



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

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

Case Number: 148/2022

**THE POLICE
(Inspector Audrey Micallef)**

-Vs-

MARK HEATH

Today, 28th September 2023

The Court,

Having seen the charges brought against **MARK HEATH**, aged 52 years, son of Graham Heath and Joan nee' Hewitt, born on the 2nd June 1969 in Chesterfield, United Kingdom, residing at 192/4A, King's Land Triq it-Turisti, Qawra and holder of identification card number 0270744A and charged with having on the 06th February 2022 and for the proceeding days and months;

1. Pursued a course of conduct and harassed his ex-partner **Catherine Ann Buttigieg** and behaved in a way, which he knows or ought to know amounts to harassment.
2. by means of an electronic communications network or apparatus, threatened the commission of any crime, or with the intent to induce his ex-partner **Catherine Ann Buttigieg** to do, or omit from doing anything or made any other improper use thereof.
3. insulted, threatened or provoked the partner **Michelle Ryle** not otherwise provided for in this code, or provoked or carried his insult beyond the limit warranted by the provocation

The Court is being kindly requested to issue a protection order, during the proceedings against **Mark Heath** to the benefit of **Catherine Ann Buttigieg** and her family as per Article 412C of Chapter 9 of the Laws of Malta

The Court is kindly requested to provide the safety of **Catherine Ann Buttigieg** and her family or for the keeping of the public peace, in addition to, or in lieu of the punishment applicable to the offence, requires that **Mark Heath** to enter into his own recognizance in a sum of money fixed by the Court as per article 383 et seq of Chapter 9 of the Laws of Malta.

The Court is humbly asked that in case of a conviction, besides the decided punishment according to law, the Court **orders Mark Heath** to incur the payment of costs in the employment of experts, as provided in article 533 of Chapter of the Laws of Malta.

Having seen the consent given by the Attorney General in terms of article 370(4) of the Criminal Code, for these proceedings to be dealt with summarily;

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

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 final oral submissions of the Prosecution and the defence during the hearing of the 13th September 2023;

Having seen that the case was appointed for today for delivery of judgement;

Having considered;

That the charges were brought against the accused after Catherine Ann Buttigieg filed a report with the Gender-Based Domestic Violence Unit on the 9th February 2022 where she claimed that she was being harassed by her former partner Mark Heath.

Catherine Ann Buttigieg, the complainant, testified¹ that in June 2019 she met Mark Heath and they entered into a relationship. They lived together in her apartment at Rosewood, Block A, Paderborn Street, Bugibba, however she eventually ended the relationship due to obsessive, jealous and possessive behaviour on his part, to the point that she could not go anywhere, even to the toilet, without him following her. She denied that she ended the relationship when her daughter returned to live with her or because she did not want her daughter to find out about her relationship with the accused, and insisted that he had lived with her together with her daughter under the same roof. She also denied that she filed the Police report because her daughter had pressured her into doing so.

¹ 13th June 2022 and 8th May 2023.

She also testified that about a year after their relationship had ended, she had met the accused in the street where he had asked her for help in completing some forms to apply for his identity card. She agreed to help him however she had also made it clear to him that she did not want to have anything to do with him otherwise. However, he began to follow her every day “*millions of times a day*”² and would not leave her alone even though she had asked him verbally to do so. He kept sending her SMS messages on her phone³, would follow her down the street and to coffee shops, wherever she would be he would turn up. She stopped messaging Mark Heath in October 2021, when she blocked his phone number by means of an application (optimizer) on her mobile phone, which unbeknownst to her at the time, also saved all messages sent to her from his number, 77943331. In fact, she did not know at the time that the accused was messaging her, since the messages sent from his number had been blocked and she only discovered all the messages that he had been sending her between October 2021 and January 2022, subsequently when she found out that the application had this particular function that saved the blocked messages. The last messages that she received from the accused were sent on the 1st January 2022, when he had sent her about six messages in one day, asking her to go and see him and talk to him “*I’m sorry, I need to see you, things like that.*” She exhibited screenshots of all the messages that had been sent by the accused from October 2021 onwards⁴, which she had found in the optimizer application. She also specifically denied that she had replied to any of his messages that were sent while his number was blocked on her phone through the optimizer application or that she spoke to the accused on a friendly basis.

Complainant also described how almost every day for a few months, from December 2021 onwards, the accused used to go to the coffee shop (Tony’s) next door to the pub where she worked (Jason’s Bar), and stare at her all day. Once, during the first week that she had started to work at the pub, in December 2021, when she saw that the accused had come to the pub, she told him not to go there while she is working and

² Testimony of 8th May 2023.

