COURT OF CRIMINAL APPEAL

Hon. Mr. Justice Dr. Neville Camilleri
B.A., M.A. (Fin. Serv.), LL.D., Dip. Trib. Eccles. Melit.

Appeal Number 438/2018/2

The Police

vs.

Michael Caruana Turner

Today 22nd. of May 2023

The Court,

Having seen the charges[1] brought against the appellant **Michael Caruana Turner**, holder of Identity Card Number 85898(M), charged in front of the Court of Magistrates (Malta) with having in these islands on the 6th. of July 2018, at about ten to four in the morning, in Ġorg Borġ Olivier Street, St. Julian's, and/or in the vicinity, driven vehicle registration no. OKW 356, make Subaru:

[1] *A fol*. 321 *et seq*..

1. through imprudence, carelessness, unskilfulness in his art or profession, or non-observance of regulations caused the death of Tim Scholten;

2. on the same date, time, place and circumstances through imprudence, carelessness, unskilfulness in his art or profession, or non-observance of regulations caused slight bodily harm on the persons of Thom Hubertina Jacobus Van Golde, Roy Leonardus Swanenberg, Ryan Knowles and Maximilianus Van Elten;

3. on the same date, time, place and circumstances through imprudence, carelessness, unskilfulness in his art or profession, or non-observance of regulations caused involuntary damages on vehicle registration no. OKW 356 make Subaru to the detriment of Nicholas Caruana Turner and/or other persons and/or other entities;

4. on the same date, time, place and circumstances through imprudence, carelessness, unskilfulness in his art or profession, or non-observance of regulations caused involuntary damages on benches, railing, electricity pole and other outdoor furniture to the detriment of the Director and Infrastructure Department, St. Julian's Local Council and/or other persons and/or other entities;

5. on the same date, time, place and circumstances driven vehicle registration no. OKW 356 make Subaru in: (a) a dangerous manner, (b) reckless manner, (c) negligent manner;

6. on the same date, time, place and circumstances driven or attempted to drive or was in charge of vehicle registration no. OKW 356 make Subaru on a road or other public place when he was unfit to drive through drink or drugs;

7. on the same date, time, place and circumstances driven, attempted to drive or was in charge of vehicle registration no. OKW 356 make Subaru on a road or other public place after

having consumed so much alcohol that the proportion of it in his breath, blood or urine exceeded the prescribed limit;

8. on the same date, time, place and circumstances after being involved in an accident involving personal injury to other persons or damage to any vehicle, animal or other property, as the driver of vehicle registration no. OKW 356 make Subaru, he did not stop, and if required did not give to the police officer, local warden or another person, who had reasonable grounds for so requiring, his name and address, the details of the vehicle, the details of the insurer of the vehicle;

9. on the same date, time, place and circumstances driven vehicle registration no. OKW 356 make Subaru in an excessive speed;

10. on the same date, time, place and circumstances driven vehicle registration no. OKW 356 make Subaru, on a road without having a valid driving licence, or drove said vehicle when said vehicle was unlicensed to be used on the road;

11. on the same date, time, place and circumstances driven vehicle registration no. OKW 356 make Subaru when there was not in force in relation to the user of the vehicle a policy of insurance in respect of third-party risks;

12. on the same date, time, place and circumstances altered, rearranged or defaced a vehicle registration mark on a motor vehicle or otherwise tampered with the registration plates of a motor vehicle.

The Prosecution requested the Court to disqualify the said person from holding or obtaining a driving licence for a period which the Court deemed appropriate.

Having seen the judgment delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 15th. of June 2021

wherein the Court, whilst abstaining from considering the third, fourth, tenth, eleventh and twelfth charges brought against the accused, after having seen Articles 225(1)(2) of Chapter 9 of the Laws of Malta, Articles 15(1)(a)(2), 15A(1)(2), 15B(1), 15H(1)(a)(2), 15I(a) and 55 of Chapter 65 of the Laws of Malta and Regulations 67(1) and 127 of Subsidiary Legislation 65.11 of the Laws of Malta, found the accused guilty of the first, second, fifth, sixth, seventh, eighth and ninth charges brought against him and condemned him to three (3) years imprisonment. The said Court ordered that the accused be disqualified from holding or obtaining a driving licence for a period of two (2) years, which period had to run from the day when the accused served his term of three (3) years imprisonment. In terms of Article 533 of Chapter 9 of the Laws of Malta, the First Court condemned the accused to pay the total sum of three thousand, three hundred and ninety eight Euros and thirty six cents (€3,398.36) representing costs in connection with the employment of experts. Since the Court abstained from considering the third and fourth charges against the accused, it also abstained from considering Article 532A of Chapter 9 of the Laws of Malta.

