



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 16th February, 2021.

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 Honorable 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 **sub article (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 sub article (2), traffics a person of age for the purpose of exploiting that person in:

- a) the production of goods or provision of services; or
- b) slavery or practices similar to slavery; or
- c) servitude; or
- d) activities associated with begging; or
- e) any other unlawful activities not specifically provided for elsewhere under this sub-title,

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

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

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

- 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 sub article (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, sub article (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*”. Sub article (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 sub article (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 **sub article (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 sub article (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 law that was not in 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, whatever 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 negatived 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 accomodation 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 accomodation. 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 mistreated 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 sub article (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 sub article (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 accommodation, 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 organized 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.

The Court heard the parties make their final submissions and this during the sitting of 12th January 2021, and thus today the case is put off for final judgment.

The Court took note of its preliminary judgment given on the 1st October 2020 wherein it upheld the first ground of appeal and declared that the first could not have found the accused guilty of the first charge of human trafficking in view that not all the elements of the offence took place in the period mentioned in the charge sheet and thus abstained from taking further cognizance of the second grievance regarding article 248A of the Criminal Code as well as part of the third grievance through which the charge of human trafficking apart from that which has been considered by this court regarding admissibility of the statement released by the accused and also parts which are also linked to the offence under 251B of the Criminal Code.

Thus the Court will be deciding whether the charge relating to harassment as envisaged in article 251B of the Criminal Code subsists in the light of the fourth aggravation raised by the appellant, besides deciding on the punishment that is to be awarded in view that this court is modifying the judgment of the first court

Considers;

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

1. That on the 6th of June 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 7th month, she did not receive any salary;

6. The complainant fled the home of the accused on the 8th of June ,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 fourth 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 28th of July 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 28th of July 2014 and that according to the testimony of Police Inspector Sylvana Briffa dated 6th of August 2014 the accused '*was given the usual caution and including his right to speak to a lawyer of his choice where he spoke to 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 the 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.

Considers;

That the fourth ground of appeal consists of the fact that the Court of Magistrates

wrongly found the applicant guilty of the second charge contemplated in article 251B of the Criminal Code. He submits that the acts leading to the offence of human trafficking precede the passive subjects arrival in Malta, whereas those leading to the later offence allegedly took place after Kelin's arrival in Malta. He submits that although jurisprudence regarding the similar yet distinct offences contemplated in article 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. The accused makes reference to a number of judgments regarding this article of the law. He submits that in the 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. The intention on the part of the applicant to cause Oriance Kelin to fear that violence will be used against her or her property must be proved. Any perception of fear on her part does not suffice. It is the alleged perpetrator's intention that is to be taken into consideration. The applicant 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. He submits that should Oriance Kelin's testimony or part of it be deemed credible, 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. He therefore submits that he should have been acquitted of this charge.

The second charge reads '*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 her ascendants, descendants, brothers or sisters or any person mentioned in article 222(1) of Chapter 9 of the Laws of Malta;*'

Article 251B of Chapter 9 of the Laws of Malta at the time of the offence read that:

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

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

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

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

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

In the judgment in the names **'Il-Pulizija (Spt. Carmelo Abdilla) Vs Omissis (1)**¹ the Court considered that:

'Umbagħad l-artikolu 251B johloq ir-reat ta' min bl-imġieba tiegħu jikkaguna li haddiehor jibza' li ser tintuza vjolenza kontrieh jew kontra l-proprjeta' tiegħu meta jkun

¹ Decided by the Court of Criminal Appeal on 21st June, 2007 (Criminal Appeal number: 321/2006)

jaf jew imissu jkun jaf li l-imgieba tieghu ser tikkaguna lil xi hadd iehor hekk jibza' kull darba minn dawn l-okkazzjonijiet. Hawnehk jidhol l-istess kriterju enuncjat fl-art. 251A u cioe' li persuna li l-imgieba taghha tkun dubjuza ("whose course of conduct is in question"), jmissha tkun taf li ser tikkaguna biza' f'haddiehor li ser tintuza vjolenza kontrieh f' xi okkazzjoni jekk persuna ragjonevoli li jkollha l-istess informazzjoni kieku tahseb li dik l-imgieba tkun ser tikkaguna biza' fil-persuna l-ohra f' dik l-okkazzjoni. Igifieri hawn it-test hu wiehed oggettivo tar-reasonable man.

Hemm ukoll f' dan l-artikolu l-iskuzanti kontemplati fl- artikolu 251 (3) (a) u (b) u dik li l-imgieba addottata mill- persuna akkuzata kienet wahda ragjonevoli ghal-harsien taghha jew ta' haddiehor jew ghall-harsien tal- proprjeta'taghha jew ta' haddiehor.'