³ Mobile number 99237259.

⁴ Dok. CB1, CB2, CB3, CB4 and CB5.

cause her trouble and he promised her that he would not. However, he still kept going there, just standing outside and staring. Then, in February 2022, when she was outside the pub while off-shift having a drink with a friend, the accused went onto her, pulled her by the arm and told her “*we need to talk, we need to talk*”. She replied that there was nothing to talk about and asked him to leave her alone and not to go to the pub and cause her anymore trouble. When her friend also asked him to leave her alone, he went after them back into the pub and started to shout abuse at her friend. He then went into the toilet and when he emerged “*he came into my face, he stared facing and I pushed him out away ...*”. From then on, he would go to the coffeeshop next door to the pub, where he would stay outside and stare at her and although she said she told him several times not to sit around staring at her, he would simply ignore her. This behaviour kept on going for several months.

He also turned up on another occasion outside her house in the front yard, ringing the doorbell. She was not there at the time however her daughter, who was at home alone at the time, called her to tell her that he had rung their doorbell. Then two minutes later she saw him pass by the pub where she worked at the time, wearing the same clothes that her daughter had described he was wearing.

Catherine Ann Buttigieg explained that this constant stalking made her feel terrible and uncomfortable, and she would avoid going to places where she knew he might be, and she would constantly look over her shoulder.

Sarah Jane Buttigieg, the complainant’s daughter, testified⁵ that Mark Heath, who she recognised as the person accused, had rung the doorbell of their residence one night in February 2022 around one month after she had moved back to live with her mother. She was alone at home when at around 8.00 p.m., the doorbell rang and when she checked from the balcony to see who rang, she could see that it was Mark Heath. Since her mother had told her that he had been stalking her, she was scared and ran down to her mother’s work place which is few minutes away and told her that he had

⁵ 28th July 2022 and 19th June 2023.

just showed up, and also described what he was wearing. Two minutes later, he walked past her mother's workplace wearing the same clothes. She also confirmed that between December 2021 and February 2022, when she would go to visit her at work around three to four times a week, she would regularly see Mark Heath outside her mother's work-place, perhaps two or three times a week.

Mark Heath, the person accused, in his statement released under interrogation on the 27th February 2022⁶, stated that he met Catherine Ann Buttigieg in June 2019. They were in a relationship until April 2020 when Catherine ended the relationship and sent him out of her residence. He went to live elsewhere and declared that he never contacted her again, however they started seeing each other again "on and off" until September or October 2021. He claimed that nobody knew about their relationship at this time except for two of his friends, Dolores and Debbie. They used to meet after she finished work, where she would go to his place or he to hers but he claimed that Catherine wanted to keep their relationship a secret. As from September 2021 they never met up again as a couple but he admitted that he used to message her continuously because she would message him back "*how are you?*" and "*good morning*". However, he deleted all these messages and although he knew that she blocked him on Messenger, she still sent him normal SMS messages and phoned him during the first two weeks of September 2021 before she went to Spain, which was the last time he saw her or spoke to her. However he would see her in the pub where she worked "*but no contact.*" He denied ringing Catherine's doorbell on the 6th February 2022 and claimed that he was not there but he was at Sailor's. He confessed that he kept on texting her for an entire three months after the termination of their relationship because they were "*still friends*" but he did not want to have anything to do with her and was trying to move on. He stated that Catherine was "*twisting words*" and although she would ignore him for a couple of days, she would then message him and denied that she was scared of him. He explained that she was scared to talk to him and to get back into a relationship or be friends with him.

⁶ Dok. AM1, page 165-168 of the record.

Having considered;

Mark Heath is being charged with the crime of harassment under article 251A(1)(a) of the Criminal Code. In the first charge, he is attributed having pursued a course of conduct which amounts to harassment of Catherine Ann Buttigieg on the 6th February 2022 and the preceding days and or months.

The Court observes that our law does not give a general definition of the behaviour that constitutes harassment and it is only Article 251C of the Criminal Code which, with reference *inter alia* to this particular crime, that provides a description of conduct that amounts to harassment: “*In articles 251A to 251BA, both inclusive, references to harassing a person include alarming the person or causing the person distress*”.

