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

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

Case Number: 750/2021

THE REPUBLIC OF MALTA

-Vs-

MUHAMAD TOPIK HIDAYAT

Today 24th July 2023

The Court,

Having seen the charges brought against **HIDAYAT MUHAMAD TOPIK** of thirty (30) years of age, son of Muhamad Ali and Kokoy, born on the twenty-seventh (27th) of July of the year nineteen ninety one (1991) in Bohonggambir, Indonesia, and residing at 'Sendai', Flat 1, William Lassell Street, Fgura, Malta, holder of Maltese Residence Permit Number 0271773(A) charged with having on the twenty-eighth (28th) of November of the year two thousand and twenty-one (2021), at a time around three o'clock in the afternoon (15:00hrs) and/or in the preceding hour/s, in Fgura,

1. Maliciously, with intent to kill or to put the life of Abdul Rozak in manifest jeopardy, commenced the execution of said crime, where such crime was not completed in consequence of some accidental cause independent of his will;

2. Also for having on the same date, time, place and circumstances, caused harm to the body or health, being a grevious bodily harm, on the person of the same Abdul Rozak, with a cutting or pointed instrument and this when they were living in the same household;

3. Also for having, on the same date, time, place and circumstances uttered insults or threats not otherwise provided for in the Criminal Code against Abdul Rozak, and/or upon being provoked, carried his insult against Abdul Rozak beyond the limit warranted by the provocation;

The Court was requested, in case of the finding of guilt, apart from inflicting the punishments as established by law, also to order the forfeiture of the *corpus delicti*, of the instruments used or intended to be used in the commission of any crime, and of anything obtained by such crime, including the arms and/or tools that were used or could have been used during such crime;

The Court was also requested, for the purpose of providing for the safety of Abdul Rozak and/or other individuals, and/or for the keeping of the public peace or for the purpose of protecting the same Abdul Rozak and/or other individuals from harassment or other conduct which will cause a fear of violence issue a protection order against Muhamad Topik Hidayat, and this in terms of Article 412C of the Criminal Code;

The Court was also requested that, in the case of the finding of guilt, apart from applying the punishment in accordance with the Law, in pronouncing judgment or in any subsequent order, sentence the person to the payment, wholly or in part, to the registrar, of the costs incurred in connection with the employment in the proceedings of any expert or referee, and this as per Article 533 of Chapter 9 of the Laws of Malta;

Having heard the accused person plead not guilty to the charges;

Having seen that the Attorney General by means of a note dated 24th March 2023, sent the accused for trial before this Court for the offences under the following articles of law:-

(a) Articles 214, 215, 217, 218, 222(1)(a) and 202(h)(v) of the Criminal Code, Chapter 9 of the Laws of Malta;
(b) Article 339(1)(e) of the Criminal Code, Chapter 9 of the Laws of Malta;
(c) Articles 382A, 383, 384, 385, 386, 412C and 412D of the Criminal Code, Chapter 9 of the Laws of Malta; and
(d) Articles 17, 31, 532A, 532B and 533 of the Criminal Code, Chapter 9 of the Laws of Malta;

Having seen that at the hearing of the 29th August 2022, the defence expressly declared that it exempts the Prosecution from the need to have the proces-verbal of the inquiry relating to the in genere (766/2021) and the report Dok. GCB1 exhibited by PC 1285 Graham Cassar Bonaci, translated from the Maltese language to the English language;

Having seen that at the hearing of the 21st November 2022, the defence also exempted the Prosecution from the need to have the report filed by Dr. Mario Scerri (Dok. MS1) and the report filed by PC 1111 Braden Borg (Dok. BB1), confirmed on oath again before the Court;

Having also heard the Prosecution and the defence declare that the witnesses who already testified in these proceesings before the Court when differently presided, do not need to be summoned again to testify;

Having heard all the testimony and seen all the evidence adduced;

Having seen all the acts and the record of the proceedings;

Having heard the defence lawyer during the hearing of the 6th July 2023 declare that it has no evidence to bring either by way of cross-examination or by way of witnesses for the defence;

Having heard the final oral submissions of the Prosecution and the defence during the same hearing of the 6th July 2023;

Having seen that the case was appointed for today in order for judgement to be delivered;

Having considered;

That this case concerns an incident which took place on the 28th November 2021 in an apartment in Fgura where the person accused, Muhamad Topik Hidayat, allegedly caused grievous injuries to Abdul Rozak during an argument between the two.

Abdul Rozak, the alleged victim, testified[1] that on a Sunday around two or three weeks prior to his testimony before the Court on the 15th December 2021, at circa 2pm or 3pm, he was in the kitchen of the place in Fgura where he had been residing during the last month, and he was cooking and drinking. At some point he felt a blow to his head and he fell down on the floor. When he opened his eyes he felt a lot of blood come out and a headache and the last thing he recalls as he fell to the floor was that he saw "Tofik" whom he identified as the person accused, and told him that if he does not like him, then he should send him home. Rozak stated that he does not know how he sustained the injuries that he suffered but he testified that the day before this incident, he saw the knife indicated in photo 11[2], which is a knife that is used for

[1] 15th December 2021.
[2] Forming part of Dok. GC1.

cooking, in the kitchen drawer. He does not know what the person accused might have done to him on that occasion but he explained that at that time he had known Topik for eight months, they enjoyed a good relationship and had no problems with each other, although he felt that Topik did not like him and wanted him to return home. He spent five or six days in hospital where he underwent surgery in his head.

Kasan Ignac testified[3] that he lives in an apartment, Sendei, Flat 1, in Fgura together with Tanadhi, Redo, Kasudi, Roazak, Slamad, and Tofik the person accused. On a Sunday around three weeks prior to his testimony, in the afternoon, he saw Topik and Rozak fight and he tried to separate them. Although he did not know the reason why they ended up fighting, he had heard Topik ask Rozak why he was screaming and after that, they started to fight. Kanadi, Jen and Parno got involved in order to hold Topik while he held Rozak in order that they would not continue to fight. When they tried to hold Topik, Topik ran away to take the knife and he hit Rozak with the knife one time in the side of his forehead while he was in the kitchen. He saw that Rozak then tried to push Topik and he tried to intervene to separate them when he saw a large amount of blood, at which point Rozak went near the toilet and he then saw him in his bedroom together with Parno. He saw a lot of blood in Rozak's bedroom which he recognised in photos 7, 8 and 9 (Dok. GC1) and he also recognised the knife that the person accused used when he struck Rozak, as the knife shown in photo 11 (Dok. GC1).