The complainant Orience Kelin in the sitting dated 13th of August 2014 testified that *'and the first month, they were very nice to me but after the first month, I see Harry's wife don't like me and he always shout and asking me to tell Harry that I do not want to work there and first Harry wife ... me with a cucumber and she don't like me and she is telling me that I don't want you I want Indian maid and please you tell Harry that you don't want to work in the house and go away but in front of Harry, Harry say I will not send you back before three years because I apply for you to come here is very expensive. I waste a lot of money to bring you come here and then they start shouting at me, like harry always says you bloody... you bloody fucker and Harry hit me because you see the first time Harry hit me because he saw phone calls to call my parents ... and I asked his wife, Mam I want to call home but she always said no later, later and until very long and I received ... from my cousin from ... is fall from the tree and have a bit of injury and I used the house phone to call and when they know that I used the house phone, Harry hit me, he wants to break my hands and they hit me a lot that time and he take my hands and ... on the wall, on the door and that is the first time Harry hit me. She says it was on September 2013 or beginning of September.' (Underlining added by this Court).*

She explained that 'Harry hit me again on November, the first of winter. He hit me because of the bathroom, he asking me that you used the bathroom already, I say yes I was already ... the bathroom and they telling me to wash the bathroom using the hand soap and the bathroom tray, the shower tray and because I scarred at everything because they are shouting at me, everyday they are trying to I am sorry so I scarred ... but when he asking me why you ... the bathroom with the floor, what you used to wash the bathroom, I said I used the floor cleaner and he started hitting me, pull me and hit me on my head, he hit me like toys, he like playing with toys. After that he stopped hitting me but he always shouting at me like you fucking stupid, you fucking idiot, you bloody ... that is when I live with them for ... and his wife always trying to tell me that I will make my husband to hit you and I will make your life miserable. That was my condition when I was in Harry's house and when they come back from India.' She explained that 'Harry came back on January, on 5th or 6th of January and his wife come back on the 14th or 15th of January. Then after that they will always shouting, they hit me but not so badly how they hit me because of the phone and because of the bathroom and one day Harry hit me until my ear is bleeding because the food is not enough salt, he telling me why you cook today is too much salt, tomorrow is not enough salt and I said what do you want exactly and he start hitting me and my ear is come out blood and his finger is touched on my earrings so his finger is also bleedings. That is after they come back from India and Harry ... with knife also. First he is using a bread knife but the second time he used a real knife and put on my neck like this and said I will bloody kill me.'

She explained that 'First he is using the bread knife because his wife is complaining that Orience is useless, Orience is not good that my name is .. and he said that I brought your from your country to come here I paid a lot of money so I will bloody kill you. That is the first time he is using the bread knife and the second time is on Sunday that is the first of June, 2014 he take the knife and poke on me like this, I kept quite because I was scared and I did not talk any more. Anything because he asking me you know how to cook garlic pasta, I said yes I know then he asking me that you tell me how to cook their garlic pasta and I explained to him that first I boil the water and I put salt and when the

water is hot already I will put in the pasta for eight minutes and then I fry the garlic and the mushroom and then I after put in the pasta. And he said no it is wrong, that is not the way I teach you and he poked me with the knife and said I will kill you, you will bloody die. He take a knife and pock on me and he telling me that you will die and you are not going back to your parents. One I remember that on the 27th May Harry ... me here and I have the photo and he hit me because of his wife's screaming that my bra is not here, were is my bra and the five minutes because ... her bra I had put the clothes in the washing machine and then she is screaming my bra is not there, my bra is not there and then she just screaming to her husband Harry Daswani and she said Harry I have a strong feeling that my bra is put inside the washing machine and Harry don't want to ask me anymore, he just come and hit me in my head, hit me on my head a few times and then he kill me on my neck and this felt painfully and I have the photo.' She showed photos taken herself on her Blackberry. She explained that *'After one hour because they went out after Harry killing me, they went out and I go out to buy chicken and people see me crying, they say why are you crying, you take the photos so next time you have some help, you show them that they are treating you very bad and I go back and I open the kitchen drawer and I take this mobile, I charge it and I take my photos for my neck'*. She explained that *'This is on the 27th of ... and the other is the day before I left that I escaped on the 8th of June, 2014 but on 4th June, 2014 Harry hit me very very badly because I have not put enough herbs on the potatoes and hit me about ten to fifteen times on my face, he punch me on my face and when I left to the bathroom to wash my face, he kick me from my back and then when inside the bathroom I wash my face, then he following me he kick me on my mouth and then my mouth is bleeding and I have the photos here. That is after one hour I washed the blood everything already and he pulled my hair up and he bang my head on the wall. That is Harry doing it to me. Harry hit me until my face is like this. That is I take inside the bathroom.'* (Underlining added by the Court)

Asked for the date when the picture was taken, she said that she thinks you will find the date on the photo, she thinks that it was the night on fourth (4th) June before she escaped on eight (8th) of June. She explained that sometimes they ask

her to go away and sometimes they hit her and that 'If they ask me to go away I say thank God but when they hit me I fell sick because it is painful especially Harry. Harry when hit because he is man so painful when hit me.'

She explained that 'After the first six months they start not paying me they say I don't pay you, you know that after six months is very, I am not in good condition any more because I wanted to talk to them so ... I scarred because they hitting me each day I get shouting from them, hitting from them so I just like I scarred they are always screaming at me that he will not be paid, we will not paying you, you will go back with no money and when I call the agency, I used the ... and I called the agency and the agency telling me that if you can you can tell me that your parents need money so you can send your money and slowly, slowly go back home so at the end you will go back home, your parents have some money already. I scarred that after three years they will not pay me and once my mother need money and when I talk to them they need money and I tell Harry, Harry I want to send money to my parents and then he asking me for bank account and I asked my cousins the bank account and I give to him and then he asking me that I need the swift code and when the swift code come, the time they hitting me until my ear is bleeding so I am not talking anymore. I just better to be quite, then I talk and they hit me because when they hit me, they shout at me and they will always tell me that I will not pay you. You will work for me for free.' She was only given six euros from Harry. She explained that 'his wife is telling me that you will be a prostitute and Harry telling me that she was telling me to... that when he finishes hitting me ... if I hit you, he is always like this and if you going to police I will tell them that you are lying and if when they say I have a lot of money I will pay them so I will be free and you will go to jail and another if you run away from my house without passport, I will go and put you in jail so your parents will not see you for your whole life and just no ideas and I think that better I stay here and treat me bad when can I get out from here and I finish three years and they send me back without money or so I, no problem but I have to make my best and work properly with them so they can send me back to my parents. That is I am thinking on.'

