



**COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE**

**MAGISTRATE
DR RACHEL MONTEBELLO B.A. LL.D.**

Case Number: 671/2021

THE REPUBLIC OF MALTA

-Vs-

BJORN RAAKE

Today 29th May 2023

The Court,

Having seen the charges¹ brought against **BJORN RAAKE** of German nationality, aged 30, born in Wilhelm-Pieck-Stadt Guben, Germany who was charged in the name of the Republic of Malta with having, in these Islands, and/or at number 5, Alhambra Flats, Flat 2, Tower Road, Sliema during the night between the ninth (9th) day of October of the year two thousand and twenty one (2021) and the tenth (10th) day of October of the year two thousand and twenty one (2021):-

1. Engaged in non-consensual carnal connection, that is to say, vaginal or anal penetration of a sexual nature with any bodily part, and or, any object, or oral penetration with any sexual organ of the body of another person, namely on the person of Zohra Chkirbani;
2. Also for having in the same period, place and circumstances, committed any non-consensual act on the person of Zohra Chkirbani, which act, does not in itself constitute any of the crimes, either completed or attempted.

In the event of conviction, this Honourable Court is hereby being requested to order the accused to pay costs related to the appointment of experts in the proceedings.

The Court was requested so besides applying the punishment in accordance with the law, to also apply articles 383, 384 and 385 of the Criminal Code, Chapter 9 of the Laws of Malta in order to ensure the safety of the victim as well as the family members of the victim:

This Honorable Court was also requested to issue a protection order in terms of Article 412C of the Criminal Code, Chapter 9 of the Laws of Malta both during the period in which the case is being heard, as well as in the case of guilt together with any other punishment which the court may deem opportune;

Having heard the accused during the examination plead not guilty;

Having seen that the Attorney General by means of a note dated 22nd July 2022, sent the accused for trial before this Court in respect of the crimes prescribed under the following articles of law:-

- a. Articles 198(1) & 198(3) of the Criminal Code, Chapter 9 of the Laws of Malta;

- b. Article 207 of the Criminal Code, Chapter 9 of the Laws of Malta;
- c. Articles 382A, 383, 384, 385, 386, and 412C and 412D of the Criminal Code, Chapter 9 of the Laws of Malta; and
- d. Articles 17, 532A, 532B and 533 of the Criminal Code, Chapter 9 of the Laws of Malta;

Having heard the testimony of the witnesses summoned by the Prosecution;

Having heard the testimony of the person accused;

Having heard all the evidence;

Having seen all the documents exhibited in evidence;

Having seen the entire record of the proceedings;

Having seen the note of submissions of the Attorney General and the note of submissions filed by the defence;

Having seen that the cause was adjourned for today for judgement;

Having considered;

That the accused is charged with the crime of rape and the crime of engaging in any non-consensual sexual act on the person of Zohra Chkirbani, in terms of article 198 and article 207 respectively of the Criminal Code. In a general manner, the rape is being alleged to have been committed by the insertion of the accused's finger into the victim's anus, without her consent, during a sexual encounter that took place between

the parties during the evening between the 9th and 10th October 2021 when they met physically for the first time.

Rape is one of those crimes that falls within the range of offences that are defined by the concept of an offence against an individual's sexual modesty which has been traditionally defined as:

*“quella speciale sensibilita’ del genere umano che, secondo i popoli e le consuetudini dei tempi, spinge ad un materiale riserbo in rapporto ai pensieri ed agli atteggiamenti che richiamano, sia pure in forma allusiva, ai miseri della generazione ed alla vita dei sensi.”*¹

The Court must begin to point out as a general observation, that every person has a right to respect for his sexual honour, modesty and autonomy and no matter how promiscuous he or she may be, this does not mean that a person must be deemed not to be entitled to have or to have forfeited any sexual taboos, inhibitions, reservations or limitations for any reason whatsoever, be it moral, religious, personal or social, on or regarding his or her participation in sexual activities. On the contrary, even a person who has voluntarily participated in uninhibited sexual intercourse with another person, even a stranger, has a right to expect that when he or she expressly or implicitly resists in a manner that reasonably conveys to the other person a lack or withdrawal of consent, to the type or measure of sexual activity that he or she might want to be involved, the other person ceases or refrains from such activity.

Giuseppe Maggiori, in his *‘Diritto Penale’*², points out that:

“Anche la prostituta, come la donna piu’ onesta, ha un diritto alla continenza dei piaceri sessuali, e percio’ di rifiutare a chi vuol piegarla, nolente, alla sua lascivia.”

¹ Maricano, cited in *‘Diritto Penale’* (L. Delpino) Vol. II, Parte Speciale, page 566.

² Page 542, *Diritto Penale. Vol. II Parte Speciale, Delitti e Contravvenzioni.*

This is being pointed out because, as would result from an examination of the evidence, both parties exhibited, to differing degrees, a certain level of lax sexual behaviour when, as two complete strangers, they agreed to meet up with the specific intention of engaging in sexual intercourse. However although such behaviour might be morally objectionable in the mind of a sizeable portion of the population, naturally, the Court shall not judge the accused on the basis of any particular yardstick of moral and ethical standards but only by applying the law to the facts established by the evidence adduced in these proceedings. Moreover, as already observed, notwithstanding this seeming lack of sexual inhibition, it does not mean that either of the parties might not have had reservations about engaging in certain sexual activities which would constitute an offence to his or her sexual modesty. Of course, the issue is one of consent or otherwise which, as will be discussed at a later stage, is fundamental to the concept of sexual offences such as rape.

It is also pertinent to point out that it is undisputed that the sexual encounter between the parties which took place during the evening of the 9th October 2021 was both voluntary and also deliberately planned and that they voluntarily engaged in consensual sexual intercourse, both vaginal and oral. The dispute arises as to whether the anal penetration of the victim with the accused's finger, is sufficiently proven to have taken place and affirmatively, whether this took place with the victim's consent or against her will.

Therefore, the Court must first proceed to examine in detail the testimony of the alleged victim, Zohra Chkirbani and the testimony of the person accused, since it is clear that the determination of the charges brought against the accused rests on an evaluation of the credibility or otherwise of their respective versions regarding the sexual encounter during which Zohra Chkirbani claims to have been a victim of non-consensual anal penetration. This testimony must then be analysed and evaluated in the context of and with reference to the testimony of the other witnesses and other evidence adduced in the record.

Zohra Chkirbani testified³ that she had been in Malta since 5th October 2021 for a work experience, where she resided in Birkirkara with a group of seven girl friends. Upon her arrival in Malta she downloaded Tinder, a dating application, where she matched with the person accused, Bjorn Raake, a German national living in Malta who she identified as the person accused in these proceedings. On the same day, they started chatting on Tinder and then they exchanged numbers and continued their conversation on WhatsApp. She stated that they discussed when they could see each other and she explained to him that she felt like having some fun. The conversation then turned onto what sexual acts they preferred, what was sexually authorised between themselves, about what they wished to do and not to do. They also mentioned her taboo of sodomy and she asked him to be sweet with her body and reduce the sexual pressure that he was exerting on her in his messages. She explained that she told him this because he had sent her a very intense message regarding the sexual activities that he wanted to carry out. She also specified to him that she did not want sodomy and she also told him in a message that she did not want to see him after all because he was selfish and only spoke about himself. He then apologised and insisted on meeting.