Mukhamad Zein Fayshal Fahmy testified[4] that he had been living in Malta for the past nine months in Fgura when the incident in which Rozak and the accused were involved, occurred. He does not know the reason why they fought as he was on the couch next to the kitchen playing a game and was wearing a headset. He saw them arguing but did not hear what they were arguing about but when they started to fight each other he tried to separate them by holding Topik while Kasan and Kanadhi were also helping him "*because the power of Topik much bigger at this time*" and "*Topik*

[3] 15th December 2021.
[4] 15th December 2021.

more powerful than Rozak". Donori and Parno were holding Rozak. He stated that Topik hit Rozak with a knife about twice on the side of his head and he tried to calm Topik down and make the fight stop. Rozak went to the toilet to try and clean the blood with a blanket and there was a lot of blood both upstairs and downstairs in the apartment. The witness confirmed that the knife that appears in photo 11 (Dok. GC1) is the knife which he had previously seen in the kitchen and which was used by the person accused to hit Rozak. He stated that he took the knife in order to hide it in a safe place, next to the shoe rack, as he was afraid that there might be another fight. He also confirmed that the blood that appears in the photos he was shown during his testimony (Dok. GC1) is Rozak's blood because Rozak was the only person who was hit and denied that anyone, including Rozak, was holding a fork during the fight and using it against Topik.

Parno Suguino who stated that he lives in Fgura together with Rozak, Kasan, Tofik, Zen, Rambo and Kanadhi, testified[5] that on the Sunday of the incident, about two weeks prior, he was lying on his bed in the apartment and heard people fighting downstairs, where he saw Rozak and Topik fighting so he tried to separate them. He held Rozak while Zen and Panadhi were with Topik on the otherside, and Kasan was in the middle. At that time, he could see that Rozak already had blood seeping from both sides of his head and he tried to hold Rozak's head with a blanket to stop the bleeding[6]. Rozak said that he had a headache and he went with him upstairs to his room where Rozak lay down for a while and after that he sat down on the floor and also tried to wash the blood from his face in the bathroom. The witness also recognised the knife in photo 11 (Dok. GC1) as the knife that was used in the kitchen of the apartment but he did not see any knife being used in the fight.

Jahori Casudi testified[7] that he had been living for the past nine months in Fgura where an incident occurred on a Sunday around two weeks before, at 3 p.m. He stated that he was in his bedroom when he heard someone fight and the words "*enough,*

[5] 15th December 2021.
[6] The witness recognised this very blanket in photos 7 and 9 (Dok. GC1).
[7] 15th December 2021.

enough, enough". He emerged from his room and saw Topik holding the knife, which he recognised as the knife in photo 11 (Dok. GC1). Topike and Rozak were being separated by their friends: Kanadi, Kasan and Jen were holding Topik while Parno was holding Rozak, who was bleeding profusely from his both sides of his head, while Topik had a scratch on his upper arm. Witness stated that he tried to take the knife from Topik's hand but did not see Topik actually use the knife to hit anyone. After the fight he assisted Rozak to his room upstairs where he lay down on his bed but then sat on the floor until the ambulance arrived. He used the blanket that is shown in photos 7 and 9 (Dok. GC1) to clean the blood from the floor.

PC 1257 Conrad Ellul testified that the incident in connection with which the person accused is charged in these proceedings, took place at Sendei, Flat 1, Triq William Lasel, Fgura. He went on site where he saw the victim lying on the couch with a towel around his head and blood on his clothes. There was also blood on the walls and other traces of blood everywhere including upstairs in the apartment. He was informed that the knife that was used in the incident was in a blanket close to the front door, placed there by one of the residents of the apartment in order to eliminate the risk of danger. The witness saw this knife which resembled a bread knife, and saw that its blade was covered in blood[8].

He also testified that Muhamed Topik Hidayat, whom he recognised as the person accused, was still in the apartment and he informed him that he was under arrest. Although he also advised him of his right to consult with a lawyer, Muhamed Topik Hidayat chose to recount his version of events[9] and explained to him how he had been sleeping when he heard Rozak Abdul calling his name. He awoke and went near Rozak and asked him what happened but Rozak started saying "*bad words*" to him at which point he hit Rozak with his fists. Rozak grabbed a fork and he then grabbed a

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[8] See photo Dok. SZ1, taken by Inspector Sarah Zerafa, of the place where the knife was found on site.

[9] The person accused himself, during his interrogation on the 29th November 2021 in the presence of his lawyer Dr. Joseph Bonnici, confirmed that he gave this version to the Police on site after he had been handed a letter of rights which was read out and explained to him, and after he was informed that he was under arrest and of the reason of such arrest – see page 107 of the record of proceedings.

knife. Rozak first hit him with the fork on his right arm and then he hit him with the knife. He then charged at him with a chair but his friends separated them[10].

In the statement released by the person accused, Muhamad Topik Hidayat, during his interrogation on the 29th November 2021 where he was assisted by an interpreter and by a lawyer and was also afforded all his legal rights, he stated that he was sleeping when he heard the victim calling his name, saying bad things about him and pointing at him. He therefore tried to push him back and they started fighting. Rozak was the first to punch him in his head and then he punched him back in the face. Rozak then got up, took a fork, moved towards him and hit him with it, at which point he grabbed the knife which was very close by within his reach, as he became emotional and wanted to pay him back.[11] He therefore "*punched*" Rozak in the head with the knife at least one time that he can remember, and then his friend Gege who was sitting on the sofa near the television, came to try and separate them. When his other friends heard the noise they also came from their rooms in order to keep them from fighting. The accused person explained that Rozak did not scare him when he took the fork and was trying to hit him and hurt him, because he knew that he was drunk and emotional. He then stated that he hit Rozak with the knife in order to defend himself as Rozak was trying repeatedly to hit him with the fork and calling him and his family bad things "*you are a dog, you are pig*" as well as a lot of nonsense since he was drunk. He also stated that after his friend Gege had taken the knife from him and while he was holding him, Rozak attacked him again with a chair after having dropped the fork to the floor. He concluded his statement by saying that he wished for Rozak to get better.

The accused chose not to testify before the Court in these proceedings.

Having considered;

[10] See also testimony of PC9, Aaron Cini, 24th January 2022.

[11] See page 116 of the record – statement of Mohamad Topik Hidayat.

The Court begins by pointing out that although the person accused was originally charged with the attempted wilful homicide of Abdul Rozak, that is, with having "*maliciously, with intent to kill or put the life of Abdul Rozak in manifest jeopardy, commenced the execution of the said crime which was not completed in consequence of some accidental cause independent of his will*"[12], the Attorney General did not ultimately send the accused for trial before this Court for the crime of attempted wilful homicide under articles 41 and 211 of the Criminal Code. Instead, the Attorney General in her note dated 24th March 2023, which was filed in accordance with and for the purposes of article 370(3)(a) of the Criminal Code, sent the accused for trial for the crime of voluntary grievous bodily harm in terms of articles 216 and 218 of the Criminal Code, committed with one of the means mentioned in article 217 of the Criminal Code.

Having considered;

Abdul Rozak - the alleged victim of of the offences with which the person accused is charged - testified before the Court in these proceedings on the 15th December 2021, in the presence of the person accused. On the 14th June 2023 the defence requested that this witness is brought by the Prosecution to testify in cross-examination however it subsequently transpired[13] that Abdul Rozak had left Malta and his wherabouts are unknown. The defence contends that his witness statement must be declared inadmissible since the person accused was not afforded the opportunity to cross-examine this witness.