(Underlining added by this Court.)

She explained that they always told her that '*you will be working for me for free, I will not pay your.*' Since '*He like the cooking, why do you cook the food like this, why you cook the chicken too hard, why you cook the chicken, why you cook late, five minutes late, the floor, even I finish clean already, they said me you haven't clean it, then ask me to kneel down and they start shouting and they start hitting me.*' She explained that '*I go out and buy top up of five euro of my money that Harry's cousin give me for three times for party for three times to give me five euro for the first time and the second time and then third time is ten euros, ten euros so I have twenty five euro and I used the five euro to buy top up...*'

Asked if she knew where he placed the passport she replied '*I don't know because when they left to india, he is telling me that I bring your passport to burn it, I bring it to India so that you will not find it and I will burn it and he is telling me that they are always screaming, the wife always screaming I will make your life miserable and then some more harry and say I will not pay you I will burn your passport, they were always telling me that.*' (Underlining added by this Court.)

The complainant in cross examination explained amongst other facts that '*after one month already they start to hit me, shout at me and screaming at me and say no off for you, you understand what is the meaning of work...*'

Anita Kobacs testified on the 6th of August 2014 were she explained that '*she told us that she didn't get food and she showed us the photos that she took with her phone the day she was hit so we took her to the nearby cafe and there we bought her some smoothy and pizza so that she can eat and after she explained further her situation and she looked were scared and terrified...*' Dr Catherine Camilleri in the same sitting among other facts testified that the complainant told her '*initially that she had been in Malta for a year, she came to Malta regularly to work as a house made, however in this year, she had never been paid, she had only been given six euros (€6), two (€2) and four euros (€4) to be able to go out two consecutive Sundays, she also claimed that she had been physically abused by her employers, that she was beaten on several occasions and insulted and threatened and that her freedom was very limited, she had no passport and no money and*

she felt that she was virtually a prisoner basically. She could not go out of the house except for very short periods of time, shopping or whatever and it was on these occasions that she met this other Filipino house made and she sought her assistance as what she should do in the circumstances and they told her we will try to find someone to help you. So I basically told her that if she wished then she could leave her employer's house and then if she did so that there were services in place to assist her, I informed her that she had a right to lodge a report which she wished to do so and she at that point said that she did wish to retrieve the wages due to her but she was not yet willing to file a Police report however she definitely wanted at that point, her priority was safety...' (Underlining added by this Court.)

She explained that 'When I went home, a couple of hours after I went home these friends called and said that Orience had taken the decision to leave her employer's home on that day so we made arrangements for her accommodation, the case was referred to Appogg and Appogg made the necessary arrangements and from then on, we also provided other services from J. R. S. including psychological support and Appogg was providing social work services.' Oriance Kelin had told her that 'the wife of Mr. Daswani was starting to ill treat her, she said she would physically abuse her but she would also insult her and humiliate her, she recounted several instances when she was insulted and abused. At the time she said that even Mr. Daswani started to ill treat her and she recounted instances where even he beat her. She also showed me, photos, a couple of photos on a mobile phone of herself with injuries and she also mentioned that she had been threatened and told that for nothing even if she reports to the Police she will not be taken seriously and that they had money and they would pay the Police as much money as they wanted and so this is what she reported to me on ...' She stated that 'it was very clear that the reason was that she was scared. She was afraid and she comes across as a very fearful, very submissive, very disempowered and she is very convinced that she is in a very weak position and so she was afraid to make a Police report. She eventually said that no she would lodge a report because people should not be treated like that and she does not want it to happen again to someone else.' In cross examination she explained

that *'there were several occasions where she said that she was beaten because she did something wrong. for example she recounted an instance where she put too much salt in the food and so in addition to being hit, she was also forced to swallow a spoon full of salt. She also recounted other instances, for example, she didn't do something and she started cooking later on she didn't do something that she was supposed to do and therefore she was shouted at and beaten on occasion etc. On one occasion she also recounted an occasion where she used a ... without permission and so she was beaten as a result for example. So in fact she links the beatings, in fact she comes across as being very convinced I am being punished for what is my fault basically but it is clear that for her many are linked with these, how can I say, alleged wrong doings of failings to do her job properly.'* WPS 261 Donatella Frendo in the sitting dated sixth (6th) of August of the year two thousand and fourteen (2014) stated that on the thirteenth (13th) of June of the year two thousand and fourteen (2014) she was instructed by her Inspector Sylvana Briffa to accompany Orience from a shelter home to where she used to live before this, in order to collect her items from his residence. She states that Orience was very scared, her attitude was not relaxed. She does not say *'petrified'* but *'not normal'*.