Having seen the appeal filed by the appellant on the 1st. of July 2021 (*a fol.* 613 *et seq.*) by which he requested this Court: "*to vary the judgment delivered by the Court of Magistrates as a Court of Criminal Judicature on the 15th. of June 2021 in the names above captioned in the sense that while it confirms that part of the judgment where the Court abstained from considering the 3rd., 4th., 10th., 11th. and 12th. charges brought against him, and found him guilty of the 1st., 2nd., 5th., and 6th. charges brought against him, it revokes and reverses that part of the judgment were exponent was found guilty of the 8th. and 9th. charges brought against him and/or varies the judgment in respect of the punishment imposed.*"

Having seen all the acts and documents

Having seen that this appeal had been assigned to this Court as currently presided by the Hon. Chief Justice Mark Chetcuti on the 9th. of January 2023.

Having seen that, during the sitting of the 9th. of June 2022 (*a fol.* 638) held in front of this Court as diversely presided, the appellant whilst holding firm his request with regards to the variation of the judgment in respect of the punishment meted out against him, withdrew his request with regards to the eight (8th.) and ninth (9th.) charge.

Having seen the updated conviction sheet of the appellant exhibited by the Prosecution as ordered by the Court.

Having seen the transcript of the oral submissions heard by this Court as diversely presided.

Having heard, during the sitting of the 25th. of April 2023, legal counsels declare that they had no further submissions to add to the submissions which were heard by this Court as diversely presided.

Considers

That the facts of this case are quite tragic in that on the night of the traffic accident which happened on the 6th. of July 2018 the appellant went to a bar in Paceville at around 1am where he drank beer and shared a tray of tequila shots. Following this the appellant decided to drive to his grandmother's house who lived in Balluta Bay. On his way whilst driving at a high speed the appellant lost control of the vehicle and ended on the pavement. Following the accident, the appellant escaped from the scene. In his statement (*a fol.* 29 *et seq.*) given to the Police, the appellant explained that he was in a state of confusion and shock. After some time, the appellant stated that he came back to his senses and decided to go back to see what happened. At that point he spoke to a police officer who told him to keep on moving however he did not inform the officer that he was the person who caused the accident. The appellant said that he wanted to speak to his father about the accident however his mobile was without credit so he decided to walk to his home. At this stage the Police stopped the appellant and took him in their custody. The

appellant also says that it was at this stage when he realised that someone had been hit.

That as a result of the traffic accident, the vehicle driven by the appellant ended up on the pavement damaging public property and on a more serious note injuring innocent persons and causing the death of a person.

Considers

That this Court notes that the appeal presented contains two grievances. The first grievance pertains to the eight (8th.) and ninth (9th.) charges whilst the second grievance relates to the punishment meted out by the First Court.

That this Court will abstain from taking any cognizance of the first grievance since during the sitting of the 9th. of June 2022 (*a fol.* 638) the appellant withdrew his grievance with regards to the eight (8th.) and ninth (9th.) charges. During the same sitting, the appellant held firm his demand for the variation of the judgment in respect to the punishment meted out against him. Hence this Court will proceed to make its considerations regarding the second grievance that is the one regarding the punishment meted out against him by the First Court.

