imputazzjoni il-Prosekuzzjoni tindika bi precizjoni matematika iz-zmien tal-allegat reat, huwa certament desiderabbli li jsir hekk, speċjalment fejn, bhal fil-kaz odjern, jirrizulta mill-provi illi **l-imputat kien ilu jislef flus lill-konjigi Worley sa minn Novembru 2010 u kwindi fuq medda ta' iktar minn sena**. Multo magis meta r-reat in kwistjoni huwa meqjus bhala wiehed istantanju u m'huwiex wiehed ta' natura permanenti, ghalkemm tul iz-zmien kollu li fih jithallsu imghaxijiet jew jigi perceptit qligh jew korrispettiv b'eccess minn dak permess mil-ligi, ghandu effetti permanenti.

Fil-kaz tal-imputazzjoni odjerna, iz-zmien indikat fl-akkuza jirreferi ghal xhur u mhux snin u ghalkemm bl-uzu tal-plural fil-kelma "xhur" l-ispazju temporali tal-fatti li ghalihom tirreferi l-imputazzjoni jista' jitqies li gie estiz ghal diversi xhur ohra, il-Qorti pero` tqis illi l-parametri tal-kelma xhur, b'mod generali ghandhom ifissru **dawk il-ftit xhur qabel id-data specifikata**, u ma jistghu qatt jiggebbdu biex jinkludu fihom fatti li jkunu sehew tnax-il xahar jew iktar, qabel. Inoltre, il-Qorti hija tal-fehma wkoll illi ma jistghux jidhlu fl-iskop tal-kliem "fix-xhur ta' qabel", dawk ix-xhur **tas-sena ta' qabel id-data espressament msemija fl-imputazzjoni**, f'dan il-kaz l-20 ta' Marzu 2012.

Ghaldaqstant, il-Qorti tqis illi ghall-fini tal-imputazzjoni odjerna tista' tinsab htija biss jekk ikun jirrizulta li r-reat taht l-Artikolu 298C tal-Kapitolu 9, **gie kommess u jkun**

sehħ fl-elementi kollha kostituttivi tiegħu mill-1 ta' Jannar 2012 'il quddiem u mhux qabel din id-data. Il-Qorti għandha għalhekk tistabilixxi mhux biss jekk jissussistux l-elementi kostituttivi kollha tar-reat addebitat lill-imputat, izda wkoll jekk ir-reat, jekk jissusissti f'dan il-kaz, giex konsummat wara l-1 ta' Jannar 2012.

Għal kull buon fini għandu jigi rilevat ukoll li għalkemm fic-citazzjoni l- imputazzjoni tagħmel referenza għall-Artikolu 18 tal-Kapitolu 9 tal-Ligijiet ta' Malta, xorta wahda jehťieg illi jintwera illi l-fatti rilevanti sehħew fil-perijodu indikat mill-Prosekuzzjoni.'

The charge sheet has in instances been considered as a notice for the accused to appear in Court, the prosecution however chose to limit the charge to a particular date as well as the preceding months and therefore excluded the preceding years. From the acts it appears clearly that all preparations made by the accused for the complainant to come to Malta took place before the period indicated in the charge sheet. Even though the complainant continued residing with the accused, his wife and the father of the accused throughout the period mentioned in the charge sheet and a payment via Western Union also appears to have taken place to Home Maid Agency PTE Ltd on 11th of June 2013 according to a document filed at fol 661 and therefore while the complainant was already in Malta and her residence permit per fol 341 was valid till the 2nd of May 2014 and was issued on the 4th of September 2013 and the employment permit was also renewed in 2014 during the period mentioned in the charge sheet, the behaviour facilitating the entry and residence took place before the complainant arrived in Malta and therefore not in the period mentioned in the charge sheet .

For these reasons, the Court is upholding the First ground of appeal and declaring that the Court could not have found guilt of the first charge in view that not all the elements of the offence took place in the period mentioned in the charge sheet. The Court is therefore abstaining from taking cognisance of the second grievance regarding article 248A of the Criminal Code as well as parts of the third grievance through which regard the charge of human trafficking, apart

from that which has been considered by this Court regarding the admissibility of the statement released by the accused and also parts which are also linked to the offence under article 251B of the Criminal Code.

(ft) Consuelo Scerri Herrera

Judge

VERA KOPJA

Franklin Calleja

Deputat Registratur