Alexia Rossi a psychologist with the JRS Jesuit Refugee Service testified on 13th of August 2014. Since this witness is an ex parte witness, the Court will not consider her opinions but will refer to what she was told by the complainant. She explained that she met Orience Kelin on 13th of June and conducted an assessment, she narrated that the complainant was insulted on numerous occasions. There was ill treatment and abuse both physical and verbal, *'She explained that there were numerous insults and also physical violence over very small matters if she for example wouldn't she was asked to explain how to cook a garlic pasta but did not explain the recipe correctly and so was threatened with a bread knife.'* Asked who threatened her according to this recollection replied *'The male in the couple, Mr. Harish and there were a number of episodes of this kind, she wasn't given food, the*

kitchen was locked for example sometimes and she wasn't allowed to eat, she would try and take bread from somewhere to eat.' The ill treatment started about a month after her arrival. She narrated that *'She mentioned that she was hit numerous times on the face, was kicked on the head and made to kneel down and repeat things like I have no brain, I am an idiot and numerous things. She was told that and then she was made either kneel or stand and repeat those words and she was bitten if she did not repeat them. because these came out of numerous sessions and there was for example another episode where she cooked food that was too salty for example and then was made to eat salt .. and it was a constant, she seemed to never do things completely right so she was told that the food was cooked too salty today and not salty enough another day or was told she didn't wash the floor when she said that she would have washed the floor or she was for example told that she gave the wrong medication when she said she gave the right but she just gave it from the wrong day from those pill boxes when she picked it up from the wrong day and gave that, not exactly the wrong medication. that was mainly the verbal abuse and insults etc and the physical beatings and be threatened with a knife on three (3) occasions if I am not mistaken.'* She explained that *'She was very very scared and she said very little. Took a while in the session I mean but a while for her to explain what happened. She was very much made to believe that she was powerless in this situation and that if she said anything or she would either end up in jail herself or she would end up working in a different job like prostitute that was one of the reasons she says she never tried to leave because she said at lease she had somewhere to live I would not like to be ... as a prostitute but she was very scarred that the people she was working for had a lot of power and she was told that basically anything she said they would contradict and they had power to be able to get their opinions and what they are saying heard. They also mentioned that if she said something, if she did report exactly the abuse that had happened, they would say basically she stole thousands of pounds..'* She explains that *'when she spoke about being threatened with a knife and she mentioned it happened twice by Sir and once by Madam.'*

Josephine Sutter in the sitting dated 2nd December 2014 explained that she met

Orience Kelin at the Kingdom Hall of Jehova witnesses, Anita was in contact with Orience. She explained that *'As far as I remember it was in Sliema and then she rang the door bell and the employer came to the door and Anita asked for Orience and the employer said "no you cannot speak with her" and so we left and then we went home on the bus, Anita received a text message from Orience and she said to me "Oh this is Orience" and she read aloud to me what Orience wrote and she wrote that the employer treats her badly and she doesn't want her to have contact with any other people.'* She did not see the message but it was read aloud to her by Anita. She met her twice maybe three times. In cross examination asked *'So she was free to move around? She was free to leave the place?'* and replied *'Yes she came to the Kingdom Hall, yes.'* The Kingdom Hall is in Marsa on Sunday, they usually meet at ten o'clock in the morning till about twelve, about two hours.

The accused in his statement released on 28th of July 2014 and found at fol 52 et sequitur of the acts asked if he ever hit her replied *'One time she gave my dad the wrong medicine and I slapped her. I apologized to her after but it was then when I decided to look for somebody else.'* He denied that there were other occasions where he physically hit her. The accused in his testimony dated 9th January 2017) among other alleged facts testified regarding the tablets his father use to take and explained that *'in the beginning it was fine well I see that it was fine, one day in May this was when I came I was there, I had to be there in the afternoon it wasn't my day to fill the pill boxes but they happen to be within my eyesight and I noticed that the morning pills were seemed in surplus so I got this BF Breakfast pill box and I freaked out at that point, I noticed that yesterday's Breakfast pills are still there, today's breakfast pills are still there and we are at afternoon of today so yesterdays' is gone, today's gone as not taken or not given, the evening pills of yesterday are not there ok fine they were given, today's evening pills are already not there and we are not at evening yet so basically two of the doses of Aspirin in particular the most important medication for any heart patient were missed out on and the evening pills were mistimed or something.'* He explains that *'at that point in time it wasn't just the tablet thing, this mess up if I may use that word, of the tablet, there were more of other instances from the start of the year as well where I*