The right of a person charged with a criminal offence to cross-examine witnesses is protected as part of the fundamental right to a fair hearing by the Constitution of Malta which in article 39(6)(d) specifies that such person:-

[12] The first charge in the summons.

[13] On the 6th July 2023 a true copy of minutes of hearing on the 6th January 2023, The Police v. Abdul Rozak, Dok. X, was exhibited, confirming that Abdul Rozak left the Island.

"*shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses subject to the payment of their reasonable expenses, and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;*"

In the case at hand, Abdul Rozak testified before this Court in the proceedings against the person accused, when it was presided differently, on the 15th December 2021. His testimony was suspended. Although this means that the defence could not cross-examine the witness at that stage because his examination was not yet concluded, the opportunity to request that the witness is brought to testify in cross-examination was available to the defence as from the date that the Prosecution declared that it had no further evidence to produce in the proceedings, that is, on the 29th March 2023. However, it would result that at this stage the witness had already left from Malta without any information as to his whereabouts. Technically, therefore, defence was never in a position to cross-examine this witness.

Although this also means that the defence has been deprived of the possibility of cross-examining the witness Rozak Abdul because he is lo longer in Malta and his whereabouts unknown, the legislator by virtue of article 646(2) of Chapter 9 intended that his statement remains admissible in evidence.

Article 646(2) of the Criminal Code provides that:-

(2) The deposition of witnesses, whether against or in favour of the person charged or accused, if taken on oath in the course of the inquiry according to law, shall be admissible as evidence:

Provided that the witness is also produced in Court to be examined viva voce as provided in sub-article (1) unless, when assessing the circumstances of the case, it is apparent to the Court that appearing for viva voce examination may cause the witness

to suffer psychological harm, or when the witness is dead, absent from Malta or cannot be found and saving the provisions of sub-article (8)...

This legal provision is an exception to the rule enshrined in article 646(1) of Chapter 9, that witnesses shall always be examined in court and *viva voce* because in the circumstances mentioned in the proviso to the subarticle, the prosecution is exempted from bringing the witness to testify *viva voce*, even in cross-examination, in the event that the witness has died, is absent from Malta or cannot be traced[14].

The fact that the witness who has tesified as a witness for the Prosecution, whether by means of a sworn statement or *viva voce* before the court, is not brought to testify in cross-examination, does not necessarily mean that the testimony becomes inadmissible[15]. If the witness statement has been adduced in evidence in conformity with the law of procedure, then it does not become inadmissible merely because of a subsequent event that prevents the witness from attending to be duly subjected to cross-examination by the defence in order to control his testimony.

This principle had already been accepted by the European Court of Human Rights in **Camilleri v. Malta** (51760/99), decided on the 16th March 2000[16]:

"*However, the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 3(d) and 1 of Article 6 of the Convention, provided that the rights of the defence have been respected.*

As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him or her either when that

[14] The First Hall, Civil Court in its constitutional jurisdiction in the case **Connie Decelis u Jason Decelis kontra l-Avukat Generali**, held:- *"meta xhieda ma jkunux ser jixhdu viva voce irid jirrizulta illi kien hemm raguni valida ghaliex dawn ma telghux jixhdu u jrid jintwera ukoll illi da parti tal-awtoritajiet ikun sar kull tentattiv possibli sabiex dawn ix-xhieda jigu rintraccjati halli jingiebu jixhdu"*.

[15] See **Ir-Repubblika ta' Malta v. Christopher Polidano**, Court of Criminal Appeal (Sup.) 26th April 2023.

[16] App no 51760/99.

witness is making a statement or at a later stage of the proceedings (see the Saïdi v. France judgment of 20 September 1993, Series A no. 261-C, p. 56, § 43; the Van Mechelen and Others v. the Netherlands judgment of 23 April 1997, Reports of Judgments). With these principles in mind the Court notes that the applicant was able to call G.F. at his trial before the Court of Magistrates and to cross-examine him as to the reasons which led him to make the incriminating statement."

The Court is of the view that although it is unable to declare the testimony invalid or inadmissible in evidence, it must avoid giving it undue weight by, for instance, relying solely upon that testimony for a finding of guilt; this in order to respect the fundamental right of the person charged to have a fair trial with all the safeguards afforded to him including therefore the right to examine and cross-examine witnesses.

This principle was in fact reaffirmed by the Criminal Court in **Repubblika ta' Malta vs Charles Paul Muscat** where it was held:-

"*huwa biss fl-istadju tal-guri, imbghad li l-gurati ghandhom jinghataw id-direzzjoni mill-Imhallef togat ghar-rigward tal-valur probatorju li ghandha tinghata lil dik il-prova fl-eventwalita' li d-difiza ma ikolliex l-opportunita' tikkontrolla dak mistqarr f'dawk l-istqarrijiet guramentati u dan sabiex il-jedd ghall-smiegh xieraq tal-persuna akkuzata ma jigix bl-ebda mod mimsus".*[17]

In fact, in **Il-Pulizija vs Malcolm Paul Bugeja**[18], the Court of Criminal Appeal held:-

"*skond is-sentenza ta' Pierre Gravina, id-dikjarazzjoni guramentata ta' xhud quddiem il-Magistrat Inkwirenti ma jkollha l-ebda validita' jekk ma tinghatax opportunita' tal-kontro ezami lill-imputat jew akkuzat. Issa x'inhuwa l-iskop tal-kontro-ezami? L-*

[17] The First Hall, Civil Court, in the judgement in the names **Emanuel Camilleri vs Avukat Generali**, declared that in such circumstances:- *"darba li, meta gie appuntat il-guri, ix-xhud Marco Abdilla lahaq miet, il-prosekuzzjoni kellha kull dritt taqra x-xhieda li kien ta' x-xhud quddiem Qorti ohra, u lill-gurati gie spjegat ghaliex kien qed isir hekk u li kellhom jikkunsidraw li x-xhud ma setghax, f'dak l-istadju, jigi kontroezaminat mill-akkuzat."*

[18] Decided by the Court of Criminal Appeal on the 30th June 2016.

iskop tal-kontro ezami huwa biex dik il-verzjoni li jkun ta' xhud tista' tigi kontradetta, challenged u sahansitra tigi reza inattendibbli minhabba l-karattru jew il-komportament tax-xhud jew inkella d-diversi posizzjonijiet li jiehu. Ikrah kemm hu ikrah ir-reat tat-traffikar tad-droga, pero' hemm principju iktar bil-wisq importanti illi hija dik illi ssir gustizzja u li dejjem issir il-gustizzja minkejja d-diffikultajiet kollha li jkollha. Jekk il-kontro ezami ma jservi ghal xejn specjalment quddiem Imhallef jew quddiem il-Magistrat togat allura hija biss cerimonja u xejn aktar."

Therefore the Court, in order to respect the fundamental right of the person charged, to a fair hearing and to ensure that these rights are not in any way compromised or neutralised, shall not take into account the testimony of Abdul Rozak in so far as this might incriminate Muhamad Topik Hidayat.