Blackstone’s Criminal Practice (2012 Ed.) describes the conduct amounting to harassment, as follows⁷:-

“‘Harassment’ is generally understood to involve improper oppressive and unreasonable conduct that is targeted at an individual and calculated to produce the consequences described in s. 7. By s. 1(3) of the Act (see B2.143), reasonable and/or lawful courses of conduct may be excluded. The practice of stalking is arguably the prime example of harassment (Curtis [2010] 1 Cr App R (S) 193) but a wide range of other actions could, if persisted in, be so categorised. A course of conduct which is unattractive and unreasonable does not of itself necessarily constitute harassment; it must be unacceptable and oppressive conduct such that it should sustain criminal liability. See Majrowski v Guy’s & St Thomas’s NHS Trust [2007] 1 AC 224, per Lord Nicholls at [30]. Harassment includes negative emotion by repeated molestation, annoyance or worry. The words ‘alarm and distress’ are to be taken disjunctively

⁷ Blackstone’s Criminal Practice, 2012 Ed, B.2.140, p. 285.

and not conjunctively, but there is a minimum level of alarm or distress which must be suffered in order to constitute harassment.”⁸

In a judgement handed down by the Court of Criminal Appeal in the names **Il-Pulizija vs James Demanuele** decided on the 26th November 2009, it was held:-

*“... Illi t-terminu legali fastidju (bl-Ingiliz "harassment") gie definit mill-Black's Law Dictionary - (7th. edit.) bhala:- "Words, conduct or action (usu. Repeated or persistent) that being directed at a specific person, annoys, alarms or causes substantial emotional distress in that person and serves no legitimate purpose", dan l-element ta' ripetizzjoni jew persistenza ma jridx jigi konsidrat "in isolation" b' riferenza biss ghall-kaz mertu tal-kawza imma wkoll irid jitqies fl-isfond tar-retroxxena u ta'l-agir precedenti tal-gudikabli.”*⁹

The Court of Criminal Appeal, in its judgement, handed down in the case **Il-Pulizija vs. Alan Caruana Carabez**¹⁰, had also held that:-

".... f' kazijiet bhal dawn ir-retroxena ghal kull incident hija importanti biex il-Qorti tkun tista' tispigola l-incident izolat u accidental minn agir abitwali ta' fastidju fuq periodu ta' zmien." Pero', xorta wahda jkun irid jirrizulta mill-provi ghall-fini tal-parametri tal-akkuza nnifisha.”

... ..

*... Kull tip ta' dan l-agir pero' hu kalkolat li johloq certa biza' f'dak li jkun b'mod li johloq sensazzjoni li qed tigi segwit u impoggi taht certa pressjoni ingusta. Hu proprju dan li din il-ligi l-gdida trid tipprojbixxi.”*¹¹

⁸ **Il-Pulizija vs Joseph Bajada** decided by the Court of Magistrates (Gozo) 2.05.2013. Emphasis made by this Court.

⁹ Emphasis made by this Court.

¹⁰ Decided 21.6.2007.

¹¹ In its judgement in the names **Il-Pulizija vs Denise Falzon**¹¹, the Court of Criminal Appeal explained:- *“... hemm distinzjoni netta, fil-fehma ta' din il-Qorti, bejn dik l-imgieba li qed tohloq fastidju u dik li tohloq semplicement inkonvenjent. ... Illi jidher allura li t-test li għandu jigi adoperat biex jigi stabbilit jekk hemmx fastidju 'illeċitu' o meno huwa billi jigi applikat it-test oġġettiv iktar milli dak soġġettiv filwaqt pero li jittiehed qies tal-fattispeċi kollha tal-kaz u l-assjem taċ-ċirkostanzi kollha li setgħu wasslu lil kwerelant jieħu l-passi li ħa.”* Emphasis made by this Court.

Having considered;

That it must be pointed out at the outset that the charges brought against the person accused all refer to crimes allegedly committed “*on the 6th February 2022 and / or the preceding days and months in the Maltese Islands ...*”. This inevitably means that the evidence brought forward by the Prosecution must show that each of the crimes with which he is charged and all the integral elements of each crime, were committed on the mentioned date or in the months preceding 6th February 2022, but not in the years preceding such date. The Court is of the view that it must therefore exclude from its examination for the purposes of establishing the guilt or otherwise of the accused, facts which constitute elements of such crimes and which occurred earlier than the 1st January 2022 and therefore, in 2021, the preceding year, since such period of time evidently falls outside the parameters expressly mentioned in the charge sheet defining the time of the commission of the crimes.