was having to deal with all her behaviour, various aspects of her behaviour which were frustrating my wife, my Dad'. He explained that 'My wife basically was pregnant at that point and her attitude and her behaviour was getting constantly negligent.' He states that 'when I found out about these tablets I went to her and I asked her, I was a bit scared, worried at that point, upset and angry at seeing this because she had been doing it for eleven months now, the same thing there was no reason for any confusion, I went to her and I asked her, what is this? The tablets are all haywire basically and she just looked very blur and ... so what I told her the tablets you know, what is going on here and she was again I don't know as if totally disinterested as not even her responsibility, at that point in time I couldn't control myself I just lost it and I slapped her, I slapped her and immediately as soon as I had slapped her I knew that it was wrong, I just went to another room, took stock of the situation, realised I ... knew there and then that was wrong, I went to her, to her room, I apologised to her as what you did was totally wrong there can be no explanation for it and don't even try but what I did as well, I had no right to slap you, I am sorry and I left her at that. I felt terrible, I still do, I am very embarrassed to say it I have never raised a hand on a man let alone a woman and I feel terrible about it.' Asked 'when she gave evidence, she said that there were other instances not just this instance, what have you to say about this?' replied 'I have no comment about it even there were some pictures that she exhibited, that was the one and the only time and I am shamed to say again when I slapped her, there were no other instances and the allegations are not true.' He explained that 'from August when my father was not happy with what she was preparing, in September I asked him if the things had improved and he said no, I in fact brought it to the attention of the Agency, I said if they speak to her maybe she will be able to understand them better so they did that she came to me with a story of her parents getting divorced hence her being distracted, sorry this is coming to your point, I am getting to the chronology of it, at that point I spoke to her as a friend, I told her your parents are getting divorced, I can understand you feel helpless as you are not there, you are so far away but they have had you, they have had your brother, they have had two kids, they have been together for so long, this is the only way they see forward then they must know what they are doing, I said it is not fair that you are just overcome by that and you shy away from your responsibility towards my

Dad, she apologised and said yes I realise that this is not right and I will focus and take care of him.' He testified about telephone bill which at first Oriance denied she had used his phone but then confirmed that she had called her friend and her cousin. He also made reference to when she put the pressure cooker at home on the biggest flame. He denies that he hit her apart from the slap. The accused explained that he had left documentation regarding a potential helper on a table before he went abroad for three weeks and that he believes that *'it was the catalyst of what was to unfold there after.'* He denied the allegations.

Daswani Jyoti Khemchand², the wife of the accused testified on the 11th of September 2017 regarding the medication tablets issue and stated that *'I told him well in the beginning I did notice a couple of times that it was happening and I told her how important they were and you know that he had to take them, and I did it at that time myself but I didn't tell you, but now that I'm pregnant, I can't keep an eye an check on these things, that's how it was. In fact at that time Harry was like so stressed by the whole thing you know, I was pregnant and you now it was like what is she doing all this mess about the tablets you know, he went to her room and he asked her like you know what's happening, what is this the whole thing with the tablets, I mean are you giving him the tables or not? And she just looked at him and said nothing and he asked her again what's happening with the tablets, are you giving it or are you not giving it, what's happening? And she said nothing at all and then he raised his hand on her.'* She explains that *'He slapped her. I went to the room, he was about it.'* She was not present when he slapped her, *'he went to her room and when Harry went to his room I went to his room, went to our room and I asked him what happened and he said I slapped her and he was miserable at that time, you know he was like she is going to kill dad, what's happening. But then he went and said sorry to her, he told her what you did was wrong, it's really wrong and what I did was also wrong and I'm sorry for it.'* She testified that *'This was when I was pregnant and this was after our holiday in*

² She was asked *'I understand that Nikita's name that you use in Malta?'* and replied *'Yes'* so the Court understands that this witness is known as Nikita.

December, I went to meet my family in India with my husband, we were away like three (3) weeks, Christmas time. When I came back in January I got to know that I was pregnant and this happened around that time I think in February or March, I'm not clear about the month.' She made reference to when the pressure cooker was kept on a large flame, she describes the behaviour of Orience as completely negligent and irresponsible. She says that Harry and his father were looking for somebody to replace her and Harry had left the copy of the passport and application form of the new helper on the dining table where she would serve dad's meals so she believes that she saw that and decided to complain. She says that she used them as a stepping stone as a means to continue living here and made these false allegations. Asked whether she was ever present or whether she knew of any incidents where Harry raised a hand on her she replied *'No never, if it would have happened Harry would have told me about it, Harry and me are very close, he would have definitely told me. In fact even when he slapped her he was feeling so horrible about it and before. I mean he loved his dad and we couldn't see that his tablets were given on time, I mean a bond I have seen before. So I mean it is difficult for him.'* In cross examination when asked whether Harry was angry about particular incidents where food was too salty she said that *'He told her that he needs a special diet and he need to take care of these things had been told by the doctors and of course like when it got to an extent when the mistakes kept repeating he would raise his voice and get angry.'* She denied that he made her eat salt. She denied that she witnessed any wrong doings towards Kelin apart from when he slapped her. Ask why they did not replace her, she stated *'She was pleading and she was saying let me stay, I won't make these mistakes...'*

Asked if there were any particular issues between her and Kelin, she replied *'No just what I mentioned, my father in law had a hearing aid so he would use us sometimes to communicate with her and obviously when mistakes, the same once are happening again and again you know I would sometimes raise my voice and tell her what's*

happening I mean telling the same thing.'

Even though this Court had abstained in its judgment of the 1st September 2020 from taking cognisance of the second (2nd) and third (3rd) grievances which regard the human trafficking charge, the Court is making reference to part of the third (3rd) grievance where the accused submitted that the two photos of alleged injuries are incompatible with her allegations, one photo he states shows a mark on her lip and another shows a mark on her neck. He submits that Kelin alleges that the applicant 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. He submits that these photos are dated 5th and 23rd October 2012 which therefore pre-date her stay in Malta with the Daswani family. He submits that 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.

