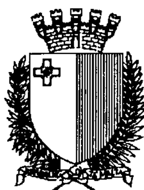

COURTS OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL INQUIRY

MAGISTRATE DR MARSE-ANN FARRUGIA LL.D.

Sitting held to-day Monday, 7th March 2022

The Police
(Inspector Clayton Camilleri)

vs

Slobodan Zivanovic

The Court,

1. Having seen the charges – as amended by a decree of the 7th February 2022 - brought against:

   Slobodan Zivanovic, father unknown, born on the 13th March 1980, in Knight's Crt, Fl 4, Triq Emanuele Pinto, San Pawl il-Bahar, holder of identity card number 123514(A)

   Charged with having on the 7th September 2019, at around 06:00hrs, at Emanuele Pinto Street, St. Paul's Bay:

   1. Without the intent to kill or put the life of Irakli Iosliani in manifest jeopardy, caused the mentioned grievous bodily harm in breach of Articles 214 and 216 of Chapter 9 of the Laws of Malta.

The Court was requested that if the accused is found guilty, it condemns Slobodan Zivanovic to the payment, wholly or in part, to the registrar of the costs incurred in connection with the employment in the proceedings of any expert or referee in terms of Article 533 of Chapter 9 of the Laws of Malta.

2. Having seen that the defendant pleaded not guilty to the charge preferred against him.

3. Having heard the witnesses brought forward by the Prosecution and having seen all the documents exhibited and all the records of the case.

4. Having seen that in the sitting of the 21st. February 2022, the following minute was registered by the defense:

   "Dr Andre Portelli for the defendant declares that there is not sufficient evidence for the trial of the defendant on indictment."

5. Having heard the submissions of the parties on whether there is sufficient evidence for the trial of the defendant on indictment

Considerations of this Court

6. In this case, the Court is carrying out its functions as a Court of Criminal Inquiry, as stipulated in Articles 389 *et seq.* of the Criminal Code. Its powers and functions as a Court of Criminal Inquiry are exhaustively prescribed in the relevant provisions of the Criminal Court. Its function is not that of deciding on the merits of the charges brought before it, but that of collecting and preserving the evidence and compiling the record which may eventually serve as the basis for the trial before the Criminal Court.

7. According to Article 390 of the Criminal Code, the Court must hear the charges and the report of the Police officer on oath, must examine, without oath the party accused and must hear the evidence in support of the charges read.

8. The subsequent provisions of the Code prescribe the manner in which the proceedings should be conducted until the conclusion of the inquiry, at which stage Article 401 triggers in.

9. On the conclusion of the inquiry, the Court must decide whether there are or not sufficient grounds for committing the accused for trial on indictment. In the first case, the Court must commit the accused for trial by the Criminal Court, and, in the second case, it must order his discharge.

10. Article 403 regulates the case when the Court is of the opinion that the offence is not one within the jurisdiction of the Criminal Court, but is one within the jurisdiction of the Court of Magistrates as Court of Criminal Judicature. In that case, the Court must proceed to give judgement as provided in Article 377.

11. In this case, the defense is submitting that there are not sufficient grounds for committing the defendant for trial on indictment, because the Prosecution did not manage to prove its case on a *prima facie* level – the level of proof required by law at this stage of the proceedings. This submission of the defense is being made for the following reasons:

    (i) The prosecution did not produce any independent eye-witnesses of the incident;

    (ii) The injured party did not recognize the defendant as the person who was aggressive towards him in the incident in question.

    (iii) The contents of a police report containing *inter alia* the version of events as stated by the defendant to the police is not admissible evidence at law.

12. On the other hand, the Prosecution is contesting this submission of the defense, and is submitting that from the evidence produced there are sufficient grounds to commit the defendant to trial on indictment.

13. From these submissions it is clear that the issue which has to be decided by this Court is what is the level of proof which must be brought forward by the Prosecution, so that this

Court, as a Court of Criminal Inquiry, can decide that there are sufficient grounds for committing the defendant to trial on indictment.