The Court expects that had the Prosecution intended to include within the particulars of time of the charge, facts that took place prior to the months preceding February 2022 but in the previous year, the summons would or should have indicated that the crimes were committed also “*in the years*” preceding 6th February 2022 and not merely in the “*days and /or months preceding*” said date. However, as drawn up, the summons makes no reference to the years preceding 6th February 2022 and consequently, events or facts that took place in the preceding year, 2021, cannot be taken into account by the Court for the purpose of establishing the concurrence of the elements of the crimes with which the accused is charged. Moreover, at no point did the Prosecution request the correction of the *avviso di comparire* in order to expressly include within the parameters of time indicated therein, with reference to the charges proffered, the years preceding 6th February 2022.

This principle was explained by the Court of Criminal Appeal in its judgement of the 18th October 2005 in the names **Il-Pulizija vs John Mary Briffa**, where the appellant had been charged with crimes that were allegedly committed “*ghall-habta tas-7.30*

p.m.” while from the evidence it was established that the incident occurred “ghall-habta tas-7.30 a.m.”-

“L-imputazzjoni ghalhekk kif impostata qed tirreferi ghal xi haga li allegatament grat tmax-il siegha wara u l-ewwel Qorti hekk sabet lill-appellant hati. Mill-provi ma jirrizultax li gara xi incident fil-hin indikat f’l-imputazzjoni u ghalhekk l-appellant ma setax jinsab hati kif fil-fatt insab. Il-frazi “ghall-habta ta’ tindika hin approssimattiv u tinkludi hin vicin dak imsemmi fl-imputazzjoni izda zgur mhux tmax-il siegha wara.”¹²

This principle was considered at length by this Court in the judgment in the names **II-Pulizija (Spettur Angelo Gafa') v. Emanuel Ellul**¹³:-

“Kif inghad, l-imputat gie mixli illi kkommetta r-reat tal-uzurija “fl-20 ta’ Marzu 2012 jew fix-xhur ta’ qabel”. Isegwi ghalhekk illi kif impostata, l-imputazzjoni tirreferi ghal fatti li graw fl-20 ta’ Marzu jew fix-xhur vicini ta’ dik id-data. Ghalkemm l-imputazzjoni giet dedotta bhala reat kontinwat, il-Qorti ma tqisx illi l-kuncett legali tal-kontinwita` a tenur tal-Artikolu 18 tal-Kodici Kriminali jista’ jestendi oltre l-parametri temporali espressament dedotti fl-akkuza, ghaliex il-Qorti ma tista’ qatt issib htija ghal xi reat li jkun sehh fi zmien iehor jew f’hin iehor u mhux dak indikat fl-akkuza.

L-Artikolu 360 tal-Kapitolu 9 ifisser kif ghandha tigi redatta ic-citazzjoni u liema huma daww l-indikazzjonijiet mehtiega sabiex il-persuna imharrka tkun tista’ theggi d-difiza taghha tajjeb u dan bic-cirkostanzi materjali indikati lilha f’dik ic-citazzjoni. Is-subartikolu (2) tal-Artikolu 360 tal-Kapitolu 9 tal-Ligijiet ta’ Malta jipprovdi li:- Ic-citazzjoni ghandha ssemmi car il-persuna mharrka, u ghandu jkun fiha, fil-qosor, il-fatti ta’ l-akkuza, bil-partikularitajiet ta’ zmien u ta’ lok li jkunu jinhtiegu jew li jkunu jistghu jinghataw. Ghandu jkun fiha wkoll it-twissija li, jekk il-persuna mharrka

¹² See also **II-Pulizija (Spettur Pierre Micallef Grimaud) vs Christopher Ryan et**, decided by the same Court 10th April 2014 and **II-Pulizija vs Raymond Xerri**, 26th January 2017.

¹³ 10th April 2019, delivered by this Court as presided. Cited with approval in the judgement delivered by the Court of Criminal Appeal in the names **II-Pulizija v. Harish Daswani** on the 1st September 2020.