Regarding this issue, this Court considers that a number of photos found on the CD marked as Dok MX1 at fol 240 presented by the Technical Court Expert Dr Steven Farrugia Sacco show a person whose face is not always completely visible with marks on her face, neck as well as blood on her lips. While thumbnails of the photos were created and modified on 21st of September 2014 following the appointment of the expert being the date when the data was extracted, details found in the report indicating the file name of these photos indicate that the photos were modified on the 5th of October 2012 and 23rd October 2012 and so refer to a period where the complainant was not in Malta and therefore not residing with the accused. In view of this, the Court has no other option but to discard such photos since it was not clarified as to whether those are the actual dates of when the photos were taken which would therefore contradict the testimony of the complainant or whether the date indicated in the report is

imprecise. The Technical Court Officer Dr Steven Farrugia Sacco in his report at fol 231 et sequitur, specifically at fol 234 concluded that '*The system which the undersigned used to retrieve the information resident on the phone was not that of a manual transcription but mainly a forensic computerized system which printed out the information tale quale.*' The report at fol 238 also provides that the date and time verification device time zone is 'MBL 07-09-2014 11:09' and the 'RTC' is '21-09-2014 19:00' This however does not mean that what the complainant testified is untrue.

The Court on the contrary deems the complainant as credible and finds no reason as to why it should discard what she alleges. In fact the Complainant in her testimony in video conference had testified that '*I recorded Harry's wife voice in my mobile then at the time she is very angry to me and she takes the mobile and broke it on the floor a few times and then take the ... and broke it and say after the mobile broken you cannot contact with anyone and we will find other things to make your life miserable...*' This is also corroborated with a message sent via Whatsapp extracted from the phone of the accused by expert Kurt Mahoney whereby in disk 2 marked as Doc KM found at fol 537 'Harry' on the thirteenth (30) April of the year two thousand and fourteen (2014) asked 'Nikita' whether she knew Orience's mobile number, Nikita stated '*I threw her phone yesterday in anger so dunno if it still works.. Here is the number : 79317516*' During the same conversation about receiving missed calls from that number Harry wrote to Nikita '*No need to shout about it*'.

The complainant in her testimony explains that she was called '*useless*', '*bitch*' and was uttered other insults by the accused and his wife. It is interesting to note that in disk 2 marked as Doc. KM part of the report of expert Kurt Mahoney it results that on twenty third (23rd) of October of the year two thousand and thirteen (2013) 'Nikita' sent a message to 'Harry' on Whatsapp stating '*This bitch*

must be talking to somebody', she later on wrote 'Har it was not Orience on the phone.. Dad was talking to Aunty...' Furthermore 'Nikita' in a message via Whatsapp message sent to 'Harry' on twentieth (20th) October of the year two thousand and thirteen (2013) stated that 'OK good I'm in the office with Orience', 'Nikita' also wrote 'I will call Manuelina before Diwali' and 'Harry' stated 'Just go again with Orience. If cleaning is what she's ok at doing then get d most out of her.' On twentieth (20th) of April of the year two thousand and fourteen (2014) 'Nikita' on whatsapp sent 'Harry' 'He's 84 but I'm also pregnant rite.. And we are managing with a dumb Indonesian here.. Who doesn't even take the house key !!!' It is interesting to note that in the same second disk found in the report of expert Ryan Mahoney it results that Harry on the eight (8th) of July of the year two thousand and fourteen (2014) sent a message on a 'BBM' app to a certain 'Kamal D' saying 'We sacked our indonesian maid so waiting new maids permit. So fucked there also'. 'Harry' on the same day wrote 'Psycho maid she was, gave my dad wrong Meds then asked for a raise! I told her here's yr tkt bitch, FO!' (Underlining added by the Court.) This confirms that the complainant is credible when she describes the way she was treated by the accused.

In a message dated the 7th of November 2013 found in the second disk with the report of expert Kurt Mahoney, sent by a contact with the name 'Alyce', she asked 'Hi Harry How is the payment for Orience ?' and 'Harry' replied on the same day stating 'Hi Alice, I am now back in Malta Will give you a call over the weekend. I think you should consider paying me! Orience is the most useless maid I have ever had! I won't go so far to say that you knew she was useless but the background check on her was not done properly. She knows Nothing! If it was easier for me to get a new permit for new maid then I would send her back but it is not easy. So now I am stuck! She either lied to you or something else happened here but she is beyond repair and understanding. I am fed up of repeating same basic things to her every day! It's like she is in a permanent daze.' In another message 'Harry' stated 'Alice, you can speak to her all you want but u did so 2 months ago also and it made no difference. She has also used my home phone between sept. 18 to sept. 22 to make 5 long distance calls direct from my home phone to

malaysia and singapore, each call more than 1 hour! Total bill Euro711!!!!!! This she did even though I gave her a special discount calling card which I paid for it myself. But card finished and so she was crazy or stupid enough to use direct call. And all behind my back! If I want I can get her locked up for theft! But I don't want all that. She is a psycho case. And the only person suffering here is ME and my family! Everything I say you can hear it from her. I have nothing to hide. Orience on d other hand has a lot to answer for. She is 100% dishonest and missing a screw in her head! So much for me using an agent who I know... where is Gary now? he is supposed to have checked her out yes? Did he have a cup of coffee with her??? Is that what you call checking her out! I will call you when I am free. Bye for now'. 'Nikita' on 20th of March 2014 sent a message on Whatsapp to 'Harry' stating 'Hi can you please send Orience's salary?' and Harry replied 'Ok this afternoon'. It however results that she never received a salary. The Court is referring to these findings in the mobile phone of the accused not as proof that fear was caused to the complainant that violence would be used against her or her property but solely in view the parts of chats referred to corroborate the way the complainant was treated and confirm that the complainant is in fact credible.