That in his appeal the appellant complains that the First Court did not taken into consideration the findings of the Social Inquiry Report in particular the fact that bar this offence the appellant is no menace to society. In addition, the appellant raises the point that the First Court did not give any weight to the recommendations of the Prosecuting Officer or to the fact that he has a clean criminal record. The appellant also mentions the fact that according to him the First Court has overlooked the purpose of punishment and that not even the members of the family of the deceased have ever requested an effective prison term. In addition, the appellant complains that the First Court failed to take into consideration the fact that he reimbursed the damages caused and that he has shown remorse. Another complaint raised in the

appeal is that it is not clear how Article 17 of Chapter 9 of the Laws of Malta is applied since nowhere is there any reference to it in the judgment. In respect to the severity, the appellant also states that this is evident from the fact that the First Court barred him from holding a driving licence despite the fact that he could not drive from the moment he was granted bail given that this was a bail condition. The appellant also complains about the wording used by the First Court in the fourth paragraph found *a fol.* 609 where in his opinion this depicts a wrong approach by the First Court on the application of the concept of punishment. Finally, the appellant compares the *ratio* of the judgment delivered by the First Court to what modern theorist state. In this regards the appellant refers to the quotes made by the First Court stating that it did not take into consideration the whole debate of the House of Lords when quoting from the author Archibold. In particular the appellant quotes the part where it is stated in the debates that custody is not in the majority of cases the most appropriate penalty.

Considers

That this Court starts its considerations by referring to the final submissions made during the sitting of the 9th. of June 2022 in front of this Court as diversely presided (*a fol.* 639 *et seq.*) wherein the lawyer of the appellant stated that an agreement had been reached with the office of the Attorney General on the punishment to be inflicted. In particular, the appellant's lawyer stated that the punishment should be that of two (2) years imprisonment suspended for four (4) years. This Court however notes as well the reaction of the Prosecution who said that he could not reach an agreement. Despite this, from the transcript of the submissions it transpires that the Prosecution was not totally against what the defence was proposing.

That having explained the above, this Court points out that normally it would not alter the punishment meted by the First Court if such punishment is within the parameters of the law. In this respect this Court refers to a judgment delivered on the 20th. of

December 2022 in the names **Il-Pulizija vs. Wajdi Lazhir Benhamed** (Number 386/2022) wherein this Court as diversely presided stated the following:

> "10. Issa, għal dak li jirrigwarda appelli minn piena, huwa paċifiku li sabiex Qorti tal-Appell tibdel il-piena li tkun erogat l-ewwel Qorti, irid jirriżultalha li tali piena tkun żbaljata fil-prinċipju jew manifestament eċċessiva. [...]
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> 11. Mill-banda l-oħra din il-Qorti trid tagħmel l-evalwazzjoni tagħha dwar jekk il-Qorti tal-Maġistrati (Malta) applikatx piena li kienet manifestament eċċessiva meta wieħed jieħu kont ukoll tal-aspetti retributtivi u preventivi tas-sentenza emessa minnha."

That the appellant has been found guilty of not only causing the death of one person but also of injuring other persons. Hence, as also evident from the last part of the judgment, the First Court (after having seen Articles 225(1) and 225(2) of Chapter 9 of the Laws of Malta) found the appellant guilty of the first and second charges brought against him. It transpires that since the appellant injured also other persons, apart from causing the death of one person, the article applicable to determine the punishment that could be meted out by the First Court is Article 225(2) of Chapter 9 of the Laws of Malta. This sub-article establishes that the maximum penalty that the First Court could impose was that of ten (10) years imprisonment. Hence the punishment of three (3) years imprisonment meted out by the First Court falls within the parameters of what Article 225(2) of Chapter 9 of the Laws of Malta establishes.

That with regards to the complaints raised by the appellant regarding the elements which were allegedly missed by the First Court, the appellant refers to the following:

- his clean criminal record;

- the results of the Social Inquiry Report,
- his sense of remorse;
- the fact that he reimbursed the damages caused, and
- the application of Article 17 of Chapter 9 of the Laws of Malta.

That in the appealed judgment, the First Court stated the following (*a fol.* 609):

> "The Court will also be taking into account the fact that the accused has a clean conviction sheet, and that the fifth, sixth, seventh, eight and ninth charges brought against the accused are absorbed in the first and second charges brought against him. The Court will also consider the Social Inquiry Report pertinent to the accused drawn up by Probation Officer Joanna Farrugia."

That even from a cursory review of the paragraph quoted above, it is clear that the First Court did not fail to consider the aspects mentioned by the appellant when giving its punishment. Hence the appellant is not correct when he states that the First Court did not consider his clean conviction sheet or the Social Inquiry Report. Nor is the appellant correct in respect to the application of Article 17 of Chapter 9 of the Laws of Malta.