She stated that they decided to meet that same day, 9th October 2021 and they met near the fountain in Valletta where they then took the ferry to Sliema: it was implicit that they were going to his place. Whilst on the ferry, Bjorn behaved very enterprisingly by putting his hand into her shorts and t-shirt, which she told him made her feel uncomfortable since this behaviour was too explicit for a public place and although he initially tried to insist, he then stopped. When they arrived at his flat, she found that he had left the music playing very loudly. They began to kiss in his office and then he showed her around the flat, and they continued to kiss and hug. Bjorn then went to the bathroom while she undressed herself and quickly sent a message to her friends telling them that she was in his flat.

³ 25th October 2021.

Zohra Chkirbani explained that when he emerged from the bathroom, Bjorn Raake wanted her to go on the egg-shaped arm chair in the sitting room, on all fours in order that he may have a good view of her bottom. He also told her to perform oral sex on him and she described that it was from this moment that he had a controlling attitude as if they were taking part in a play, where he told her what to do and how to do it. This attitude made her feel bad, and humiliated, as if she was working for him, to the extent that it was causing her anxiety⁴. However she never gave him the impression that she was anxious; on the contrary she gave him the impression that she was comfortable⁵. They also had sex on the armchair where she was still on all fours and he came from behind her. She described the vaginal intercourse as very intense as Bjorn seemed to be very excited by the idea that she was on all fours: “*in his excitement he was very intense and in his excitement, he was alone, he was exciting himself alone.*”⁶ She was not equally excited.

She testified that she felt she needed to have a shower so she invited Bjorn to take a shower with her, where after the shower he “*expressed orders*” telling her to go on her knees and give him oral sex. Although she accepted and complied, he wanted her to go further, more deeply in her throat but she told him she could not. He pushed twice but she felt as if she was going to vomit so she pushed him back so that she could open her mouth and stand up. Bjorn Raake then put on the television and asked whether he could set up a mirror in the bedroom and position it against the wardrobe in such a way that they could see themselves. They ate the food that they had ordered and then had sex again. He kept asking her whether they could have sexual intercourse without a condom, but she refused even when he suggested inserting only the tip.

He then asked her for anal penetration and continued to ask her “*so many times*” but each time she refused: “*I told him no I don’t want. I don’t like I don’t want.*”

⁴ Pages 33 and 69 of the record of the proceedings.

⁵ Page 71.

⁶ Page 35.

She explained that at that point, she was on all fours on the bed while he was penetrating her from behind, vaginally. He then decided to stop and masturbate and ejaculated on her bottom. She could see him in the mirror in front of her. She testified:-

*“We were on the bed. We were kissing each other and carassing each other. At one moment I don’t know why and how, he asked me again for an anal penetration **and I said no but he did it just the same with the finger. He penetrated me with his finger ... I pushed him and told him ‘what are you doing?’ this lasted three seconds but it was three seconds too much because I had passed the evening at repeating ‘no’. He told me ‘how could you tell that you don’t like it if you don’t try?’ I was shocked very much, I was humiliated**”⁷.*

She explained that when he had asked her for anal sex:-

“... it was always ‘come on let me do it I feel a lot, I cannot hold back, your bottom excited me so much’ ... he was telling me ‘I want I want I cannot hold back’. She explained that he used pressure, telling her that she must try.”⁸

She also testified that only about five seconds had passed between her refusal to have anal sex and feeling his finger inside her anus. *“I felt that the more I said ‘no’ the more he wanted, the more he asked”.*

She also explained that she knew it was his finger because she did not feel any pain but she felt a foreign body inside her anus: *“In my anus he put his finger. I don’t know whether it was 2 centimetres, 5 centimetres or a whole finger, but he put his finger.”*

She stopped him by pushing him and she also moved back, telling him *“what are you doing?”* to which he replied *“it’s not something important”*. She explained that she

⁷ Emphasis made by the Court.

⁸ Page 40.

was shocked and she understood that he did not respect her consent. She also started to be afraid but did not want to panic, and they proceeded to have sex in the spoon position. He also penetrated three fingers in her vagina to which she described as not very pleasurable so he stopped and asked her if he could lick her anus and, in his way of asking, she said that she could not manage to say no and she let him do it even though she told him that she did not like it⁹. He then decided to leave his penis inside and when she asked him why he did not withdraw, he replied that he liked it. When she asked him again, he said that it felt good and at the same time, he caressed her bottom. She felt afraid that she would fall asleep, since she had realised that he did not respect her lack of consent and was not interested in what she asked of him, so she told him not to do anything if she fell asleep. However, she knew he would not respect that, so she found an excuse and told him that she will not manage to sleep as she needed to be in her bed in order to sleep. She did not want to stay with him at his place and did not want him to make her stay or insist that she stays. However he did not insist.

Therefore, according to Zohra Chkirbani, between 22:45p.m. and 23:00 p.m., she decided to get dressed and leave the apartment. She kissed him goodbye, he accompanied her to the door and left; then sent him a message two hours later and told him that she arrived home. He replied telling her that she took some time to message and that she must have gone to make love to someone else. He also said that he was joking and that it was not his business. She then replied to him telling him that she was feeling bad and he had insisted too much that he wanted sodomy and that he wanted to have sexual intercourse without a condom, that she had to repeat to him eight or ten times that she doesn't like it, that she doesn't want it¹⁰. She said that Bjorn replied that she had too many "*mental blocks*" and that it is over now. This was the last message that they exchanged between them.

⁹ Page 41 and 42.

¹⁰ Page 48.

Zohra Chkirbani explained that from the time they took a shower till the end of their encounter, she felt a sense of exigency on the part of the accused, as if she had to answer his needs. She had even wanted to remove her glasses but he told her to keep them on and she understood that this corresponded to some kind of fantasy that he had - he had said: "*it was prettier for love, the glasses*".

When she arrived at her place, her friends were asleep but in the morning she spoke to them and explained how she was not feeling good about what had happened. She told them how the accused had penetrated her and they had a discussion. She explained that initially she did not intend to make a report as she was returning to France and wanted to make a "lighter" report once back in France. However on Tuesday, three days after the encounter, she decided to file a report at the Sliema Police Station, spoke to a Police inspector and also contacted a lawyer for advice and took the decision to proceed upon the report.

Under cross-examination, Zohra Chkirbani insisted that there were no misunderstandings between herself and the accused during their communication via Tinder and she agreed that they had been discussing having sexual intercourse right from the start of their communication. She also agreed that she was willing to meet the accused and go with him to Sliema and that initially she was at ease and did not stop the accused from having sexual relations with her. Although she then did not feel at ease with the accused, she confirmed that at no point did she tell him that she was anxious. However, in order to feel relaxed and more comfortable with the accused, at one point she asked him to take a nude photo of her with her phone. She also insisted that she did not discuss sexual intercourse without protection with the accused since she would never accept a vaginal relation without a condom with a stranger.

She testified¹¹: *“On the whole I cannot say that I was not satisfied. It was no longer a pleasure to be there. At first I felt like it. At the moment that he penetrated me, I wished to leave.”*

She explained that although she wished to leave she did not express this thought, as she did not know this man and did not know what reaction he might have if she decided to leave, she was shocked but remained calm. She also confirmed that this was the first time that she put herself in such a situation where she was with a stranger and wanted to leave. She did not agree that the accused asked her if she was fine with each sexual action he took: she explained that while he did ask her, this was done with a certain pressure and when she had said she did not like certain things, his attitude was that since she had never tried, she should therefore try it out. Which is why she then told him ‘no’ categorically. She confirmed that she performed oral sex on the accused in the bathroom, in the shower, at the beginning but did not recall that this occurred prior to her leaving the apartment.

