



Court of Magistrates (Malta) as a Court of Criminal Judicature

THE POLICE (INSPECTOR NICHOLAS VELLA) V. ALEXANDER JOHANNE GATT (ID. 123697M)

MAGISTRATE: DR. VICTOR G. AXIAK

25/10/2022

THE COURT,

Having seen the charges issued against the accused:

**Lill- Alexander Johanne Gatt.
ID. 123697M**

**Bin Simon James Joseph u Tania Tabone nec Viljoen.. Imwield. Pieta.06/03/1997.
Toqghod ; 1 Triq Tumas Fenech, Birkirkara.**

**BILLI int akkuzat talli fis 7 ta`Dicembru 2021 ghall habta ta 01.00Hrs fil-Coast Road, Naxxar, waqt li kont qed
issuq vettura Nru.FBQ-827**

- (1). Soqt l-imsemmija vettura b`manjiera bla kont.
- (2). Soqt l-imsemmija vettura b`manjiera traskurata.
- (3). Soqt l-imsemmija vettura minghajr ma kellek licenzja tas-sewqan.
- (4). Soqt l-imsemmija vettura minghajr ma kont kopert b`polza ta`assigurazzjoni dwar ir-riskji tat-terzi persuni.
- (5). Soqt jew ipprovajt issuq jew kellek kontroll ta`vettura Nru.FBQ-827 fit-triq jew f`post pubbliku meta ma kontx f`kundizzjoni li ssuq minhabba xorb jew drogi.
- (6). W`aktar talli inqast jew irrifjutajt li taghti kampjun tan-nifs meta kont mitlub li taghmel hekk skond il ligi.

Il-Prosekuzzjoni titlob li l-imsemmija persuna jigi skwalifikat mill licenzji kollha tieghu tas-sewqan ghal perjodu ta zmien ta mhux inqas minn sitt xhur.

Having heard the witnesses summoned before it and having considered the testimony that was produced, that is, the testimony of PS 1021 Christian Cauchi (affidavit) and Kenneth Pace (affidavit);

Having seen all the acts of the case;

Having heard final submissions made by the Prosecution and the Defence;

Is giving the following

Judgement

First three charges

From the affidavits of PS 1021 Christian Cauchi and Kenneth Pace (Transport Malta) it was proven beyond reasonable doubt that on the date, at the time and in the place indicated on the summons, the accused had been driving a vehicle with registration number FBQ-827 when he was not in possession of a driving license. More precisely the affidavit of Kenneth Pace (Transport Malta) proves that the accused had returned his driving license to Transport Malta on 9 December 2020, having earlier received from the said authority a letter informing him that his driving license had been revoked due to accumulation of penalty points. Up till 12 October 2022 the accused had not yet applied for a new driving license. It is therefore clear that on 7 December 2021 the accused was not in possession of a driving license.

In the judgement of the Court of Criminal Appeal given on 6th May 1997 in the names: **Il-Pulizija v. Alfred Mifsud** it was held that:

“Sewqan traskurat (negligent driving) hu kwalsiasi forma ta' sewqan li jiddipartixxi minn, jew li ma jilhaqx il-livell ta' sewqan mistenni minn sewwieq ragjonevoli, prudenti, kompetenti u ta' esperjenza. Bhala regola l-ksur ta' regolamenti tat-traffiku kif ukoll in-non-osservanza tad-disposizzjonijiet tal-Highway Code li jincidu fuq il-mod jew il-kwalita' ta' sewqan ta' dak li jkun, jammonta ukoll ghal sewqan traskurat...sewqan bla kont hu sewqan bi traskuragni kbira u tinkludi kazijiet fejn wiehed deliberament jiehu riskji fis-sewqan li m'ghandux jiehu minhabba l-probabilita ta' hsara li tista tirrizulta lil terzi ... sewqan perikoluz jirrekjedi li fil-kaz partikolari ssewqan kien ta' perikolu ghal terzi.”