Even though the third grievance regarded the human trafficking charge, the Court also makes refers to where the appellant submitted that the credibility of witnesses could not be fully examined in terms of **article 637 of the Criminal Code** in view that the witnesses were not heard by the Honourable Magistrate who determined the case. The Court however considers that the complainant testified via video conference and so the Court did not only have a transcript of that testimony but could also test the demeanour of the witness while testifying, furthermore the parties including the defence itself who during the sitting dated 17th of June 2019 exempted the Court from re-hearing once again all the witnesses who had already been heard by the Court as otherwise presided before the case was assigned to that Court. Furthermore, the fact that the complainant had a two month reflection period to decide whether it wanted to initiate criminal proceedings against the accused does not in any manner impinge on her credibility. Other witnesses such as Dr Catherine Camilleri and Alexia Rossi also

narrated what the complainant told them. Their testimony narrating what the complainant told them is still admissible evidence. The accused also submitted that from the testimony of Alexia Rossi a psychologist, it resulted that the complainant use to refer to the applicant and his wife by their first names, Harry and Nikiti in view that she was not at all afraid of them and was treated with respect and as an equal. This Court disagrees with the appellant's interpretation, in fact the way the complainant was treated is palpable from the testimony of the complainant. Even though not all persons mentioned in the testimony of the complainant such as her friend Melinda and personnel from Home Maid Agency Pte Ltd did not testify, the Court considers that the testimony of the complainant alone is sufficient in proving beyond reasonable doubt that the accused caused fear that violence would be used against the person or property of the complainant.

Even though data extracted by expert **Ryan Mahoney** from the phone of the accused, gives the impression that the accused was trying to find a new carer while the complainant was still living with the accused, the Court does not agree that paperwork left on the table showing a potential carer³, was the reason as to why these allegations surfaced. Furthermore, Daswani Jyoti Khemchand, the wife of the accused on 11th September 2017 testified that *'it was around April I'm sure yes and I was at the swings with my daughter and I saw her 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 me and try to talk to me.'* The allegation that the complainant had approached the wife of the accused

³ Photos of this document was shown to the complainant in cross examination.

during the proceedings was not sufficiently proven on the basis of probability, the defence could have requested that the complainant be summoned to be questioned about this episode but failed to do so.

The accused himself admitted that he had once slapped the complainant on the face. This Court opines that the complainant is credible when she states that she was hit and insulted several times. The Court does not agree with the accused that he never intended to cause her fear that violence will be used against her. It is clear that the way the accused treated the complainant would have resulted in any reasonable person to fear that violence will be used against him as was in this case. The intention of the accused therefore also results. It was certainly not the manner in which the accused should have guided the complainant to carry out her duties in a proper manner. It also results that there was a course of conduct, in that the behaviour of the accused was not an isolated incident but was recurrent, so much so that the complainant decided to flee from the apartment. Furthermore it also results that the accused had in his possession the passport of the complainant and the complainant alleges that he had threatened that he would burn her passport. From the CD disks marked as Doc. KM found at fol 537 presented with the report of Court expert Ryan Mahoney it results that an *sms* dated ninth (9th) of June of the year two thousand and fourteen (2014) and therefore a day after the complainant left the residence, reads "*Orience come and collect your things and your passport.*" The complainant was subsequently accompanied by police officers to collect her belongings.

As stated by the First Court:

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

behaviour.

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

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

The Court agrees with this consideration as well as the fact that there exists a course of conduct in the behaviour of the accused. The Court therefore confirms guilt of this second charge.

Considers;

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 particular circumstances of this case. He submits that the only consideration made by the Court in favour of the applicant was that his conduct sheet was clean. He submits that he 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.

He also makes submissions regarding the offence of human trafficking, which the Court will disregard in view that it did not confirm guilt of the first charge. The First Court had found the accused guilty of the first and second charge and condemned the accused to a two (2) year term of imprisonment and a fine of five thousand euros (€5000). Since the Court is not confirming guilt of the offence of human trafficking but is confirming guilt of the charge relating to 'harassment', this Court will consider what punishment is suitable in this case. Article 251B of Chapter 9 of the Laws of Malta at the time of the offence provided for the punishment of three (3) months to six (6) months imprisonment or a multa of not less than four thousand, six hundred and eighty five euros and seventy five cents (€4,658.75) and not more than eleven thousand, six hundred and forty six euros and eighty seven cents (€11, 646.87) or both the multa and imprisonment.

The Court while considering that the accused has a clean conviction sheet, also considers that the offence the appellant was found guilty of is a serious offence, through which a person who travelled to Malta for work, was subjected to ill treatment on several occasions, ill treatment which would have caused fear to any reasonable person that violence will be used against her person or her property. The Court also indicated article 222(1)(a) and 202(h)(v) of Chapter 9 of the Laws of Malta in that fear was caused that violence will be used against any person mentioned in those subarticles, however the charge brought forward by the prosecution against the accused does not fall under those subtitles, so an increase in punishment under those two articles of the law does not apply. The Court feels that in the circumstances, the Court should impose a fine.