14. Article 401(2) of the Criminal Code uses the words *"sufficient grounds for committing the accused for trial on indictment."* In the first place, this phrase means that the level of proof which must be brought forward by the Prosecution must be higher than that of a reasonable suspicion that the defendant committed the offence with which he is being charged. A reasonable suspicion justifies an arrest and a search, but is not enough for this Court as a Court of Criminal Inquiry to decide that the defendant should be committed to trial. The level of proof which must be brought forward by the Prosecution must be higher than this level. On the other hand, this Court as a Court of Criminal Inquiry must not require proof beyond all reasonable doubt – that is the function of the jury or of the Court of Magistrates as a Court of Criminal Judicature.

15. In the decree **Il-Pulizija vs Dottor Lawrence Pullicino** delivered on the 17th March 1988, where an identical issue was raised, this Court, presided by a different magistrate,[1] analysed in detail the case-law on this subject, and reached the following conclusion:

"Mill-gurisprudenza citata jidher illi jezsisti cursus curiae fis-sens illi l-principju li ghandu jigi uzat huwa fuq il-livell ta' ezami ta' possibilita sa massimu ta' probabbilita, pero dejjem prima facie."

16. In the judgement **Il-Pulizija vs Joseph Lebrun** decided on the 9th February 2007, the Constitutional Court examined the provisions of law which regulate the inquiry, and stated as follows:

"Sinifikanti huwa l-fatt li, ghalkemm fl-istadju kontemplat fl-Artikolu 401(2) tal-Kodici Kriminali, il-Magistrat jiddeciedi biss fuq bazi ta' prima facie – komparabbli ma' decizjoni fil-kamp civili, li tittiehed kemm mill-Prim'Awla u kemm mill-Qorti tal-Appell ghal diversi finijiet, li hemm probabilis causa litiganti[2] - u minghajr ma l-istess Magistrat jaghmel valutazzjoni tal-provi biex jara lil min jemmen jew, f'kaz ta' zewg verzjonijiet opposti, liema verzsjoni ghandha tregi, fl-istruttorja il-Qorti hi obbligata li tigbor u

[1] *Per* Magistrate Godwin Muscat Azzopardi.
[2] *Ara Artikoli 904 u 919 tal-Kodici ta' Organizzazzjoni u Procedura Civili.*

tikkonserva wkoll il-provi mressqa mill-imputat jekk dan jaghzel li jressaq tali provi f'dana l-istadju. ... ...

Fid-dawl ta' dan li ghadu kif inghad, ghalhekk, meta l-Qorti Istruttorja tiddeciedi li hemm ragunijiet bizzejjed biex l-imputat jitqieghed taht att t'akkuza, galadarba d-decizjoni hija wahda fuq bazi prima facie u minghajr ma jittiehed kont tal-provi mressqa mid-difiza anke jekk dawn ikunu tressqu fl-istadju tal-istruttorja, ma jistghax jinghad li dik id-decizjoni hija "decisive for the determination of the criminal charge." Dik id-decizjoni la tidhol fil-meritu u anqas tista tincidi fuq il-meritu – dejjem s'intendi jekk il-gudikant ma jkunx esprima ruhu b'tali mod li jkun qal aktar minn dak li kien mehtieg li jghid. Huwa proprju ghalhekk li, fuq rinviju ghall-gudizzju maghmul mill-Avukat Generali skond l-Artikolu 370(3) jew 433(5) tal-Kodici Kriminali, l-istess Magistrat li jkun iddecieda li hemm ragunijiet bizzejjed biex l-imputat jitqieghed taht att t'akkuza jista' in segwitu jiddeciedi fil-meritu."

17. In the light of this case law, for the purpose of these proceedings, it is enough if on the conclusion of the inquiry, this Court is satisfied that the Prosecution has produced enough evidence which can legally and reasonably convince a judge/magistrate or a jury to find the defendant guilty. Even if the issue is a debatable one – that is the evidence can reasonably lead to a guilty verdict, but it can also lead to the opposite conclusion – there are still sufficient grounds to commit the defendant for trial on indictment. Even if the evidence brought forward by the Prosecution are contested, this Court must also decide that there are enough grounds to commit the defendant for trial on indictment, because it is not the function of this Court, as a Court of Inquiry, to decide in a definite manner the merits of the case, but simply to decide whether there are *"sufficient grounds"*.