Having considered;

The testimony of the witnesses for the Prosecution is consistent with the version of the person accused in so far as it is established that he and Abdul Rozak were involved in a fight in an apartment in Fgura, where although the witnesses tried to intervene to stop the fight, the person accused struck Abdul Rozak in the head with a knife.

After having appraised the deposition of the eye witnesses who testified on the 15th December 2021, the Court is convinced beyond a reasonable doubt that the accused struck Abdul Rozak with a knife on his head and caused him the injuries that were certified by Dr. Russell Bonnici Farrugia on the 28th November 2021[19] and subsequently reported by Dr. Mario Scerri (Dok. MS1). This conclusion is further corroborated by the accused's own admission, both in the version he recounted to the Police officers on the scene of the crime as well as in the statement he released during his interrogation on the 29th November 2021.

Having considered;

[19] Dok. SZ2, page 82 of the record.

The Court must now proceed to determine the nature of the bodily harm caused to Abdul Rozak as a result of the accused striking him on his head with a knife,

Dr. Mario Scerri in his report Dok. MS1, explained that the injury suffered by the victim consists in a deep incision or opening in the face of around 3 centimetres in length on the right hand side of the fact, surrounded by a large demarcated haematoma. He had to be operated and the cut was sutured[20]. This incision involved blood vessels and was accompanied by an extensive heamatoma on the right hand side of the face which extended also to the ramus of the mandible. He described this wound as one of a grievous nature which will leave a permanent mark on the face.

Article 216 deems a bodily harm to be grievous and is punishable with imprisonment for a term from one year to seven years, if, according to the relevant sections:-

(1)(b) ... it causes any deformity or disfigurement in the face, neck, or either of the hands of the person injured; ...

Then, according to the relevant provisions of article 218(1) of the Criminal Code, a grievous bodily harm is punishable with imprisonment for a term from five to ten years:-

(b) if it causes any serious and permanent disfigurement of the face, neck, or either of the hands of the person injured.

The principles that govern the classification of the various degrees of bodily harm are well-established in case-law:-

"Il-kwistjoni ta' jekk offiza hiex wahda hafifa u ta' importanza zghira, hafifa, gravi jew gravissima hi wahda ta' fatt u ghalhekk rimessa ghall-gudikant tal-fatt (fil-kaz ta'

[20] This would result from Dr. Mario Scerri's report – Dok. MS1, pages 215, 252.

guri, ghalhekk, rimessa f'idejn il-gurati; fil-kaz odjern rimessa f'idejn il-gudikant ta' l-ewwel grad...). Ma hix, ghalhekk, kwistjoni, li tiddependi neccessarjament jew esklussivament fuq "opinjoni medika". It-tabib jew tobba jispjegaw x'irriskontraw bhala fatt; u, jekk il-qorti tippermettilhom, jistghu joffru l-opinjoni taghhom dwar, fost affarijiet ohra, kif setghet giet ikkagunata dik l-offiza, jew ma' xhiex huma kompatibbli s-sintomi li jkunu gew klinikament riskontrati. Ikun jispetta mbaghad ghall-gudikant tal-fatt li, fid-dawl mhux biss ta' dak li jkun xehed it-tabib izda fid-dawl tal-provi kollha, jiddetermina n-natura ta' l-offiza."[21]

As far as the deformity and or disfigurement in the face, hands or neck, mentioned in articles 216(1)(b) and 218(1)(b) of the Criminal Code, it has been held[22]:-

"B'mankament fil-wiċċ il-ligi qed tirreferi għal kull deterjorament tal-aspett tal-wiċċ li, anke mingħajr ma jnissel ribrezz jew ripunjanza, jipproduċi sfigurament "cioe' peggioramento d'aspetto notevole o complessivo o per l'entita' della alterazione stessa, o per l'espressione d'assieme del volto". Sfreġju, mill-banda l-ohra u a differenza ta' mankament, hija kull ħsara li tista' ssir fil-regolarita' tal-wiċċ, fl-armonija tal-lineamenti tal-wiċċ, u anke f'dik li hija s-sbuħija tal-wiċċ. Skont ġurisprudenza ormai pacifika, din il-ħsara li tammonta għal sfreġju trid tkun viżibbli minn distanza li hi dik "li soltu jkun hemm bejn in-nies meta jitkellmu ma' xulxin."

It is clear that the permanence or otherwise of the disfigurement of the face, hands or neck is not an essential element for the disfigurement that is envisaged in article 216(1)(b) of the Code. This interpretation was affirmed by the Court of Criminal Appeal in **Il-Pulizija vs Fortunato Sultana** decided on the 5th February 1998:-

"Skond din id-disposizzjoni, l-offiza fuq il-persuna hi gravi jekk, fost cirkostanzi ohra, iggib sfregju fil-wicc. ***Il-Ligi ma tirrikjedix li dana l-isfregju jipperdura ghal xi zmien partikolari, sfregju fil-wicc (jew fl-ghonq jew f'wahda mill-idejn) anke ta' ftit***

[21] **Il-Pulizija vs Joseph Azzopardi** – Qorti tal-Appell Kriminali, deciza 30 ta' Lulju 2004.
[22] Il-Pulizija vs Paul Spagnol, deciza mill-Qorti tal-Appell Kriminali wkoll fit-12 ta' Settembru 1996.

granet jibqa' sfregju ghal finijiet ta' l-imsemmija disposizzjoni, il-permanenza ta' l-isfregju hi relevanti biss meta, abbinata mal-gravita', taghti lok ghal hekk imsejjha "Offiza gravissima" skond l-Artikolu 218(1)(b) tal-Kodici Kriminali. *"* [emphasis made by this Court]

The Court also makes reference to the judgement in the names **Il-Pulizija vs Antonio sive Anthony Randich**, delivered on the 2nd September 1999[23]:-

"Kif din il-Qorti kellha l-opportunita` li tirrimarka f'okkazzjonijiet ohra, l-isfregju ('disfigurement') fil-wicc (jew fl-ghonq jew fl-id) kontemplat fl-artikolu 216(1)(b) tal-Kodici Kriminali jista' jkun anke ta' natura temporanea, bhal, per ezempju, sakemm il-ferita tfiq. ***Huwa biss fil-kaz tal-hekk imsejjha 'offiza gravissima' fl-artikolu 218(1)(b) li l-ligi tirrikjedi l-permanenza (oltre l-gravita`) ta' l-isfregju.*** *"*

Upon applying these principles to the facts of the case at hand, it is the Court's view that Abdul Rozak suffered a disfigurement on his face because it was, at the very least, aesthetically damaged as a result of the deep incision made when he was struck by the accused with the knife. This particular disfigurement was described and certified by Dr. Mario Scerri as not only grave but also permanent since it will leave a permanent mark on the face. This conclusion was not contrasted or undermined in any wat and consequently, it has been satisfactorily proved that the bodily harm caused to the injured person by the accused is one of a grievous nature in terms of article 218(1)(b) of the Criminal Code, consisting of a serious and permanent disfigurement of the face.