She recalled having told her friend Christelle while she was still exchanging messages with the accused, that he was strange because he would only speak about her bottom and about his excitement, describing her bottom as ‘*big juicy booty*’. She had pointed out to her friends where he lived and had also told them that they had decided to meet in Valletta: she wanted them to know for her own security.

Christelle Bodie testified that when Zohra, in the morning following the encounter, recounted that the accused had penetrated her anus with a finger, she was very annoyed, she had tears in her eyes.

Elodie Frade Dos Santos also testified that Zohra told her that she was a bit afraid of the accused before meeting him but even more during the meeting with him. She testified:- *“She was sad; we realised that she was hurt by what had happened. She*

¹¹ Page 61.

wept and she told us because she was weeping we realised how she felt, but then she told us too.”¹²

Ambre Villeneuve testified¹³ that when Zohra recounted the episode to her the next day, she was sad and hurt by what had happened, that is, the accused having penetrating her anally. She testified:

“She explained to us that she felt very bad about it and she wanted to leave this place, where they were, that is, his place- but she didn’t know how to go about it, she wished very much to leave she was afraid to leave immediately, so she did not leave right away.”¹⁴

The person accused, Bjorn Raake, chose to testify before the Court¹⁵. He stated that he met Zohra Chkirbani on the social media platform known as Tinder, where they started chatting before shifting their communication onto WhatsApp. He claimed that they were both very aware of their intentions because the reason that they wanted to meet was to have a sexual encounter and this was mutual. They agreed to meet in Valletta near the fountain and it felt natural right away when they spoke, they hugged each other and after a few minutes he proposed to go to his place as it was getting rather cold. They took the ferry to Sliema and went to his apartment where he stated that she took the initiative and grabbed him to go closer to her. At that point he led her to the living room and while he visited the bathroom, she had taken most of her clothes off and he found her waiting for him almost completely naked. He was a little surprised but pleased with her appearance. He claimed that she asked him to take a photo of her which he politely declined because he found it strange that she would ask him to take a photo of her when she was already there. Until the food that he had ordered arrived, she agreed immediately to engage in sexual intercourse on his armchair where she was in a doggy position and they had intercourse in that position.

¹² Page 196.

¹³ Testimony of the 31st January 2022.

¹⁴ Ambre Villeneuve, page 377 of the record of proceedings.

¹⁵ Testimony of the 26th January 2023.

He also asked her to perform oral sex. They then took a shower together where they washed each other and he asked her again whether she would perform oral sex, which Zohra Chkirbani appeared to have anticipated and immediately agreed to.

The person accused testified that both himself and Zohra felt comfortable with the situation and they exchanged compliments and also conversed while they ate their food on the bed. This made him wonder about the different impression he had formed of her from the WhatsApp messages they had exchanged previously, where she was rather difficult to communicate with and to arrange a meeting. He excluded that there was any language barrier as Zohra spoke English fluently and he also confirmed that they connected well. From there on they had a regular sexual encounter that went on for about an hour or two where they changed several positions and where Zohra also used dirty talk and also agreed to perform doggy-style vaginal sex. He stated that he was then exhausted, having been active himself for ninety percent of the encounter. They therefore lay down in a spoon position and he asked whether he could insert his fingers into her vagina and also lick her anus, to which she complied. However when he asked her soon after if she was enjoying it, she resisted and replied “*not very much*”. He then asked her if he could insert his penis into her vagina and lay side-by-side, because he was exhausted, and she agreed and they both relaxed. However two or three minutes later, Zohra got up, went to the toilet and asked if she can go home, even though earlier on in the evening they had agreed that she would stay overnight at his place. Before she left, he asked her whether she could do him a favour and perform oral sex upon him one final time, and he also told her that she does not have to if she does not really feel like. She did not say yes or no, she just went on her knees and performed oral sex for one minute only. He asked if she could continue but she refused and had already stood up; she told him that she would like him to crave her more. He unlocked the door, she gave him a kiss and told him that she’d see him soon. He confirmed that she messaged him at around 1am or 2am to tell him that she had arrived home and also to tell him that she had said no seven or eight times about something.

Having considered;

The crime of rape is defined in Article 198(1) of the Criminal Code as non-consensual carnal connection, that is to say, vaginal, anal or oral penetration with any sexual organ of the body of another person.

Indeed in the case at hand, the Prosecution maintains that the non-consensual carnal connection was committed not with the accused's sexual organ but with another bodily part, that is, his finger.

In the case at hand, the Court is faced with two diametrically opposed versions: Zohra Chkirbani's version where she insists that the accused requested her repeatedly during sexual intercourse to penetrate her anally, amongst other requests, which request she declined each and every time but nonetheless he proceeded to penetrate her anus with his finger; and the accused's version on the other hand where he denies having requested anal intercourse, insists that the subject was not brought up or discussed during their physical encounter and rejects the assertion that he inserted a finger into the victim's anal cavity.

It very often happens that a Court is confronted with conflicting versions and testimony. In this particular case, the divergence exists in respect of the material constitutive elements of the offence of rape, that is the sexual act complained of itself. There having been, as is expected in such circumstances, no other witnesses to the sexual encounter, the Court is faced with a situation where the guilt or otherwise of the person accused rests solely upon a matter of credibility between the version of the accused and the alleged victim.

It is well-established in case-law that the fact that witnesses might have given conflicting accounts of the facts does not necessarily mean that the accused must be acquitted: the Court may decide to assign credibility to one version and dismiss the others, naturally after having taken into account not only the manner in which the

persons concerned would have testified, but also the entire compendium of evidence including circumstantial evidence.

The Court of Criminal Appeal in its judgement **Il-Pulizija vs Joseph Thorne**¹⁶, held that not each and every inconsistency in the evidence must necessarily result in an acquittal because in such cases:

«... il-Qorti trid tevalwa l-provi skond il-kriterji enuncjati fl-Artikolu 637 tal-Kodici Kriminali w tasal għall-konkluzjoni dwar lil min trid temmen u f'hiex ser temmnu jew ma temmnux».

In the Criminal Appeal in the names **Il-Pulizija vs. Graham Charles Ducker**¹⁷, it was held that:-

“It is true that conflicting evidence ‘per se’ does not necessarily mean that whoever has to judge may not come to a conclusion of guilt. Whoever has to judge may, after consideration of all circumstances of the case, dismiss one version and accept as true the opposing one.”

In order to evaluate the credibility of witnesses in such cases, the provisions of Article 637 of the Criminal Code stipulate that the decision as to the credibility of the witness shall lie in the discretion of those who have to judge of the facts, regard being had to the demeanour, conduct, and character of the witness, to the probability, consistency, and other features of his statement, to the corroboration which may be forthcoming from other testimony, and to all the circumstances of the case. As far as witnesses of minors and other persons mentioned in Articles 633 and 636 of the Criminal Code including persons who might have an interest in the issue in respect of which their testimony is required or in the decision of the matter, the decision regarding credibility

¹⁶ Deciza 9.7.2003.