That with regards to the issue of the payment of the damages caused, this Court points out that given the gravity of the ensuing death of Tim Scholten this plays only a limited role when considering holistically the circumstances of the case. In particular this Court deems it appropriate to point out that no amount of damages will bring back to life Tim Scholten. That is the real tragedy of this case!

That regarding the issue of remorse, this Court notes that the words of the appellant have been quoted on page 10 of the judgment (*a fol.* 591) and his sense of remorse is reflected in the Social Inquiry Report which has been taken into consideration by the First Court. Hence it is the conviction of this Court that the appellant's statement pertaining to the sense of remorse is not correct. Nor is the appellant correct when he says that the First Court did not give weight to the recommendations of the Prosecution. In this respect, this Court notes that the following was stated in the appealed judgment (*a fol.* 609):

> "The fact that the Prosecution is not seeking an effective imprisonment term for the accused, too is not something which must bind the Court in its ultimate decision regarding punishment, particularly when, as already stated above, in this case negligence, recklessness and dangerous driving have been proven beyond reasonable doubt."

That it is the prerogative of the Magistrate/Judge delivering judgment to determine, on the basis of the proof presented, the guilt or otherwise of the accused, and the nature of the punishment to be meted. The suggestions made by the Prosecution may be taken into consideration but they do not bind in any way the Court in its decision.

That with regards to the punishment of imprisonment meted out by the First Court, this Court notes that in other judgments delivered by various Courts the following was stated:

- *"… il-pieni li kienu qed jingħataw f'ħafna każijiet t'omiċidju nvoluntarju kienu irreali u jagħtu wieħed x'jaħseb li l-ħajja ta' bniedem f'pajjiżna, hija rħisa w ir-reat in kwistjoni mhux xi ħaġa serja*". [**Il-Pulizija vs. Mark Galea** (Court of Criminal Appeal – 15th. of October 1987)];

- *"Il-piena preskritta mil-liġi għar-reat in kwistjoni hija l-priġunerija li ma teċċedix l-erba' snin jew il-multa. Din il-Qorti*

jidhrilha li n-nuqqas ta' prekawzjoni ovvja għal perikolu daqstant ovvju, jindika l-piena ta' priġunerija u mhux ta' multa". [**Il-Pulizija vs. Joseph Busuttil et** (Court of Criminal Appeal – 26th. of November 1992)];

- *"Fuq inċidenti bħal dawn din il-Qorti kif preseduta ġja kellha opportunita' tesprimi ruħha preċedentement* [*Vide* ***Il-Pulizija vs. Giovanni Conte*** *deċiża 2 ta' Marzu 2000 u* ***Il-Pulizija vs. Antoine Cassar*** *kif konfermata fil-Qorti tal-Appell nhar it-22 ta' Settembru 2009] fejn uriet il-preokkupazzjoni tagħha li paragunati ma' sentenzi f'każijiet simili li jingħataw f'pajjiżi ċivilizzati oħra, s-sentenzi ta' dawn il-Qrati huma pjuttost miti".* [**Il-Pulizija vs. Gordon Micallef** (Court of Criminal Appeal – 11th. of January 1994)].

That in the judgment delivered on the 1st. of August 2008 in the names **Il-Pulizija vs. Roderick Cauchi** (Number 48/2004), the Court of Magistrates (Gozo) as a Court of Criminal Judicature stated the following:

> "Illi f'dan il-kuntest, huwa għaqli analiżi tas-sentenza tal-Qorti tal-Appell Ingliża fl-ismijiet **R v. Boswell** [1984] 6 Cr. App R (s) 257, komposta minn ***Lord Lane CJ. Michael Davies*** u ***Kennedy JJ***. datata dsatax ta' Ġunju 1984 ***"The All England Law Reports"***, 1984, Vol. 3, pp. 353 – 361, fejn ġie ritenut, meta l-liġi Ngliża kienet għadha simili għal dik Maltija, li:
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> [...]
>
> Mitigating factors include:
>
> 1. The piece of reckless driving which might be described in the vernacular as a 'one off', a momentary reckless error of judgment [such as briefly dozing off at the wheel or failing to notice a pedestrian on a crossing];

2. A good driving record;

3. Good character;

4. A plea of guilty;

5. A show of genuine remorse or shock; and

6. Where the victim is a close friend or relative of the driver, the strong emotional effect of his death on the driver."