tonqos li tidher, hija tigi arrestata b'mandat tal-qorti u mressqa quddiem l-istess qorti fil-jum li jkun imsemmi fil-mandat.” Huwa rikonoxxut illi z-zmien huwa cirkostanza materjali u sostanzjali tal-kaz tal-Prosekuzzjoni, b'dan illi jekk il-parametru taz-zmien ikun gie indikat hazin, allura l-binarji tal-azzjoni wkoll jitqiesu li huma hazin. Ghalkemm m'huwiex rikjest mil-ligi li fl-imputazzjoni il-Prosekuzzjoni tindika bi precizjoni matematika iz-zmien tal-allegat reat, huwa certament desiderabbli li jsir hekk, speċjalment fejn, bhal fil-kaz odjern, jirrizulta mill-provi illi l-imputat kien ilu jislef flus lill-konjugi Worley sa minn Novembru 2010 u kwindi fuq medda ta' iktar minn sena. Multo magis meta r-reat in kwistjoni huwa meqjus bhala wiehed istantanju u m'huwiex wiehed ta' natura permanenti, ghalkemm tul iz- zmien kollu li fih jithallsu imghaxijiet jew jigi perceptit qligh jew korrispettiv b'eccess minn dak permess mil-ligi, ghandu effetti permanenti. Fil-kaz tal-imputazzjoni odjerna, iz-zmien indikat fl-akkuzza jirreferi ghal xhur u mhux snin u ghalkemm bl-uzu tal-plural fil-kelma “xhur” l-ispazju temporali tal-fatti li ghalihom tirreferi l-imputazzjoni jista' jitqies li gie estiz ghal diversi xhur ohra, il-Qorti pero` tqis illi l-parametri tal-kelma xhur, b'mod generali ghandhom ifissru dawk il-ftit xhur qabel id-data specifikata, u ma jistghu qatt jiggebbdu biex jinkludu fihom fatti li jkunu sehew tmax-il xahar jew iktar, qabel. Inoltre, il-Qorti hija tal-fehma wkoll illi ma jistghux jidhlu fl-iskop tal-kliem “fix-xhur ta' qabel”, dawk ix-xhur tas-sena ta' qabel id-data espressament msemmija fl-imputazzjoni, f'dan il-kaz l-20 ta' Marzu 2012.”¹⁴

In the judgement delivered by the Court of Criminal Appeal in the names **Il-Pulizija v. Harish Daswani**¹⁵, it was held, on the basis of the aforementioned principle:-

“... that the Court could not have found guilt of the first charge in view that not all the elements of the offence took place in the period mentioned in the charge sheet. The Court is therefore abstaining from taking cognisance of the second grievance regarding article 248A of the Criminal Code as well as parts of the third grievance through which regard the charge of human trafficking, ...”

¹⁴ Emphasis made presently by this Court.

¹⁵ *Ibid.*

Applying this principle to the facts of the case at hand, the Court notes that Catherine Ann Buttigieg was categorical when she explained in her testimony that Mark Heath sent her SMS messages several times a day during the period 26th October 2021 and 1st January 2022. Therefore, these messages (save for those sent on the 1st January 2022) in so far as they were sent in the year preceding 6th February 2022 cannot be taken into consideration for the purposes of determining the course of conduct that constitutes one of the essential material elements of the crime of harassment, since they fall outside the parameters of time defined in the summons as the time of the commission of the offence.

In any event, these messages, although they would in theory constitute persistent and oppressive behaviour such as would amount to harassment, were not actually received by Catherine Ann Buttigieg at the time that they were sent, because in October 2021, as correctly pointed out by the defence in its final submissions, she had blocked Mark Heath's number and was not aware that these messages were being sent until such time as she discovered that they had been saved by the optimizer application on her mobile phone. Since his last message appears to have been sent on the 1st January 2022, the Court understands that the existence of these messages was only discovered subsequently to that date. Consequently, precisely because Catherine Ann Buttigieg never knew that these persistent and repetitive messages were being sent, they could not have caused her to feel distressed and troubled **by a course of conduct pursued at the time that they were sent.**

Above all, the Court cannot fail to observe that the Prosecution did not bring any evidence whatsoever that proves beyond a reasonable doubt that the printed copies of the messages received by Catherine Ann Buttigieg between 26th October and 1st January 2022 (Dok. CB1 et), were messages that were indeed sent by the person accused from a telephone number that is registered in his name. When interrogated by the Police on two occasions, Mark Heath was not questioned about his mobile number and although when he was shown "*the batch of endless messages which Catherine provided to the Police*" he declared that "*Catherine was twisting words and that those*

messages were all 'nonsense'”, no witness testified that the messages being referred to are the same messages exhibited by Catherine Ann Buttigieg in these proceedings. The admission of the person accused of his telephone number and or the testimony of the service provider of the telephone number 77943331 that would attest to the fact that this number was registered in the name of the person accused, or at the very least, evidence that he was indeed shown the same messages that were exhibited by Catherine Ann Buttigieg in the record of proceedings, was the best evidence that the Prosecution was bound to bring forward in order to prove that the crime of harassment was committed by means of incessant SMS messages sent by none other than Mark Heath. Anything less than this would mean that in order to conclude that those same messages exhibited in the record were sent by the accused, from the mobile number 77943331, the Court would be making an assumption based on supposition and speculation, which of and in themselves, fall within the margins of a reasonable doubt.