Having considered;

The Attorney General also cited article 217 of the Criminal Code in his note sending the accused for trial by this Court, in terms of which a grievous bodily harm is punishable with imprisonment for a term from two to ten years if it is committed with

[23] Court of Criminal Appeal.

arms proper, or with a cutting or pointed instrument, or by means of any explosive, or any burning or corrosive fluid or substance.

There is abundant evidence that proves beyond a reasonable doubt that the accused person used a knife, that is a cutting instrument, during the fight with the victim: this results from the testimony of the various eye witnesses who testified before the Court and identified the knife in photo 11 (Dok. GC1), which photo is identical to the photo marked as DOK 21CDC 216A[24], as the knife which was seen in the accused's person's hand during the struggle with the victim. The existence and use of a knife is also affirmed by the accused himself who admitted unreservedly that he grabbed a knife from the kitchen sink and struck the victim at least once on the head with it. This knife, with its blade covered in blood, was found by PC 1257 and PC9 near the door of the apartment where the struggle took place, in the place that it was hidden, wrapped in a blanket, by Muhkamad Zein Fayshal Fahmy.

However, the Court must observe that although the grievous bodily harm results to have been caused by the means mentioned in article 217, the applicable punishment cannot be that which is stipulated in the said article, that is, imprisonment from two to ten years because this punishment is evidently less than that which would be applicable upon a finding of guilt for the crime under article 218 of the Code, that is, imprisonment from five to ten years. It makes no sense that a grievous bodily harm caused by one of aggravating means mentioned in article 217 is punishable by a lesser punishment than the non-aggravated form of the offence. This leads the Court to conclude that article 217 of the Criminal Code and the punishment mentioned therein, applies only where such means are used to cause the grievous bodily harm envisaged in the preceding article 216, and not also the more grievous bodily harm mentioned in the succeeding article 218.

Having considered;

[24] Pge 234 of the record of the proceedings – report of PS 1111 Braden Borg.

That the Attorney General cited the aggravating factors mentioned in article 222(1)(a) and 202(h)(v) of the Criminal Code. This means that upon a finding of guilt for the crime under article 218 of the Code, the applicable punishment shall be increased by one degree in the event that the harm is committed *inter alia* on any person mentioned in article 202(h) - in this case paragraph (v) - of the same Code, that is, any other person living in the same household as the offender or who had lived with the offender before the offence was committed.

This means that the Prosecution must discharge according to Law the burden of proving beyond a reasonable doubt that the victim, Abdul Rozak, lived in the same household as the person accused when the offence was committed or before the offence was committed.

The defence submitted that provisions of article 202(v)(h) of the Criminal Code, cannot apply to persons who although they occupy the same apartment or house, do not share a family bond or other domestic relationship and have no other connection between them.

The Court must begin by pointing out that the law in article 202(v)(h) of the Criminal Code requires that the persons live in the same "*household*", a term that is generally taken to mean a house and its occupants, regarded as a unit, regardless of their relationship. However the following observations must be made. The wording of the law is not limited to persons merely "*occupying*" the same house, but it requires that they "*live*" in the same "*household*". It must be pointed out that the Criminal Code does not define the term "*household*" and therefore the Court will not equate the definition of a "*household*" with that of a "*domestic unit*" which, in article 2 of Chapter 581, is defined as including merely "*adults sharing the same household*". After all, the Law for the purposes of article 202(h)(v) of the Criminal Code requires that the person "*live*" in, not merely "*share*", the same household. In fact, the Maltese version of article 202(h)(v) of the Criminal Code uses the words "*tgħix fl-istess dar bħall-ħati*" which means that for this aggravating factor to apply, the evidence must

show beyond a reasonable doubt that the offender and the victim "*live*", that is, **they make their home together in the same place and not merely in a temporary or sporadic manner, such that they form part of a unit**.

The Court examined the evidence carefully and thoroughly and is of the view that it is only just about comprehensible from the testimony of the several eye witnesses who testified before the Court during the hearing in the 15th December 2021, that they reside in the same apartment together with "*Rozak*" and "*Tofik*", the two persons who were involved in the incident that took place in that same apartment. Almost none of the eye witnesses who testified were in a position to provide the address of this apartment, save that this is situated in Fgura. Although the person accused himself declared that he resides at Sandei Flat 1, Triq William Lasell, Fgura and that the incident in respect of which he is charged in this case, took place at this address – a fact which is also established from the testimony of PC 1257, PC 9 and Inspector Sarah Zerafa - the Court is not satisfied that the evidence brought by the Prosecution is sufficient to convince beyond a reasonable doubt that the offender and the victim "*live*" in the same household and actually constitute a "*household*" for the purposes of article 202(h)(v) of the Criminal Code.

Firstly, there is nothing to show that this apartment was indeed the official place of residence of the accused – no identification document, lease agreement or other evidence as to the place of residence of the victim or the accused was brought to dispel any doubts as to the fact that they lived the same address. Although it is true that it can be sufficiently concluded from the testimony of some of the eye witnesses that the victim had a bedroom and a bed in the apartment where the incident occured, which bedroom and bed were identified by them in some of the photos forming part of Dok. GC1[25], the Court expects that in order to adequately discharge the burden of proof of the aggravating circumstance envisaged in article 202(h)(v) of the Criminal Code, the Prosecution would bring evidence that the accused is registered officially as

[25] These photos are evidently copies of the photos taken by PC 1111 Braden Borg, forming part of his report Dok. BB1.

residing in the same apartment where the victim also officially resides and that he has been residing there for some time **and** in a manner that adequately conveys that they "*live*" in the same house and also constitute a "*household*".

However, faced with the poor level of evidence brought by the Proseuction in this case, the Court cannot exclude that the victim or the accused might have only been occupying a room or a bed under the same roof only periodically or at irregular intervals or for a very short time: circumstances which would exclude in the Court's view, the elements of the aggravating factor envisaged in article 202(v)(h) of the Criminal Code. The fact that the victim had a bed in the same apartment where the person accused acknowledged that he resides, without any supporting documentation or clear and precise evidence that would dispel any doubt arising from the vague and ambiguous testimony of the eye witnesses that he lived there habitually, is not sufficient in itself to prove satisfactorily and in any event beyond a reasonable doubt, that the accused actually lived in the same household. The Court will not accept anything less than proper attestation of the requirements of article 202(v)(h) of the Criminal Code for the purposes of article 222(1)(a) of the Code, when this constitutes an aggravating factor which would see the applicable punishment of imprisonment increase mandatorily by one degree and thus impacts the accused's liberty.

Therefore the Court will not apply the aggravated punishment contemplated in article 222(1)(a) and article 202(h)(v) of the Criminal Code for the crime under article 218(1)(b) of the same Code.

Having considered;

That the defence, during final oral submissions, pleaded that the accused acted in self-defence.

In terms of section 223 of the Criminal Code : *No offence is committed when a homicide or a bodily harm is ordered or permitted by law or by a lawful authority, or*

is imposed by actual necessity either in lawful self-defence or in the lawful defence of another person.