18. Obviously, this does not mean that the evidence brought forward by the defendant should not be taken in consideration. If for example, the evidence presented by the defense completely neutralizes the evidence of the prosecution – where for instance is amply clear from the evidence taken as a whole that the Prosecution has charged the wrong person – then in that case there certainly will not be sufficient grounds to commit the defendant to trial on indictment.

19. In the second place, the phrase *““sufficient grounds for committing the accused for trial on indictment”* mean that the evidence produced by the Prosecution must point towards an offence which falls within the competence of the Criminal Court and not towards an offence which falls within the competence of the Court of Magistrates as a Court of Criminal Judicature. For example, in a case concerning a charge of bodily harm, as in the present case, there may be enough evidence that the defendant caused bodily harm, but there may be no evidence that the harm was a grievous one. In the second hypothesis, the Court must decide that there are no sufficient grounds to commit the defendant to trial on indictment, but this Court must convert itself into a Court of Criminal Judicature, and deal with the defendant for the minor offence (in this hypothesis slight bodily harm), in accordance with Article 403 of the Criminal Code.

20. Consequently, in order for this Court to decide whether there are sufficient grounds to commit the defendant to trial on indictment, when the inquiry is concluded, it is not necessary that all the evidence, or the best evidence have been presented by the Prosecution. One must not forget that Article 638(1) of the Criminal Code prescribes that *“(i)n general, care must be taken to produce the fullest and most satisfactory proof available ... ...”* This Article does not prescribe that the second best evidence is inadmissible. This Article is simply underlining the fact that caution must be exercised in view of the final decision on the merits which still has to be taken. This caution is addressed to both the Prosecution as well as to the defense, despite the difference in the level of proof which they need to satisfy.

21. In the light of the above consideration, this Court must decide if the evidence produced by the Prosecution till to-day – and this evidence must of course be admissible evidence – may (not necessarily will) lead a reasonable person to conclude that (1) the offence of grievous bodily harm has been committed and (2) that it was the defendant who committed this offence.

22. As regards the first conclusion, the injured party Irakli Ioseliani gave evidence about the violent aggression which he suffered in connection with an argument on a car which allegedly was not parked properly. He also describes the injuries which the driver of the car allegedly inflicted on him during this incident. There are is also the medical certificates issued from the Mosta Health Centre on the 7th September 2019, which

referred the injured party to Mater Dei Hospital, and later that same date a certificate from Mater Dei Hospital, after a CT scan was taken of the head of the injured party, which reached the conclusion that the injured party had suffered a grievous injury. The result of the CT Scan clearly states that the injured party had *"a fracture of the base of lateral pterygoid plate of the sphenoid bone on the L side"*.[3] A fracture of a bone is grievous *per durata* in terms of Article 216 of the Criminal Code.

23. As regards the second conclusion, various Police officers explained under oath how they reached the conclusion that on the day of the incident the vehicle FCL – 721 involved in this case, was being used by the defendant, and consequently that he was the alleged aggressor. After being informed of his right to legal assistance and the right to remain silent, the defendant gave his version of the events to PS 1300 Julian John Fenech, who incorporated this version in the police report. In this version the defendant admitted being on the site where the incident in question took place, that a person was complaining on the way he parked his car, and since he thought that this person was going to be aggressive towards him, he pushed him. There is no doubt that the evidence of these Police Officers, including PS 1300 Julian John Fenech and the police report itself constitute valid and admissible evidence for the purposes of these proceedings.

24. The defense submits that the contents of the report is hearsay evidence and has no probative value, and consequently it is inadmissible. Apart from the fact that under Maltese law hearsay evidence is not necessary inadmissible,[4] the Prosecution exhibits a copy of the police report in nearly every criminal case, and summons the Police officers concerned to confirm what is written in the report, as evidence of what third parties, including the suspected person, actually told them *a tempo vergine*, and as evidence of their own personal involvement in the case. The Police report is not exhibited as evidence that what the third party said to the Police is true. In this case, PS 1300 Julian John Fenech confirmed on oath the contents of the report, including the part where he reproduced the version of events given to him by the defendant.