That this Court refers also to the judgment delivered on the 20th. of December 2022 in the names **Il-Pulizija vs. Clifford Gatt Baldacchino** (Number 243/2019) where this Court as diversely presided explained the following as regards punishment:

"12. [...] Dan peress li l-ġustifikazzjoni tal-imposizzjoni tal-piena fl-eżerċizzju tad-Dritt Penali modern hija pernjata fuq tliet prinċipji kardinali u tiffoka fuq tliet effetti prinċipali, jiġifieri l-effett:

(a) Retributtiv;
(b) Preventiv; u
(ċ) Riedukattiv jew rijabilitattiv tal-piena.

13. L-aspett retributtiv tal-piena huwa, skont il-ġurista Francesco Carnelutti, dak li jservi biex jirristabbilixxi moralment is-sitwazzjoni għal kif kienet qabel ma seħħet il-ħsara bil-kommissjoni tar-reat. Il-ħati jrid jagħmel tajjeb għall-azzjoni vjolattiva tad-dritt penali kommessa minnu u li tkun kisret il-paċi u trankwillita' soċjali.

14. L-aspett preventiv tal-piena huwa dak li jrid jassigura li l-piena tkun strument li bih, grazzi għal biża li s-sanzjoni li tkun tista' tingħata toħloq f'moħħ il-persuni, b'mod li dak li jkun jerġa jaħsibha darbtejn qabel ma jikkommetti reat. Fi kliem ieħor, minħabba l-biża li teħel

il-piena, persuna tiġi mġegħela tixtarr sew il-konsegwenzi tegħmilha **qabel** ma twettaq l-att kriminuż.

15. L-effett preventiv għalhekk huwa dupliċi: wieħed ta' natura ġenerali u l-ieħor ta' natura speċjali. L-effett preventiv ġenerali huwa dak li bis-saħħa tal-liġi penali li tistabbilixxi l-piena, l-kollettivita' tiġi kemm jista' jkun miżmuma milli tikkommetti reati minħabba l-biża' li tinkorri fil-piena jekk tinstab ħatja. Aktar ma dik il-piena tiġi applikata fil-prattika, aktar dak l-effett preventiv ġenerali jkun laħaq il-mira tiegħu. L-aspett preventiv speċjali huwa dak li japplika għall-ħati innifsu, li jkun esperjenza fuqu personali l-effetti tal-piena, b'mod li darb'oħra jerġa' jaħsibha sew qabel ma jagħżel li jikser il-Liġi. Jekk il-kollettivita' titlef din il-biża' mill-piena minħabba li l-Liġi penali tibda titnaqqar fil-kwalita jew kwantita tal-piena jew inkella minħabba li l-pieni ma jiġux applikati bir-rigorosita' dovuta għall-fattispecie tal-każ, allura ma jkun hemm xejn li jġiegħel lill-kollettivita' milli tiddeżisti għax jekk tiddelinkwi mingħajr konsegwenza jew b'konsegwenza żgħira, isir konvenjenti għall-kollettivita' li tiddelinkwi. Dan iwassal għal proliferazzjoni ta' delinkwenza b'konsegwenzi nefasti għall-interessi tal-istess kollettivita'. Il-kollettivita' allura teħtieġ li l-piena jkollha aspett preventiv li jkun effettiv u effikaċi meħtieġ għall-eżistenza paċifika tal-istess kollettivita'. Altrimenti, il-kollass.

16. Finalment hemm l-aspett riedukattiv u rijabilitattiv tal-piena, li tikkonċentra mhux daqstant fuq l-aspett tal-ħtija speċifika tal-ħati u li għaliha tkun immirata l-azzjoni repressiva tal-piena, daqskemm fuq l-aspett ta' trattament terapewtiku individwali, immirat lejn ir-rijabilitazzjoni tal-ħati. Dan l-aspett rijabilitattiv huwa kruċjali għall-kollettivita' in kwantu jgħin lill-ħati jgħaddi minn proċess ta' riforma tiegħu innifsu biex jgħinu jinqata' mir-raġunijiet u l-kundizzjonijiet li jkunu

> wasluh biex jiddelinkwi, billi jagħraf iqum fuq saqajh, billi jibni ħajtu mill-ġdid u ma jibqax aktar ta' theddida għas-soċjeta' bħal meta kien fil-mument meta jkun iddelinkwa."