Article 224 of the same Code then lays out, in an non-exhaustive manner, certain instances in which this defence may be successfully raised, that is, where the act is entirely justified and considered legitimate, while article 227(d) of the same Code, read together with article 230, envisages the case where the limits of self-defence are exceeded. In such a case, the wilful homicide or bodily harm will not be completely justified but excusable[26], save that that any such excess shall not be liable to punishment if it is due to the person being taken unawares, or to fear or fright.

In order that the defence envisaged in article 223 of the Criminal Code is successfully raised, the person accused must prove on a balance of probabilities that he was forced to act because found himself faced with an act of unjust aggression or danger which he could not have reasonably avoided by employing other means, such as by escaping the danger or having recourse to the law in order to safeguard himself from such danger. It must also be proven that the threatened harm or danger was actual, grave and inevitable and that the accused person's reaction was also proportionate to the aggression or threat thereof.

The essential elements which, if proved, would exclude the existence of any criminality in the act, were eloquently explained in the judgement in the names **Repubblika ta' Malta vs Mariano Grixti**[27]:-

[26] As defined in articles 230, 231 and 232 of the Code.

[27] Court of Criminal Appeal [Sup.] 3rd October 2018. See also **Il-Pulizija vs Joseph Psaila**, decided by the Court of Criminal Appeal on the 20th January 1995, where it was held:- *"Sabiex id-difiza tal-legittima difiza tigi invokata b'success, il-ligi timponi certi kundizzjonijiet. Cjoe' theddid ta' xi agressjoni jew dannu jrid ikun ingust, gravi u inevitabbli. Id-difiza trid tkun saret biex jigu evitati konsegwenzi li jekk jaffettwaw ruhhom jikkagunaw hsara irreparabbli kif ukoll biex jigi evitat perikolu li ma setax jigi evitat b'xi mod iehor. Jigifieri l-periklu ghandu jkun attwali, istantanju u assolut u ma jridx ikun xi perikolu anticipat, ghax dan jista' jaghti lok biss ghall-provokazzjoni u mhux difiza legittima."*

"*Id-dritt ghall-legittima difesa jitwieled u huwa konsegwenza naturali mid-dritt fundamentali ta' kull bniedem li jipprotegi lilu nnifsu minn xi aggressjoni jew dannu anke bl-uzu ta' forza. Izda il-ligi timponi certi kundizzjonijiet biex din l-eccezzjoni tigi milqugha. Cioe' t-theddid ta' xi aggressjoni jew dannu jew perikolu irid ikun ingust, gravi w inevitabbli. Id-difiza trid tkun saret biex jigu evitati konsegwenzi li jekk* [javveraw] *ruhhom jikkagunaw hsara irreparabbli lid-difensur jigifieri hsara jew offizi fil-hajja, gisem u/jew partijiet tal-gisem tad-difensur. L-imputat difensur irid jipprova li dak li ghamel, ghamlu stante li fl-istat psikologiku li kien jinsab fih f'dak il-mument biex jevita xi perikolu li ma setghax jigi evitat b'xi mod iehor. Jigifieri il-perikolu ghandu jkun attwali, istantaneju u assolut u ma jridx ikun xi perikolu anticipat. Il-perikolu ghandu jkun attwali jigifieri ta' dak il-hin u mhux xi theddida ta' perikolu li tkun saret hinijiet qabel ghax dan jista jaghti lok biss ghal provokazzjoni u mhux difesa legittima. Il-perikolu irid ikun assolut cioe' li f'dak il-mument li qed jsehh ma setghax jigi evitat b'xi mod iehor.* "

As for the element of the danger faced by the person who acts in legitimate self-defence, the Court of Criminal Appeal, in the judgement in the names **Il-Pulzija vs Zachary Vella**[28], explained:-

"*Kwindi huwa evidenti li sabiex l-att difensjonali jkun ġustifikat għal dak li jirrigwarda dan l-element, din trid tkun ta' ċertu portata u ta' daqstant periklu. In oltre l-azzjoni kontra min qed jiddefendi lilu nnifsu trid tkun tammonta għal reat vjolenti jew li jseħħ f'tali ċirkostanzi li jqajjmu biża raġjonevoli tal-periklu tal-ħajja jew sigurta' personali ta' dak li jkun jew ħaddieħor.*"

It has also been held in this context:-

"Wiehed irid ipoggi lilu nnifsu fil-posizzjoni li jkun fiha l-imputat kemm mentalment kif ukoll fizikament, fil-mument meta l-istess imputat agixxa ghar-reazzjoni li kien infaccjat biha, u cioe' l-hsieb tieghu li kien ser jigi aggredit."[29]

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[28] Deciza 3 ta' Mejju 2019.

The Court recalls that, as has already been established, during the fight with Abdul Rozak, the person accused took a knife and struck the victim on the head, causing him life-threatening injuries and grievous bodily harm.

The accused alleged that Rozak used a fork during the altercation with the person accused. This allegation was not substantiated by the persons who witnessed the scuffle, most of whom intervened in order to separate the two, and indeed, none of these eye witnesses mentioned that Rozak had a fork in his hand at any point. In fact, this fork, which the accused stated had fallen from Rozaks' hand to the floor during the scuffle, was not found at the scene of the crime. However, the Court notes that the accused person's version with regard to the use of the fork by the victim during the fight, was unwavering and consistent. Moreover, it must be observed that when asked specifically in cross-examination whether he saw Rozak using a fork during the struggle with the accused, Mukhamad Zein Fayshal Fahmy stated that "*no one had a fork **at this moment***"[30], a statement which cannot be interpreted as positively and definitively excluding that the victim at some point had a fork in his hand and was using it to hit the other person. Particularly so when evidently, none of the eye witnesses appear to have witnessed the argument from the outset, and Jahori Kasudi confirmed in his testimony that Topik had a scratch on his upper arm. In the circumstances, the Court deems that the accused's version that the victim was attacking him with a fork is probable and therefore, and in any event, any doubt must benefit the accused.

However, notwithstanding the fact that the victim might have been trying to attack the accused with a fork during the fight, during his interrogation the accused explained that Rozak did not scare him when he was trying to hit and hurt him with the fork because he knew that he was drunk and emotional: "*he was emotion, not too scary,*

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[29] **Repubblika ta' Malta vs Dominic Briffa.**
[30] Emphasis made by the Court.

..."[31] In fact, the accused stated that he wanted to avenge himself for the insults and for the fact that Rozak had grabbed a fork and was hitting him with it. In fact, in his statement he admitted that when Rozak allegedly hit him with the fork, he himself became "*emotional*" and wanted to pay him back[32], which he did by "*punch*(ing)" Rozak in the head with the knife at least once. This version is substantiated by Kasan Ignac who testified that when they tried to hold the accused back from fighting with Rozak, "*Topik ran away to take the knife*" and he hit Rozak with the knife on his head, while Mukhamad Zein Fatshal Fahmy testified further that the accused was much "*bigger*" and more "*powerful*" than Rozak which is why three persons were needed to hold back the accused.

These statements, in the Court's view, exclude in the most conclusive manner that the accused might have acted in self defence because it results from the evidence that the threat of violence from the victim was not absolute and could not have and indeed did not instil in the accused person a reasonable fear for his life or personal safety or that of another person.