¹⁷ Deciza 19.5.1997.

is left in the hands of the judge of the facts taking account also of the aforementioned factors.

Moreover, in the matter of credibility, Article 638 of the Criminal Code makes it clear that while it is the duty of the Prosecution to take care to produce the fullest and most satisfactory proof available, and not to omit the production of any important witness, nevertheless, in all cases, **the testimony of one witness if believed by those who have to judge of the fact, shall be sufficient to constitute proof thereof, in as full and ample a manner as if the fact had been proved by two or more witnesses.** This principle has been reaffirmed repeatedly in local case-law.

It must also be said that the criminal law does not require that in order that a person is found guilty of a crime the judge of fact must be absolutely certain of his guilt and indeed, rarely does one encounter such certainty. In order to establish criminal guilt, the threshold that needs to be reached is conviction beyond a reasonable doubt on the basis of the evidence adduced by the Prosecution, where such evidence has not been neutralised by the defence on a balance of probabilities. This level of proof is in effect the highest threshold that the law envisages in our juridical system for the finding by a court of criminal justice of guilt for a criminal charge. Whether this threshold has been satisfied or otherwise requires that the Court in each particular case determines whether and to what degree a person would be stating the truth under oath, by applying the principles outlined in Article 637 of the Criminal Code, cited above.

« Jekk il-Qorti tqis li, applikati dawn il-principji, xhud ikun qieghed jixhed is-sewwa, allura tkun tista' toqghod fuq dak li jkun qed jghid jew fuq parti minn dak li jkun qed jghid skont il-każ. Jispetta dejjem lil min ikun irid jiġġudika l-fatti jiddeċiedi jekk, applikati dawn il-principji, jemminx xhud f'dak kollu li jkun qed jghid jew safejn jemmen minn dak li jkun qed jghid, u dan japplika wkoll meta x-xhud ikun xhud waħdieni tal-fatti allegati. Huwa biss meta jkun hemm id-dubju veru, bażat fuq ir-raguni, fuq is-sens komun u fuq il-buon sens, u fuq s'tharriġ dettaljat u b'attenzjoni, b'diligenza u b'mod imparzjali tal-provi u l-argumenti kollha li jkunu ġew imresqin

mill-Prosekuzzjoni u mid-Difiza li jwassal sabiex dak il-livell ta prova lil hinn minn kull dubju dettat mir-raġuni jkun jista' jingħad li ma ntlahaqx u li allura, bħala konsegwenza, l-akkużat ikun irid jiġi dikjarat mhux ħati talakkużi miġjuba kontrih. »¹⁸

Therefore, the fact in itself that, as already pointed out, the accused person testified as to a different version of events to that of the alleged victim and refutes the allegations made by the Prosecution, and the fact that there therefore exists contradictory evidence, does not necessarily mean that the accused must be acquitted. As pointed out, the Court must apply its discretion in order to weigh the evidence and evaluate the credibility of the respective witnesses and could therefore choose to lend credence to the Prosecution's witnesses, rather than to the testimony of the accused or the witnesses for the defence.

Having considered;

Applying these principles to the testimony of the alleged victim and the accused, the Court cannot but point out that Zohra Chkirbani's version was consistent and credible from beginning to end. In her testimony she recalled every detail of the sexual encounter and explained how she felt throughout. It is notable that she recalled having immediately felt uncomfortable with the accused's assertive demeanour, where he would request particular sexual positions and activities in a somewhat imposing manner, and his evident excitement, where she described him as "*very intense and in his excitement, he was alone, he was exciting himself alone*". She described the experience as almost theatrical but was clear that until he began to request anal penetration persistently, she participated voluntarily and willingly in the sexual intercourse both vaginal and oral. Her testimony regarding the accused's behaviour and actions at the time when he was pestering her for anal intercourse is unequivocal and was not contrasted or challenged effectively, or neutralised by conflicting evidence. On the contrary, the Court finds that Zohra Chkirbani's version of events, apart from being consistent and credible, is corroborated by the messages exchanged

¹⁸ **II-Pulizija vs Clifford Bugeja** – decided by the Court of Criminal Appeal on 5.12.2019.

with the accused in WhatsApp both before and after sexual encounter on the 9th October 2021.

It is uncontested that prior to their one and only encounter, the accused and Zohra Chkirbani communicated only via Tinder and Whatsapp messages, with a couple of audio messages in between from Zohra Chkirbani's end. Therefore, almost all that was said, planned and agreed between them would result from an examination of the Whatsapp messages which were extracted from Zohra Chkirbani's phone by the court-appointed expert.

The Court analysed the messages exchanged between 7th October and 9th October 2021 prior to the encounter, and observes that both the accused's and Zohra Chkirbani's differing expectations from the sexual encounter that was planned between them - mainly the accused's almost compulsive anticipation - are clear from the outset. Notably, Zohra had refused from the very start the accused's request to send him a full-body photo of herself including her *'juicy booty'*. She told him she is *'not comfortable with it.'* It is clear that the accused was very keen to have a sexual encounter with her and when he sensed that she was not ready to fling all caution to the wind and realised that they would not have their own room if they were to meet at her place, he asked: *"What do u mean? U don't wanna get fucked?"* to which she replied *"not like that ... date before, a drink maybe, little talk, flirting"*. She rejected outright - *"No way"* - his suggestion that she might jump into a cab and go to him that very evening, spontaneously.

It is also very evident from the amount and content of messages sent by the accused that he was very persistent and did not easily give up even when faced with her luke-warm attitude and more conservative and sensible approach to his advances. In fact, on the 9th October 2021 he asked again for a picture of her whole body, to which Zohra again replied *"No."* Then, when she told him in a message sent on the morning of 9th October 2021 after the accused sent her several messages throughout the night, *"I dont want to talk again with you"*, he did not give up but proceeded to ask her why

she should not want him to *“fill out your juicy pussy with my big cock”* to which she replied *“Because you always talking about what you want. You’re selfish”*. He also confessed on the 8th October 2021 that *“i am horny for you for a whiileee”*.

All this ties in perfectly with Zohra’s testimony that the accused was imposing and constantly wanting her to conform to his sexual needs and desires during their encounter, from oral sex in the shower, sexual intercourse while on all-fours and in front of a mirror, licking her anus, sexual intercourse without protection and anal sex, which latter two requests she flatly refused.

In fact while the accused was evidently intent on playing out his sexual fantasies during the sexual encounter, Zohra Chkirbani’s frame of mind is conveyed clearly by the following message that she sent to him the day that they met, prior to their encounter, that she wanted to have things done in a more conventional manner, by *“first meeting, talking and getting to know”* the accused before choosing what to do, although it is undisputed that she was always agreeable to the idea of having sexual relations with the accused: *“I’m looking for more (than) a sex friend. Somebody that I’m comfortable, have fun, go out, partying but nothing serious. In 3 weeks I’m gone.”* Also: *“We meet, talk, know each other and after we have the choice”*. When she made this clear to him, she then conceded to his insistence to send him a full-body photo by telling him: *“If we’re good and have fun you take a picture when we’re together.”*

The accused makes no effort to disguise his extreme ardour and zeal about the forthcoming sexual encounter with Zohra Chkirbani and in his messages prior to the encounter he focuses almost solely on this aspect of the encounter:

“But you still need to know, i am very very naughty boy” to which she replied: *“If your not violent and be gentleman it’s okay”*

Also: “cannot wait for you ... my juicy goddess ... but with you I can tell I could be permanently horny while sex, you will see it, I’m just curious if you can handle me and my size”.