25. Secondly, a distinction has to be made between the admissibility of evidence and the probabative value of that evidence. Evidence is admissible even if it turns out that it has

[3] See fol. 24 and 26 of the proceedings.
[4] See Article 599 of the Code of Organization and Civil Procedure, made applicable to these proceedings by Article 645 of the Criminal Code.

no or little probabative value. In the (preliminary) judgement **Ir-Repubblika ta' Malta vs. Meinrad Calleja**[5] decided on the 14th December 1998, and subsequently confirmed on appeal,[6] the Criminal Court referred to the dicta of Lord Chief Justice Goddard in the case ***Kuruma, son of Kaniu v. The Queen***[7] where in page 203 it is stated as follows: *"... ... the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible, and the court is not concerned with how the evidence was obtained. While the proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordship's opinion it is plainly right in principle."*

26. In the case **Il-Pulizija vs David Sant** decided on the 15th October 2007, the Court of Criminal Appeal (in its inferior jurisdiction)[8] stated as follows, with reference to the dicta of Lord Chief Justice Goddard above quoted:

"Ghalkemm dan intqal fil-kuntest ta' allegazzjoni li l-prova kienet inkisbet b'mod illegali, il-principju jibqa' li t-test huwa dak tar-relevanza: jekk il-filmat jew ritratti jew registrazzjoni hu jew jista' jkun relevanti – jigifieri mhux manifestament irrelevanti – allura, fin-nuqqas ta' xi exclusionary rule of evidence dak id-dokument hu ammissibbli, salv dejjem kif inghad il-kwistjoni tal-valur probatorju. Mill-banda l-ohra, jekk ir-relevanza tad-dokument ma tkunx tista' tigi stabbilita mill-istess filmat jew ritratt jew registrazzjoni, allura, fin-nuqqas ta' xi xhud li jkun jista' jistabilixxi dik ir-rilevanza, il-Qorti tista' tasal ghall-konkluzzjoni li dak l-istess dokument hu manifestament irrelevanti u allura anqas biss tqisu." (emphasis made by that Court).

27. The defense submits that that part of the report which reproduces the version of events given by the defendant to the Police is not admissible at law because that statement was not made in front of a police inspector and signed by the accused. This is not legally correct. Article 658 of the Criminal Code provides as follows:

[5] Bill of Indictment number 20/97.
[6] On the 3rd May 2000.
[7] [1955] AC 197.
[8] *Per* Chief Justice Vincent De Gaetano.

"Any confession made by the person charged or accused, whether in writing, orally, by audiovisual means or by other means, may be received in evidence against or in favour of the person, as the case may be, who made it, provided it appears that such confession was made voluntarily, and not extorted or obtained by means of threats or intimidation, or of any promise or suggestion of favour"

28. The defense is not contesting that the statement was made voluntarily and that prior to releasing his statement, the defendant was informed about his right to legal assistance, which he waived,[9] and informed about his right to remain silent.[10] The defense is contesting the probatory value of this part of the report.

29. There is no doubt that the police report and the evidence of the Police Officers is relevant to these proceedings, and in the absence of an exclusionary rule of evidence it is admissible, without prejudice, as already stated, to its probatory value.

30. In view of the above considerations, the Prosecution has proved on a *prima facie* basis that there is a link between the grievous bodily harm and the defendant.

31. For the reasons explained above, this Court cannot enter into the merits of the charge and examine it in the light of the evidence produced – including the fact that there are no eye-witnesses, the fact that the injured party did not recognize the defendant and the probative value of the statement of the defendant as reproduced in the police report – because if it were to do so, it would be acting beyond its functions as a Court of Criminal Inquiry.

Conclusion

32. For these reasons, and always within the limits of examination which this Court has declared it is going to do further up in this decree, on the conclusion of the inquiry into the evidence brought forward against the defendant, the Court declares that there are sufficient grounds to commit the defendant to trial on indictment, and consequently commits the defendant to trial under a bill of indictment before the Criminal Court.

[9] See fol. 23 of the proceedings.
[10] See fol. 30 of the proceedings.

33. The Court orders that the records of these proceedings together with all the material objects relating to the offence are sent to the Attorney General within the time-limit prescribed by law.

Magistrate

Doreen Pickard
Deputy Registrar