The Court therefore while confirming the €5,000 euro multa, revokes where the Court ordered a two (2) year imprisonment.

Regarding the appointment of experts in this case, the Court makes reference to the minute of the sitting dated 13th August 2014 where *'The Prosecution, parte civile and defense agree to request the Court to appoint an expert in order to examine a Blackberry phone and a Sony phone and to analyse their contents and in particular to extract and download the pictures found in the Blackberry allegedly taken by Orience Kelin as mentioned by her during her testimony as well as to produce colour copies of the same in the records of these proceedings.'*

The First Court during that sitting acceded to the request and appointed *'Dr. Steven Farrugia Sacco in order to analyze these two phones, to extract all data including pictures, text messages and call and text information from the mobile phone Sony if at all possible and to extract and download the pictures found in the Blackberry that were allegedly taken by Orience Kelin as mentioned by her during her testimony.'* The Court granted said expert all powers mentioned by Article 650(5) of the Criminal Code. The First Court in that sitting noted that Orience Kelin stated that the Blackberry phone was taken from the Daswani's residence and that it does not belong to her while the Sony mobile phone belongs to the witness.

It results that data was extracted from the Blackberry phone not the Sony since it was damaged. In view that the Court discarded the photos found in the CD presented with the report of Dr Steven Farrugia Sacco for the reasons explained earlier on in this judgment and in view that guilt is not being found on the basis of what the report provides, it will revoke where the First Court ordered the payment of expenses of expert Dr Steven Farrugia Sacco in terms of article 533 of Chapter 9 of the Laws of Malta.

Regarding the appointment of Kurt Mahoney, during the sitting dated 24th of February 2015 Inspector Sylvana Briffa exhibited Harish Daswani's mobile:

'The Prosecution officer requested the Court to appoint an expert in order for him to

carry out a detailed analysis in relation to the contents of the said mobile phone as well as to carry out an analysis in relation to the call profiles and text message profiles as well as Facebook messenger and what's app profile as well as his email address correspondence and contacts.

The defence while declaring that it finds no objection in principle to the request lodged by the Prosecuting Officer so much so that it was going to lodge this same request itself at the appropriate stage of the proceedings, declares at this stage that it finds exception to the fact that it has taken so long for the Prosecution to exhibit his document in the records of the proceedings given that in the mean time this document could have been both handled and mishandled. Further reserves its course of action and the raising of further exceptions at the appropriate stage of the proceedings in relation to this fact.

The Prosecuting Officer replied that the Prosecution did not exhibit this document earlier on on account of the fact that the same document formed part of a separate investigation that was carried out by the executive police in relation to the accused's wife who stands charged with a different offences before another Court. Further declared that in the mean time this mobile phone, since the conclusion of the investigation was not further used.

The Court in view of the above accedes to the request and appoints Kurt Mahoney in order to carry out the necessary analysis requested above and in order for him to report to the Court in writing his eventual findings.'

The First Court had during the sitting dated the 2nd of October 2015 ordered that the password of the mobile phone be forwarded to Kurt Mahoney in order for him to be able to proceed with his technical analysis forthwith. Whatsapp and text communications found on the phone of the accused and extracted by the expert as earlier on made reference to in this judgment confirm that the complainant was treated with disrespect and which therefore confirmed the credibility of the complainant. The Court will therefore confirm where it ordered payment of expenses of expert Ryan Mahoney in terms of article 533 of Chapter 9

of the Laws of Malta.

For these reasons, the Court is upholding the appeal limitedly and while confirming where the First Court found the accused guilty of the second (2nd) charge and not guilty of the third (3rd) and fourth (4th) charge, revokes where the Court found guilt of the first (1st) charge and therefore finds him not guilty of the first (1st) charge. The Court while confirming where it condemns the accused Harish Daswani to a fine of five thousand euros (€5000), revokes where it condemned the accused to two (2) years imprisonment.

The Court confirms the order of the Court to provide for the security of Oriance Kelin in terms of article 412C of Chapter 9 of the Laws of Malta where it provided for a Protection Order against the accused in favour of Oriance Kelin and this for a period of three (3) years which start running from the date of this judgment.

The Court confirms where the First Court with reference to the prosecution's request in terms of the provisions of Chapter 373 of the Laws of Malta and articles 23A and 23B of Chapter 9 of the Laws of Malta, did not deem that the prosecution managed to prove the amount representing the proceeds of the crimes of which the accused had been found guilty by virtue of the judgment of the First Court and where it therefore rejected this request.

The Court **revokes** where the First Court had in terms of Article 533 of Chapter 9 of the Laws of Malta ordered the appellant to pay to the Registrar, the sum of €730.00 representing costs incurred for the report 'Regarding two cellular smart phones' (document SFS1 at folio 231) presented by Dr Steven Farrugia Sacco.

It however confirms where the First Court ordered the accused to pay the Registrar the sum of €612.14 representing costs incurred for the report 'Computer

Forensic Expert's Report' of Ryan Mahoney (document KM1 at folio 524⁴).

The Court orders that a copy of this judgment is communicated to the Registrar of Courts.

(ft) Consuelo Scerri Herrera

Judge

TRUE COPY

Franklin Calleja

Deputy Registrar

⁴ Not fol 521 as indicated by the First Court in its judgment.