“How about your drive? You feel like you could have some good long sex?”

These explicit sexual references evidently annoyed Zohra who asked him to stop and she again showed him that she wanted to “Talk laughs. Know each other. Eat some Japanese food. And will see...”

But again the accused slipped back into fantasising, prompting ZOHRA CHKIRBANI to state “I dont know why you’re like that. What is happening?” To which the accused replied that he feels very sexually attracted and charged and proceeded to explain how in intricate detail¹⁹.

The Court understands that this led to Zohra’s apprehension about how this encounter might turn out, and her emphasis that nothing is done which might scare her: this is evident from her messages: “But think of me my body” and “Be gentle with my body”.

At 00:51h upon her arrival back home after she decided to leave from the accused’s apartment, Zohra sent the following message to the accused; “I am home and I’m okay.” The accused replied that it “took a while” to which she replied: “Because I wasn’t go home directly. **I wasn’t good.**”²⁰ Asked by him to explain what she meant by that, she told him: “No you push me too hard”. At that point, as explained by Zohra during her testimony, the accused told her “too many mental blocks you have.” She then replied: “When someone **told you I don’t like this you have to listen** even if you think it’s the best thing ever. But I have to told you like 8 or 10 times don’t or I don’t like it.”²¹

¹⁹ See page 121 of the record of proceedings.

²⁰ Emphasis made by the Court.

²¹ Emphasis made by the Court.

The Court has no doubt that, as Zohra herself testified, **the reference in these messages that were exchanged immediately after the encounter, is to the accused's persistent and unrelenting requests to have anal intercourse.** She testified at length and in unequivocal terms that she steadfastly refused to concede to the accused's relentless requests to have anal intercourse and intercourse without contraceptive protection but notwithstanding her having expressly and categorically refused, explaining to him that she does not want and would not like to have that sort of intercourse, the accused proceeded to furtively insert a finger into her anus while they were engaging in sexual acts.

After having considered all the evidence and weighed Zohra Chkirbani's testimony with the contents and tone of the messages exchanged between the parties both prior to and after the encounter, the Court is not only satisfied that the accused did indeed penetrate Zohra's anus with his finger but is also wholly convinced that he did this after and despite persistent requests which were expressly turned down.

The Court came to this conclusion after having also considered the accused's version of events and other evidence.

As has already been pointed out, the accused flatly denied the assertion that he penetrated Zohra Chkirbani with his finger and thus refutes the very existence of the sexual act as a material element of the crime of rape. The Court, while already having established that Zohra Chkirbani's testimony is reliable and unswerving, regard being had also to her demeanour and other features of her statement as well as the corroboration provided by the exchange of messages and the testimony of her flat-mates, was struck by the lack of credibility and consistency that marked the accused's version in his testimony.

Asked by his lawyer whether he met Zohra Chkirbani again, the accused explained that he did not want to meet her again. He explained that this was due to the fact that he had not expected to have to be so physically active during their sexual encounter

and also because of the difference between her attitude in person and her attitude over the phone where in the latter case it was exhausting for him to communicate with her.

However in the Court's view, this declaration of the accused contrasts manifestly with his previous testimony that they both got on well, they felt comfortable with each other, he found her cute, and felt insatiable sexual hunger for her so much so that despite being very exhasuted after hours of sexual activity, he still wanted oral sex from her before she left. He also stated that before she left, she told him she'd see him soon.

Moreover, the accused fails to explain the reason why Zohra left abruptly at about 23:20h immediately after the eposide where he licked her anus and inserted his fingers into her vagina, when they had previously agreed that she would spent the night with him. The accused also fails to give an account of his constant requests to perform anal penetration and sexual intercourse without contraceptive protection and Zohra's repeated and steadfast refusals. Instead, he denied that he inserted his finger into Zohra's anus and stated that this did not happen at all. He confirmed that he was only close to that part of her body when he asked to lick her anus and she agreed, but he insisted that he did not insert anything inside at any point. **He also denied, upon being asked by the Court, that he asked her for anal sex or that she objected to anything at all.**

However, when asked later on by the Court what exactly was Zohra referring to when she messaged him after leaving his apartment: "*No you push me too hard ... When someone **told you I don't like this you have to listen** even if you think it's the best thing ever. But I have to told you like 8 or 10 times don't or I don't like it.*", at this point, he testified:

"So she is referring to the messages because I remember from the testimony is she explained (sic) that I asked about anal and while we met and all these things never happened. I mean it happened yes but not while we met. So it happened through

the messaging, everything else through the messaging because with ZOHRA CHKIRBANI everything for me was actually quite clear. ... She was referring to the messages because I was in messaging asking about anal and that I like to do it. But with Zohra, I experienced really quickly through the messaging ok she is really objecting a lot.”

This means that the accused admits that he asked about anal sex at some point and that Zohra objected, although he claims that this took place during the messages that they had exchanged. However the Court read through all of the messages exchanged between them and save for his evident fancy to buttocks and his requests for a picture of her buttocks, could not find any specific message where the accused asked whether he could perform anal sex when they meet – this means that Zohra Chkirbani’s version that the accused requested anal intercourse several times during their sexual encounter and it was during such sexual encounter that each time she objected, is by far more credible than the accused’s version.

Moreover, the Court cannot find any significance to Zohra’s message at 00:56h²² unless this message is placed in the context of the accused’s persistent requests for anal intercourse during their immediately-preceding encounter, which despite her having flatly refused, he carried out nonetheless with the insertion of his finger into her anus. There can be no other reasonable explanation for Zohra’s evident disappointment at this behaviour on the part of the accused, so much so that she felt she had to point it out again after having arrived home from his place from which she claims to have abruptly left.

When asked with reference to Zohra’s message, what she was referring to when she said “*I told you and you didn’t listen*”, the accused replied that she was referring to something that did not happen and he insisted that he was “*quite aware*” due to what was stated in their previous messages, that there would not be anal intercourse with

²² *When someone told you I don’t like this you have to listen even if you think it’s the best thing ever. But I have told you like 8 or 10 times don’t or I don’t like it.*

Zohra. He did admit however, in his testimony, that when he told her that she has *“too many mental blocks”* in the message he sent in reply to her *“You think it’s my fault?”*, he was referring to *“about not having anal and why not having anal”*. In the Court’s view, this confirms that indeed, contrary to the accused’s testimony, the issue of anal intercourse was effectively brought up and discussed during their encounter. In fact, asked by the Court why therefore the subject of anal intercourse was mentioned immediately after their encounter in a message if, according to the accused, it was not mentioned at all during their encounter but only in messages prior to their encounter, the accused replied: *“This I cannot tell 100% because when I met her of course we decided on vaginal sex but it doesn’t mean that I dont like anal anyway so I was still thinking I dont want to meet his person because we were not going to have anal really, so”*.²³

Moreover, it must be pointed out that when the accused was asked again by the Court later on during his testimony in cross-examination, whether therefore the issue of anal sex was discussed during their encounter and whether he did try to show Zohra during that same encounter that he wanted to have anal intercourse, he admitted:-

“Erm, I might have in a way asked for let’s say when she realised, ok maybe something maybe I would go towards something like this which was towards the end when I asked her to if I could lick around her butt...” (Court’s emphasis)

Above all, in his reply to her message *“you pushed me too hard”* which has already been established, *ex admissis*, as a reference to anal penetration, he stated: *“Yeah it happened”*²⁴.