Irrespective of the manner in which the accused was driving prior to the collision with the barrier, the Court therefore considers that the mere act of driving without a driving license on the part of the accused was in itself tantamount to negligent driving. The second and third charges are therefore proven. On the other hand, the first charge does not result.

Fourth charge

During the sitting held on 25 October 2022, counsel for the Defence submitted a true copy of a declaration issued by England Insurance Agency Ltd attesting to the fact that the accused was

insured by the said company under Policy no. P21361336 regarding the use of vehicle in question between 11th May 2019 and 23rd December 2021.

As has been held by this Court on several occasions, in line with several other court judgements on this matter (including **Police v. Emanuel Zarb** (App. Nr. 329:2010:MM, 26th March 2015), the legislator's intention behind Art. 3(1) of Chapter 104 of the Laws of Malta is to protect third parties and not to penalise drivers who may be in breach of an insurance policy. Given that a valid insurance policy covering the use of the vehicle for the period in question was in force, criminal liability cannot arise.

Fifth and sixth charges

The law (Article 355AU(1) of Chapter 9 of the Laws of Malta) makes it clear that the right of access to a lawyer **prior to giving a statement to the Police (and during the giving of such statement)** is competent both to accused persons and to suspects and applies irrespective of whether they are deprived of liberty or not. It is also clear that the accused was suspected of having committed the offence under Chapter 65 Art. 15A when he was requested to provide a sample for the breathalyser test and later on, when he was requested to go to the Naxxar Police Station. This right of access to a lawyer has been extended also to instances when the accused is asked to submit to a breathalyser test. Indeed our Courts have consistently held that the very first thing that the Police or Community Officers ought to do in such circumstances is to first inform the suspect of his right to obtain legal assistance and then proceed with asking the suspect whether he wishes or not to provide a sample for the purpose of the test.

In this particular case it results that the police offer (i) informed the accused that he was going to administer the breathalyser test, (ii) informed him that had the right to refuse it, but that in do so there would be legal repercussions, and subsequently (3) informed him of his right to consult a lawyer of his choice prior to performing the test. The accused wanted to consult the legal aid lawyer who was on duty on the day in question and for this reason the Police conveyed the accused to Naxxar Police Station. So far so good. However it then transpires that the Police could not reach the legal aid lawyer and when they asked the accused whether he wanted to approach another lawyer, the accused stated that since it was the middle of the night, it was not the appropriate time to reach his lawyer. Thereafter the accused refused to perform the breathalyser test.

The Court considers that at the point when the accused refused to consult another lawyer of his choice, the Police had no other option other than to consider this as a refusal on the accused's part to consult a lawyer prior to the attempted administration of the breathalyser test. According to Article 355AUA(6) of Chapter 9 of the Laws of Malta, when the accused refused legal assistance the Police should have recorded this fact in writing in the manner referred to in such article. This was not carried out. Since the waiver was not recorded in terms of law, it cannot be said that such waiver was given in an "*unequivocal manner*" and "*attended by the minimum safeguards commensurate to its importance*" (Paskal vs Ukraine – ECtHR 15 September 2011). Therefore the right of access of the accused to a lawyer prior to the attempted administration of the breathalyser test was not granted to him in accordance to law and therefore the subsequent refusal of the accused to submit to the test should not be considered admissible evidence against him. In these circumstances both the fifth and sixth charges have not been proven in terms of law.

Decision

For the abovementioned reasons the Court acquits the accused of the first, fourth, fifth and sixth charge as they do not result, and having seen the law (Chapter 65, Art. 15(1)(a)), finds him guilty of the second charge (driving in a negligent manner) and of the third charge (driving without a driving license) and fines him the amount of five hundred and fifty euro (€550). In addition to the fine, the Court disqualifies the offender from holding or obtaining a driving licence for a period of sixteen (16) days (Ch. 65, Art. 15(3)).

**V.G. Axiak
Magistrate**

**Y.M. Pace
Dep. Registrar**