Moreover, the evidence strongly suggests that when faced with the victim's behaviour, the reaction of the accused person – that is, grabbing a large sharp knife and striking the victim's head with the said knife – was disproportionate and could not have been the only available means to ward off, deal with or out an end to the aggression that might have been manifested by the victim. The drunken state of Rozak (as he admitted himself in his testimony) and the difference in the strength of the two persons, as described by Mokhamad Zein Fayshal Fahmi, is enough to convince the Court that it was not necessary for the accused person to grab a knife and strike the victim's head with it and he could have easily avoided doing so, **especially when other persons had already intervened and were trying to separate the two**. Consequently, the danger that was faced by the person accused cannot be said to have been neither grave nor inevitable.

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[31] Page 115 of the record of proceedings – statement of Mohamad Topik Hidayat.

[32] See page 116 of the record – statement of Mohamad Topik Hidayat.

It is therefore evident that the essential ingredients of legitimate self-defence have not been proven to the satisfaction of the Court on a balance of probabilities and therefore, the plea of self-defence cannot be upheld.

As observed earlier on, in order that an accused person may successfully plead an excess of legitimate self-defence in terms of article 227(d) of the Criminal Code, which would mean that the bodily harm inflicted on the victim in this case would be excusable, the co-existence of the elements of self-defence must in any event be proved, save that the limits imposed by necessity[33], in this case, were exceeded. However as already established, the elements of legitimate self-defence, that is the necessity of the act and gravity and inevitability of the danger presented by the victim, were not demonstrated. Moreover, it is undisputed that the elements of fear, surprise or fear that would justify impunity are entirely lacking in the circumstances of this case since it has been excluded that the accused person feared the victim at any point, or that the victim took him unawares or that he frightened him to the point that he felt the need to defend himself from an unjust, grave and inevitable act of aggression or violence in his regard.

Therefore a plea of an excess of self-defence cannot be upheld either.

Having considered;

That in the backdrop of these considerations, the Court shall now proceed to assess the additional plea raised by the defence during final oral submissions, that the person accused acted under provocation and that consequently, his actions resulting in the bodily harm caused to Abdul Rozak, are excusable.

Article 227(c) of the Criminal Code, which in this case must be read together with articles 229 and 230(b), stipulates that wilful bodily harm is excusable if:-

[33] Or by law or by the authority.

"… it is committed by any person acting under the first transport of a sudden passion or mental excitement in consequence of which he is, in the act of committing the crime, incapable of reflecting;

the offender shall be deemed to be incapable of reflecting whenever the homicide be in fact attributable to heat of blood and not to a deliberate intention to kill or to cause a serious injury to the person, and the cause be such as would, in persons of ordinary temperament, commonly produce the effect of rendering them incapable of reflecting on the consequences of the crime."

It is settled case-law that it is required to be proved in all cases that the act constituting the provocation is unjust. The Court of Criminal Appeal in its judgement in the names **Il-Pulizija vs Paul Abela**, decided on the 10th September 2004 held:

"... dejjem irid ikun hemm provokazzjoni ingusta ... il-gurista Francesco Antolisei in konnessjoni ma'l-attenwanti generali tal-provokazzjoni ighid hekk: "la situazione psicologica di cui trattasi ... deve essere determinata da un fatto ingiusto altrui. Non occorre che tale fatto costituisca reato e neppure che sia giuridicamente illecito; basta che sia ingiusto dal punto di vista morale. Percio' l'attenuante dovra' ammettersi anche di fronte ad un comportamento legittimo che assuma carattere provocatorio per le modalita' esose o anche semplicemente sconvenienti con cui si effetua, o per ragioni che lo hanno determinato (rancore, odio, vendetta, iattanza, dispetto ecc.) Quanto alla reazione non si richiede che sia proporzionata al fatto ingiusto" (Antolisei F. Manuale di Diritto Penale – Parte Generale Giuffre Milano 1989 pg.394 -397).

As for the state of mind of the person who pleads that he acted under provocation, Prof. Sir Anthony Mamo in his Notes on Criminal Law explains that the defence would be available if it is proven "*that the provocation was sufficient to deprive a reasonable man, a man of ordinary temperament, of his self-control, not whether it*

was sufficient to deprive of his self-control the particular person charged..."[34] The yardstick is therefore an objective one: the person of ordinary temperament.

The Court reviewed the evidence and the testimony including the version of the accused person while still at the scene of the crime and also during his subsequent interrogation. His statement that the victim was calling him names and bad words, including *"pig"* and "*dog*", was not refuted by any other witness and it does indeed result that there was a verbal argument between them which began when the accused awoke to hearing the victim calling him names and insulting him. Evidently, this behaviour on the part of the victim, who *ex admissis* was drunk at the time, aggravated the accused to such an extent that he admitted that he punched him. The victim then punched him back and a scuffle ensued, where the victim however also grabbed a fork and used this to assault the accused who was hit on his right arm with the fork[35].

The Court agrees that the accused was unjustly provoked by Abdul Rozak: in fact in his statement he explained that he felt emotion at being hit by the victim with the fork and wanted to pay him back, but the Court cannot agree that it is probable that the use of the fork during an ongoing fight could have reasonably evoked a loss of temperament and control and thus the extreme reaction of reaching for a large, sharp knife and using it to strike the victim in his face or head. In other words, it is unreasonable to conclude that a person of ordinary temperament would lose control of himself and become incapable of reflecting on the consequences of his actions simply because during the physical scuffle, the victim hit him with a fork, even if the victim might have also been insulting him and calling him names. These acts in the Court's view, even if they constitute unjust provocation, could not reasonably excite such extreme violence in a person of ordinary temperament.

[34] Vol. II, page 262.

[35] See photos at page 243 of the record, and Jahori Casudi's testimony.

In **Ir-Repubblika ta' Malta vs Francis Buhagiar**[36], confirmed on appeal[37] the Court quoted Jeremy Horder: '*Provocation and Responsibility*' (OUP, 1992, p. 120):-

"'*... notwithstanding that a man's reason might be unseated on the basis that the reasonable man would have found himself out of control, there is still in every human being a residual capacity for self-control, which the exigencies of a given situation may call for. That must be the justification for passing a sentence of imprisonment, to recognise that there is still left some degree of culpability...*'"

Therefore, failing the objective test required by paragraph (c) of article 227 of the Criminal Code, the extenuating circumstances envisaged in articles 230(b) and 232 of the same Code, cannot be applied in this case.

However, it must be recalled that the wilful bodily harm caused to the victim would be excusable if it is proved to have been provoked by a grievous bodily harm, or by any crime whatsoever against the person accused, punishable with more than one year's imprisonment, or by any crime whatsoever against the person, as envisaged in article 227(a) and article 230(c) of the Criminal Code, respectively.