The Court is also convinced that while the accused not only harbours a fetish for active anal peneration such that he admitted that he did not wish to meet Zohra again

²³ Page 546 of the record.

²⁴ Court’s emphasis.

due to her adamant refusal to participate in anal intercourse²⁵, he could not have been stating the truth when he said that he refused to meet her again for this very reason. As rightly pointed out by the Attorney General, if the accused insisted that he was “quite aware” prior to meeting up with Zohra Chkirbani that she would not consent to anal intercourse, it begs the question why he did agree to meet up with her for a sexual encounter in the first place. More so when it is evident from an examination of the messages exchanged between the parties that it was the accused himself who showed great eagerness and insistence on meeting with Zohra when according to his testimony, he was well aware of Zohra’s taboo on anal intercourse. In fact, it would result that Zohra Chkirbani had already conveyed to the accused in no uncertain terms an averseness towards any focus on her buttocks, even before their sexual encounter.

Consequently, there is little doubt left in the Court’s mind that Zohra’s messages sent to the accused after she abruptly left from his place, referred to none other than **the materialisation of the accused’s fetish for anal penetration notwithstanding and against her express and repeated negative responses to his requests**. Moreover, in the Court’s view, Zohra’s abrupt departure, which the accused also admitted to, is explained precisely by the surreptitious penetration of her anus with his finger, which penetration was not only non-consensual but performed notwithstanding and in violation of the victim’s express veto.

The accused also contradicted himself when he stated in his testimony that he decided not to meet up with Zohra again, a few days after their encounter and not immediately afterwards. It is evident from the exchange of messages that not only was there no further communication between them after the messages sent in the early hours of the

²⁵ This is also evident from the fact that he asked his victim more than once to send him a photo of her behind even prior to their physical encounter, at the stage when they were exchanging messages on WhatsApp, and from his description of the buttocks. This fixation on the part of the accused with the victim’s buttocks was then exhibited during their sexual encounter where the evidence shows that he required her to position herself on all-fours and penetrated her from behind and also persistently requested her to allow him to penetrate her anally and also to lick her anus. The latter request she conceded to however the Court is convinced, taking into account all the circumstances, that she submitted unwillingly as a means of compromise, having steadfastly refused actual anal penetration.

10th October 2021, but also that the accused himself in his last message that same night told Zohra: “*Hey no one to blame. Its finished:9*”

In the Court’s firm view, the accused’s attempts to explain what was meant by these messages are not in the least convincing and upon an evaluation of the entire context of the testimony of both parties, the Court finds that the accused’s version is not in the least probable and does nothing to diminish the credibility of Zohra Chkirbani’s testimony.

Having considered;

The crime of rape, as in force today after the promulgation of Act XIII of 2018, requires proof of two elements: the sexual act consisting of a carnal connection, or anal, vaginal or oral penetration with a part of a body not being a sexual organ, and the lack of consent of the victim. These two elements are cumulative and must be shown to subsist simultaneously during the commission of the sexual act, such that if one of these elements is lacking, then the offence cannot subsist. Naturally, as in all criminal offences, the intentional element that is, the *dolus* on the part of the perpetrator must also subsist independently of the element of lack of consent on the part of the victim. Of course, the nature of the lack of consent and whether this was effectively conveyed to the perpetrator requires an examination of all the particular circumstances of the case in order to establish guilt for the crime of rape.

The second proviso of Article 198(1) of the Criminal Code stipulates that penetration with any bodily part, therefore including the finger, shall be deemed to be complete by its commencement, and it shall not be necessary to prove any further acts.

In this regard, it has been held;-

“Ir-reat ta’ stupru jissussisti: “upon proof of penetration only: and the slightest penetration is sufficient” (Ibid).

Kif gie ben ritenut mill-Qorti ta' l-Appell Kriminali per l-Onor Imhalled Joseph Galea Debono, fl-ismijiet il-Pulizija Supt. Bartholomeo Mula et. vs. OMISSIS, deciza fl-4 ta' Settembru 2003:

“Biex ikun hemm ir-reat ta' stupru mhux mehtieg li jkun hemm penetrazzjoni shih u l-icken bidu ta' konnessjoni karnali hija sufficjenti biex jissussisti reat.”²⁶

As for the second material element of the crime of rape, that is, the non-consensual nature of the connection or penetration, Article 198(3) of the Criminal Code, as a result of the amendments introduced by Act XIII of 2018, appears to have shifted the evidential burden onto the accused person by creating a *juris tantum* presumption that the carnal connection complained of by the injured party was non-consensual. In fact, it is stipulated that *“the acts referred to in sub-article (1) shall be deemed to be non-consensual unless consent was given voluntarily as a result of the person’s free will, assessed in the context of the surrounding circumstances ...”*

Notwithstanding this apparent inversion of the evidential burden onto the accused in order to prove consent on a balance of probabilities, either by showing that the victim consented or that in the context of the surrounding circumstances it was reasonable for him to conclude that the victim consented to the sexual act, the Court is of the view that it is for the Prosecution not only to prove beyond a reasonable doubt that the carnal connection took place but also to bring some conclusive level of evidence that the act, in some manner, lacked the consent of the victim. The Court would be seriously concerned about the validity, from a constitutional perspective, of a legal provision which places entirely onto the accused the evidential burden of disproving one of the two constitutive elements of a crime that carries such an onerous punishment: such a strict requirement would undoubtedly create an excessive burden on and also possibly impinge upon the fundamental right on an accused person not to incriminate himself, of which the right to silence forms an integral part.

²⁶ **Ir-Repubblika ta' Malta vs. Mustafa Ali Larbed**, decided on 5.7.2002.

Moreover, if the presumption contained in Article 198(3) of the Criminal Code is to be interpreted as relieving the Prosecution of any onus of proof whatsoever of the non-consensual nature of the sexual act, it would mean that every sexual act involving a carnal connection as defined in Article 198(1) of the Criminal Code, is to be deemed to be performed without the passive subject's consent unless proved otherwise by the accused person.

The concept of lack of consent or volition to the penetration has replaced the element of violence that was required for the subsistence of the crime of rape prior to the amendments introduced by Act XIII of 2018. Lack of consent can be proved by applying the subjective test to establish whether the victim's actions or words convey consent or lack thereof, and even objectively from an examination of the circumstances surrounding the case in order to establish whether consent was forthcoming or otherwise.

This two-fold test is found in sub-article (3) of Article 198 of the Criminal Code, which provides that the acts referred to in *inter alia*, sub-article (1), applicable in this case, shall be deemed to be non-consensual unless consent was given voluntarily, as the result of the person's free will, assessed in the context of the surrounding circumstances and the state of that person at the time, taking into account that person's emotional and psychological state, amongst other considerations. This definition is intended to focus on the free will and autonomy of the passive subject of the crime, two essential ingredients of consent that the lack thereof forms one of the constitutive elements of the crime.