That when determining the punishment, the Court must balance out the nature and effect of the punishment. This is not an exact science but rather it is left to the wisdom of the individual Judge or Magistrate who has to balance out the interests of the society and the victim\s with that of the appellant.

That as regards the point raised by the appellant in respect to the approach of the First Court to the concept of punishment, this Court is of the opinion that the phrase *", the situation is different"* (*a fol.* 609) is nothing more than a typo and that what the First Court meant is very clear, nonetheless. In the opinion of this Court, the First Court meant that each case must be treated on its own merits depending on the circumstances of the case. The First Court continued that the evidence presented in this case clearly showed and proved beyond reasonable doubt that negligence, recklessness and dangerous driving on the part of the appellant caused the accident. Hence given the above, the appellant's argument referred to above will be discarded too.

That this Court can neither ignore nor tolerate the fact that the death of Tim Scholten was the direct result of the negligent conduct of the appellant. Every case has to be examined on its own and this does not mean that an effective jail term should be automatically imposed whenever a person is killed in a traffic accident. Yet, when extreme irresponsibility is proven, the situation is different. The Court notes that if the appellant in this case was more responsible, Tim Scholten would not have lost his life and the other persons would not have sustained any injuries.

That the punishment advocated by the lawyer of the appellant was that of two years imprisonment suspended for four years. As stated above, this Court does not usually interfere with the punishment meted out by the First Court if such punishment was

within the parameters established by law and not manifestly excessive. This Court notes that the mitigating factors applicable in favour of the appellant have been taken into consideration by the First Court. On the other hand, this Court points out that there were a number of aggravating circumstances in the way the appellant conducted himself after the accident, which circumstances were also taken into consideration by the First Court. Consequently, given the above, this Court finds no reason why it should reduce the punishment meted to two years imprisonment suspended for four (4) years.

That this Court also refers to the statements made by the appellant regarding the suspension of the driving license for a period of two years. This Court notes that according to the breathalyser test (*a fol*. 65) the appellant had an alcohol content which was far beyond the limit which is allowed in terms of the law. This Court deems that the period of the suspension of the licence meted out by the First Court is proportionate to the alcohol abuse. The mere fact that the bail conditions imposed prohibited the appellant from driving is, in the judgment of this Court, not a mitigating factor.

That this Court makes reference to the judgment delivered on the 27th. of October 2016 in the names **The Police vs. Justin West** (Number 323/2015) where this Court as diversely presided said the following:

> "[…] Consequently it is evident that the punishment tendered by the First Court of two years imprisonment was well within the parameters of the law, taking into consideration the fact that appellant was found guilty not only of the charge relating to involuntary homicide but also of no less than another seven offences including involuntary damage to property and other traffic offences including driving under the influence of alcohol. The Court, therefore, in such circumstances has a wide choice and discretion in the application of the punishment to be imposed, keeping in mind that that punishment has to reflect the particular circumstances of

> each case and to the degree of criminal liability pertinent to the person accused. [...]
>
> Now in this case the First Court outlined a serious of valid reasons which led it to impose a term of imprisonment of two years against the accused, which reasons this Court fully adheres to. Thus the grievances put forward by appellant were addressed by the First Court including his clean criminal record and the fact that there was no contributory negligence from the victims part in this case. [...] The Court feels that in this case [... the appellant] wilfully decided to drive his vehicle in a dangerous and reckless fashion thus turning it into a lethal weapon, as the First Court rightly pointed out, causing irreparable harm to innocent third parties."

That this Court is in agreement with has been stated above. As a consequence of all the above, this Court will reject the second grievance of the appellant and the judgment of the First Court will be confirmed in its entirety.

Decide

Consequently, for all the above-mentioned reasons, this Court rejects the appeal filed by the appellant and confirms the judgment delivered by the First Court in its entirety.

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Dr. Neville Camilleri
Hon. Mr. Justice

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Alexia Attard
Deputy Registrar