Here, the Court deems that it is sufficiently proven on a balance of probabilities that the accused was provoked by the victim not only when he called him names and insulted him, but also when he was pointing at him, punching him and trying to hurt him, whether with a fork in hand or otherwise, as explained by the accused in his statement[38]. It would result that the accused sustained injuries to his person in the form of fresh scratches, trauma and redness – these injuries are visible in the photos[39] taken by scene of crime officer PC 1111 Braden Borg on the 28th November 2021 at the Police Headquarters where the accused was taken after having been placed under

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[36] Decided by the Criminal Court on the 5th November 2003.
[37] On the 24th September 2004 by the Court of Criminal Appeal (Sup.).
[38] See pages 113 – 116 of the records – pages 11 to 14 of the transcribed statement.
[39] 21CDC 3128, 21CDC 3129, 21CDC 3130, 21CDC 3131, 21CDC 3132, 21CDC 3133, pages 243 – 245 of the record (Dok. BB1).

arrest immediately on the scene of the crime. Moreover, Jahori Caudi testified that during the fight he saw that the person accused had a scratch on his upper arm.

When these marks and injuries were pointed out by the person accused himself to the Police during his interrogation, he explained that these were inflicted when Rozak was punching him with the fork. He also stated that at this point, his "*emotion*" led him to take the knife and stab Rozak in the head[40]. It is therefore sufficiently proven not only that the person accused felt provoked and acted as a direct and immediate result of the victim's continuous efforts to hit him with the fork, and that the accused sustained injuries probably caused by the victim (as shown in the above-mentioned photos), but also that the blow with the knife took place at the same time as the victim as assaulting the accused with a fork. Therefore, the requirements of article 235 of the Criminal Code are also satisfied.

As for the injuries sustained by the person accused, although they do not appear to be grievous in nature, since they are manifestly superficial, the crime of causing slight bodily harm as defined in article 214 and 221 of the Criminal Code, is punishable by imprisonment for a maximum term of two years, meaning that all the elements of extenuating factor envisaged in paragraph (a) of article 227 of the Criminal Code, as well as article 230(c), are proven to the Court's satisfaction.

It must be pointed out that for the purposes of proving excusable bodily harm, it is irrelevant that the offender, in causing the wilful bodily harm, was or was not also acting under the first transport of a sudden passion or mental excitement in consequence of which he is, in the act of committing the crime, incapable of reflecting as defined in paragraph (c) of article 227. The two instances of excusable wilful bodily harm under paragraph (a) and paragraph (c) of said article 227 are completely separate and it is not necessary in order for an act to be excusable, that in addition to the element of provocation caused by a crime against the person (in this case slight bodily harm) punishable with more than one year's imprisonment, for the defence to

[40] Page 115,116 of the record (page 13,14 of the statement Dok. MLM1).

also prove the concurrence of the elements envisaged in paragraph (c) of article 227 of the Criminal Code, so long as the provocation took place at the same time as the act in excuse thereof it is pleaded (bodily harm in this case).

Consequently, the bodily harm caused to the victim is to be considered excusable in terms of article 227(a) of the Criminal Code and the provisions of article 230(a) and (c) of the same Code. It has already been established that the bodily harm caused to Abdul Rozak is grievous in terms of article 218(1)(b) of the Criminal Code.

Having considered;

The person accused is being charged also with the contravention envisaged in article 339(1)(e) of the Criminal Code, that is of having uttered insults or threats not otherwise provided for in this Code, or being provoked, carries his insult beyond the limit warranted by the provocation.

It is immediately evident that the accused person cannot be found guilty of this contravention. No witness, not even the victim, Abdul Rozak himself, testified that he heard the accused uttering a threat or insulting the victim. Indeed, the evidence would show that it was the victim, not the accused, who uttered insults: in both his statements the accused declared that the argument that led to these proceedings, broke out when he heard the victim insulting him and calling him "*bad names*". He is therefore to be acquitted of the third charge.

The Court took note of the fact that the accused has a clean criminal conduct but at the same time, it cannot ignore the fact that the grievous bodily harm caused to Abdul Rozak was extremely serious and will leave a permanent mark on his face.

This means that the applicable punishment for the excusable wilful grievous bodily harm caused to Rozak Abdul in terms of article 218 of the Criminal Code, is the diminished punishment in terms of article 231(1)(b) which provides that where the

harm caused is grievous and produces the effects mentioned in article 218, the applicable punishment is of imprisonment for a term not exceeding six months.

It must be observed that the punishment in terms of article 231(b) of the Criminal Code (which refers to the excuse mentioned in article 227(a)), provides for a much lesser punishment than that which applicable in respect of a wilful bodily harm which is excusable in terms of article 230(c), that is where it has been provoked by "*any crime whatsoever against the person*". Therefore, the person accused must benefit from the lesser punishment, that is the punishment of imprisonment for a term not exceeding six months as specified in article 231(b) which refers to article 230(a) of the Criminal Code.

For all these reasons while finding the accused not guilty of the contravention under article 339(1)(e) of the Criminal Code, after having seen articles 214, 215, 217 and 218(1)(b) of the Criminal Code, Chapter 9 of the Laws of Malta, finds MUHAMAD TOPIK HIDAYAT guilty of having caused grievous bodily harm on the person of Abdul Rozak, which bodily harm is excusable in terms of articles 227(a), 230(a)(c) and 231(1)(b) of the said Code, and condemns him to a punishment of imprisonment for a term of five (5) months.

In terms of article 382A of the Criminal Code since it is expedient to do so for the purpose of providing for the safety of the injured person, Abdul Rozak, the Court orders the issue of a restraining order against MUHAMAD TOPIK HIDAYAT which shall remain in force for a period of three (3) years, which period shall commence to run from the date of expiration or remission of the punishment.

In terms of Article 533 of the Criminal Code, orders MUHAMAD TOPIK HIDAYAT to pay unto the Registrar of Courts the total sum of four hundred and

five Euro (€405) representing one-twentieth (1/20)[41] of the costs incurred in connection with the employment in the proceedings of various experts including those appointed in the examination of the *proces-verbal* of the inquiry[42].

For the purposes of article 15A of the Criminal Code, orders MUHAMAD TOPIK HIDAYAT to pay unto ADBUL ROZAK the sum of five hundred Euro (€500) as compensation for the permanent injury caused by him through the commission of the offence under article 218 of the Criminal Code. This order shall constitute an executive title for all intents and purposes of the Code of Organization and Civil Procedure, Chapter 12 of the Laws of Malta.

Upon application of article 23 of the Criminal Code, orders the forfeiture of the *corpus delicti* that is, exhibit (knife) Dok. 21 CDC 216A (KA 185/2022)[43] and also orders that a copy of this judgement is served on the Registrar of Courts to take cognisance of this forfeiture.

DR. RACHEL MONTEBELLO
MAGISTRATE.

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[41] Representing the proportion of the difference in punishment between the maximum punishment prescribed by article 231(1)(b) of Chapter 9, and the maximum punishment to which otherwise the accused would have been liable had the provisions of article 227(a) and 230(b) of the Chapter 9 not been applicable.
[42] €83.06 – Dok. MLM1; €779.80 – Dok. BB1; €360.20 Dok. MS1, €163.16 – Dok. GCB1; €6,697.68 – Dok MC1. Total of €8,083.90.

[43] Page 312 of the record.