Blackstone, on this matter, makes the following observations:²⁷

“Consent covers a range of behaviour from whole-hearted enthusiastic agreement to reluctant acquiescence. There are circumstances where a jury will require assistance

²⁷ Blackstone's Criminal Practice, 2012 Ed.

with the distinction between reluctant but free exercise of choice, especially in the context of a long-term loving relationship, and unwilling submission due to fear of worse circumstances.

Moreover:

*“In R. v. Hysa, EWCA Crim 2056 ... Hallett LJ stated (at [31]) that simply because the complainant did not say ‘No’ at the moment of initial penetration was not fatal to the prosecution case. There is no requirement that absence of consent has to be demonstrated or communicated to the accused (Malone [1998] 2 Cr App R 447)”.*²⁸

Applying these considerations to the facts of the case as established from an examination of the evidence adduced, the Court is of the view that in addition to the victim’s determined and consistent testimony over more than two hours, the exchange of messages and the testimony of her friends, the Prosecution has proven beyond a reasonable doubt that the accused not only penetrated his victim’s anus with his finger, but it has also proved, without need to resort to the presumption established by Article 198(3) of the Criminal Code, that he did so without the victim’s consent.

The penetration is evidenced by the following part of Zohra Chkirbani’s testimony where she explained that when they were on the bed: *“He penetrated me with his finger ... I pushed him and told him ‘what are you doing?’ This lasted three seconds but it was three seconds too much because I had passed the evening at repeating ‘no’. He told me ‘how could you tell that you don’t like it if you don’t try?’ I was shocked very much, I was humiliated”.* She also testified that only about five seconds had passed between her refusal to have anal sex and feeling his finger inside her anus.

As far as the non-consensual nature of the penetration in this case, is concerned, it has been amply proven by the Prosecution on the basis of Zohra Chkirbani’s testimony – which as has already been established is reliable, consistent and

²⁸ Blackstone’s Criminal Practice, 2012 Ed., B3.15.

unambiguously genuine - that the accused asked her for anal penetration “so many times” and each time although she refused, he used pressure, telling her that she “must try” and “the more I said no the more he wanted, the more he asked ... it was always come on let me do it I feel a lot, I cannot hold back, your bottom excited me so much ... he was telling me I want I want I cannot hold back”, but above all from the fact that she testified to having “pushed him and told him ‘what are you doing?’ as soon as she felt his finger inside her anus.

In the judgement handed down by the Court of Criminal Appeal in the case **Il-Pulizija vs James Demanuele**, the Court made reference to the jurist Maino who, with regard to the element of lack of consent require for the crime of rape, stated:-

*“L’indagine caratteristica del delitto si riduce a questo, di determinare se la congiunzione carnale sia avvenuta contro la volonta` della vittima, e nonostante quella resistenza che secondo le sue forze fisiche e la sua energia morale ha potuto fare. Tutto il resto si reduce ad un apprezzamento delle circostanze del fatto che rientra nelle nozioni piu` ovvie della vita” (op. cit., para. 1463, pp. 178, 179).
Għalhekk ma huwiex il-każ ... li biex ikun hemm l-istupru jrid ikun hemm, da parti tal-vittma, xi resistenza sa l-ahhar nifs, jew li l-istess vittma tant tkun irrezistiet fizikament li tispicca mbengla minn rasha sa saqajha.”²⁹*

In addition, when Zohra Chkirbani’s testimony is assessed in the context of the corroborating messages exchanged between the parties, hardly any doubt is left in the Court’s mind that Zohra Chkirbani’s consent to anal penetration by any means whatsoever, was not only not given voluntarily or freely, but such consent was completely inexistent, such that **there could not have reasonably been any doubt in the accused’s mind, from an examination of all the surrounding circumstances of the case that he was forbidden from penetrating her anus in any manner. This is not a case of mistaken belief that there was consent on the pretext that the parties were engaging in consensual vaginal intercourse and caresses, but an absolute**

²⁹ This Court’s emphasis.

lack of consent made clear from the outset and also continuously until the moment of the surreptitious penetration, where the victim immediately manifested her resistance not only vocally, once again, but also physically, when she pushed him and exclaimed: “what are you doing?”

Nor is this a case of mere submission although, even had it been, for argument’s sake, such submission was undoubtedly lacking in consent and volition³⁰ and would have been procured solely as a result of the unrelenting pressure exerted by the accused to satisfy his fetish and perform anal intercourse. Blackstone makes the following observation:-

*“... To have the freedom to make a choice a person must be free from physical pressure, but it remains a matter of fact for a jury as to what degree of coercion has to be exercised upon a person’s mind before he or she is not agreeing by choice with the freedom to make that choice.”*³¹

Above all, the accused, in view of the line of defence adopted by him, where he insisted that no anal penetration occurred during the sexual encounter, failed in the most absolute manner to show that the penetration he was proven to have performed, was performed with the victim’s consent. None of the surrounding circumstances of the case tend to show that Zohra Chkirbani consented to anal penetration; rather, the Court is of the view that such circumstances actually exclude that intention, and as already established, the fact that she might have consented to have sexual intercourse with a person who she did not know, does not by any means neutralise the modesty of her sex.

There can be little or no doubt that Zohra Chkirbani refused not once but several times over, the accused’s requests for anal penetration: refusals that were not implied but

³⁰“There is a difference between consent and submission; every consent involves a submission, but it by no means follows that every submission involves consent”. Coleridge J.Day [9 C.& P. 722 at pg 724.” – cited in the judgement **II-Pulizija vs Omissis**, decided by this Court differently presided, 24.2.2012.

³¹ Blackstone’s Criminal Practice, 2012 Ed., B3.15.

very much express and categorical. However the accused, notwithstanding that he had to have understood and been fully aware that Zohra did not consent to anal penetration – as he also admitted to in his testimony - tenaciously but furtively inserted a finger into her anus, at which point her attitude to the entire encounter changed drastically so much so that while she tried to remain calm, she resolved to leave the accused's place.

In view of the facts established from an examination of the evidence, there can be little doubt that Zohra Chkirbani's express rejection of the accused' requests for anal penetration should, and effectively must, have alerted him to the fact that he did not have her consent to penetrate her anally even with his finger. In fact, the Court cannot but observe that the accused's indefatigable resolution to perform such penetration corresponds perfectly with his apparent obsession with her behind which he had repeatedly described as "*juicy booty*" "*wanna grab that big booty good*", as would result from his assiduous messages prior to their encounter, while on the other hand, Zohra's inhibitions and apprehensions during their encounter are a manifestation of her more conventional and reserved approach to this impending sexual encounter where she expressed her abhorrence of his sexually explicit messages and repeatedly asked that he respects her body and is gentle.

In the Court's view, neither the fact that Zohra Chkirbani was prepared and willing to have sexual intercourse with a person who she did not know and had never met in person, nor the fact that the parties had consensual vaginal intercourse and performed other sexual acts both before and following the non-consensual anal penetration, serves to neutralise the evidence that shows that Zohra Chkirbani did not consent to such anal penetration or lessen the Court's conviction as to Zohra Chkirbani's credibility.

The Court believes Zohra Chkirbani when she testified that she was shocked when she realised that the accused penetrated her anus with his finger and she began to feel very anxious. After all, as already pointed out, she had been steadfast in her refusal to consent to anal penetration and her insistence that the accused respects her body and is

gentle with her was evident from the outset. Moreover, the Court finds nothing untoward or unreasonable in her explanation that despite her feeling very perturbed and insecure following the non-consensual anal penetration, she tried to remain calm, act normally and resist the temptation to leave abruptly because she did not know how the accused, a stranger, would react. Contrary to the argument put forward by the defence, even the fact that she may have consented to sexual intercourse after the anal penetration, taken in this context, does not neutralise the abundant evidence of her lack of consent.

Moreover, Zohra's message to the accused immediately after arriving back home that she was feeling bad about the fact that he did not listen to her when she told him several times "*don't or I don't like it*", continues to show her evident disappointment and corroborates her testimony that indeed, the accused asked her several times to penetrate her anally and did not give up even though each time she refused. Her dismay and change of heart at this point and the consequent decision to leave from the accused's place and return home when the original plan was to stay over at his place, is also conveyed by the message that she sent on the group chat "*there is a change I am coming back home*"³² which had worried her friend Ambre Villanneau, who asked why and waited for her in vain to go home.

That message sent by Zohra Chkirbani at 23:23h is moreover in evident contrast to the message that she had sent on the same group chat to her friends earlier on that evening where at 20:49h she told them: "*I am at his flat and at the moment all is well (smiley icon)*" and "*I am spending the night here. I will come back at 8h I think. Good night girls*" at 22:42.³³

Having considered;

³² Page 310 of the record – translation Dok. ALX (WhatsApp chats from 'Group de la Classe Sam 2'.) Message at 23 :23h

³³ Page 312 – Dok. ALX.

The fact, as pointed out by the defence, that Zohra Chkirbani failed to report the rape immediately cannot possibly be considered to detract in any substantial manner from the reliability of her version.

It is amply proven and undisputed that Zohra Chkirbani discussed this unpleasant episode for her, which caused her great humiliation and disappointment, with her flat mates the very next morning and also reported at the Sliema Police Station the day after that. Inspector Neil Caruana testified³⁴ that Zohra Chkirbani was apprehensive about the fact that an inquiry would have to be opened and that an expert would have to examine her, and she was also uncertain as to whether she would want to be able to testify since she was leaving Malta in a short while. She therefore declined to file a formal report that day and instead she asked whether she could consult with a friend first, also having had doubts as to whether she wanted to go through the entire court procedure which was more cumbersome than that which would apply in France. It results that subsequently, Zohra Chkirbani ultimately decided to proceed with a formal Police report on the 14th October 2021.

Blackstone in this context, makes the following comments:-

*“The fact that the trauma of rape can cause feelings of shame and guilt which might inhibit a woman from making a complaint is sufficiently well known to justify a comment to that effect. The Court approved an example in general terms of an appropriate direction in such circumstances which covers the following points: (i) experience shows that people react differently to the trauma of a serious sexual assault, that there is no one classic response; (ii) **some may complain immediately whilst others feel shame and shock and not complain for some time; and (iii) a late complaint does not necessarily mean it is a false complaint.**”³⁵*

³⁴ 11th April 2022.

³⁵ Emphasis made by the Court.

In the circumstances of this case the Court does not agree that the fact that the formal complaint was made a few days after the event and not immediately, impacts on or detracts in any manner from the soundness of the evidence brought forward by the Prosecution of the elements of the crime of rape, and the Court's certitude of the veracity of the version recounted by Zohra Chkirbani.

Consequently, the person accused must be found guilty of the crime of rape in terms of article 198 of the Criminal Code upon applying the rules provided in subarticle (3) of the said article 198.

Having considered;

The person accused is also charged with having in the same period, place and circumstances, committed any non-consensual act of a sexual nature on the person of Zohra Chkirbani which act does not constitute of itself, any of the crimes either completed or attempted referred to in Sub-Title II of Title VII³⁶ the Criminal Code.

The Court, since it has established that the Prosecution has successfully proven the commission by the person accused of a non-consensual act of a sexual nature which constitutes the crime of rape in terms of article 198(1) of the Criminal Code, cannot also find guilt for the offence under article 207 of the Criminal Code since this crime can only subsist in the event that the non-consensual act of a sexual nature does not constitute any of the crimes mentioned in articles 198 to 206 of the Criminal Code.

Having considered;

According to Article 198(1) of the Criminal Code, as presently in force in virtue of Act LXIV of 2021, the crime of rape is punishable by imprisonment for a term of six to twelve years where the non-consensual carnal connection, that is to say, vaginal,

³⁶ Book First, Part II.

anal or oral penetration, is committed with any sexual organ of the body of another person.

Then, the first proviso to the said Article 198(1) provides for a lesser punishment in the event that the non-consensual vaginal, anal, or oral penetration is committed not with a sexual organ of the perpetrator, but with any other part of the body not mentioned in sub-article (1), on the body of another person. In such a case, the punishment on conviction shall be of imprisonment for a term from three (3) to nine (9) years³⁷.

This is the situation obtaining as a result of the enactment of Act LXIV of 2021³⁸ which, although having been promulgated **after** the alleged commission of rape by the person accused in this case, provides for a lesser punishment than that which was in force as prescribed by Article 198 of the Criminal Code³⁹ upon conviction for the crime of rape at the time of the alleged commission of the offence (9th October 2021)⁴⁰. The law was amended in order to make a distinction for the purposes of punishment for the offence of rape, between anal, vaginal or oral penetration with a **sexual organ** of the perpetrator and anal, vaginal or oral penetration with **any other part of the body** of the perpetrator.

Consequently, upon a finding of guilt on the part of the person accused in this case, where the non-consensual anal penetration was committed with his finger, not with a sexual organ of his body, the Court deems that he must benefit from the lesser punishment applicable at the time of conviction, that is, imprisonment for a term from

³⁷ The second proviso to sub-article (1) of Article 198 stipulates that penetration with any bodily part shall be deemed to be complete by its commencement, and it shall not be necessary to prove any further act.

³⁸ Article 5.

³⁹ Brought into effect by virtue of Act XIII of 2018.

⁴⁰ Article 198(1) as in force by virtue of Act XIII of 2021: *Whosoever shall engage in non-consensual carnal connection, that is to say, vaginal or **anal penetration of a sexual nature with any bodily part**, and, or, any object, or oral penetration with any sexual organ of the body of another person shall, on conviction, be liable to **imprisonment for a term from six to twelve years**.* (Emphasis made by the Court)

three to nine years, rather than the punishment as per the law that was in force at the time of the commission of the offence.

For all these reasons, the Court, while abstaining from taking cognisance of the second charge under article 207 of the Criminal Code and after having seen article 198(1)(3) of the Criminal Code, finds BJORN RAAKE guilty of the first charge that is the crime of non-consensual anal penetration with a part of his body not being any sexual organ, on the person of Zohra Chkirbani, and condemns him to imprisonment for a term of three (3) years.

For the purposes of article 382A of the Criminal Code, issues a Restraining Order against the offender for the protection of the security of Zohra Chkirbani for a period of three (3) years, which Order shall come into effect upon the execution of the punishment of imprisonment.

For the purposes of article 533 of the Criminal Code, condemns the offender to the payment unto the Registrar within six (6) months, of the sum of one thousand and five Euro and ninety seven cents (€1,005.97) by way of the costs incurred in connection with the employment in the proceedings of two experts⁴¹.

**DR. RACHEL MONTEBELLO
MAGISTRATE.**

⁴¹ Dr. Martin Bajada, Dok. MB1 and Dr. Katya Vassallo, Dok. KV1.