However, In view of the absence of satisfactory evidence which would prove beyond any reasonable doubt that the messages exhibited were indeed sent by the person accused, the Court cannot take into consideration the messages Dok. CB1, CB2, CB3, CB4 and CB5 for the purpose of determining the elements of the crime of harassment.

Having considered;

That however, even if the evidently persistent, repetitive and bothersome messages are removed from the Court’s area of scrutiny, both for having been sent prior to the 1st January 2022¹⁶ and for lack of evidence tying the person accused with the number 77943331, the Court has little doubt that the person accused from the 1st January 2022 onwards, pursued a repetitive conduct by behaving in a manner that is not only objectively and intrinsically assiduous due to its recurrent and persistent nature, but was also subjectively distressing to Catherine Ann Buttigieg, and thus falls within the scope of the crime of harassment as defined in settled case-law.

¹⁶ Despite the fact that it would result that two messages were sent from that number to Catherine Ann Buttigieg on the 1st January 2022, begging her to talk to the sender and to meet him (page 97).

It has been consistently held in local case-law that harassment includes:-

“Kull tip ta’ dan l-agir pero’ hu kalkolat li johloq certa biza’ f’dak li jkun b’mod li johloq sensazzjoni li qed tigi segwit u impoggi taht certa pressjoni ingusta. Hu proprju dan li din il-ligi l-gdida trid tipprojbixxi.”

This sensation of undue pressure and distress is abundantly evident from Catherine Ann Buttigieg’s testimony – which the Court deems to be credible, consistent and reliable - where she unswervingly explained how in December 2021 and for several months afterwards, Mark Heath would stalk her by sitting at the coffee-shop opposite her place of work on a very regular basis, simply staring at her - despite her having asked him numerous times to leave her be and not to go near her place of work - and also on one occasion, having despite these unequivocal pleas to leave her be, grabbing her arm and begging her to talk to him and entering her place of work, shouting abuse to her friend and staring her directly in the face. Mark Heath, during his interrogation, admitted that he would see her in the pub where she worked *“but no contact”*, a statement which in the Court’s view continues to validate the victim’s version that he would indeed loiter around her place of work and stare at her.

The Court took note of the fact that Catherine Ann Buttigieg felt very upset and uncomfortable due to Mark Heath’s insistence on loitering in the vicinity of her place of work, staring fixedly at her each time she emerged from the pub. This odd and recurrent behaviour made her fear for her safety – a feeling that was evidently exacerbated when her daughter told her that he had turned up unexpectedly outside their home one evening, during that same period, where he then appeared outside her place of work a few minutes later. She testified that his conduct also made her feel as if she always needed to look behind her and had to avoid places where she knew he might frequent.

This state of mind was also affirmed by her daughter Sarah Jane Buttigieg who testified that because she knew her mother was being stalked by the accused, she was

scared when she recognised him as the person who rang their doorbell one evening in February 2022 and as the person whom she also recognised a few minutes later, wearing the same clothes, outside her mother's place of work. Sarah Jane Buttigieg also testified that she used to see the accused loitering around her mother's place of work around two or three times weekly whenever she used to visit her mother. Although the person accused denied in his statement to the Police, having insisted that he was not the person who rang the doorbell as he was at another place at the time, the Court is not convinced, after hearing the *viva voce* testimony of the victim and her daughter, that on a balance of probabilities, that person was unlikely to have been the person accused.

Although in her testimony Catherine Ann Buttigieg stated that this episode where the person accused turned up outside her residence unannounced, occurred in April 2022, it is evident from the testimony of PC 2043 Jacqueline Chapelle and from the report filed by Catherine Ann Buttigieg herself (Dok. JC1) on the 9th February 2022, that she had reported the accused as having turned up at her residence on the 6th February 2022. In fact, Sarah Jane Buttigieg herself testified before the Court that Mark Heath had rung the doorbell of their residence when she was alone at home, one night in February 2022. Consequently, the Court finds that it has been sufficiently proved that the occasion where the person accused turned up unexpectedly outside Catherine Ann Buttigieg's one evening, during the period when he was also turning up outside her place of work staring at her while sitting in coffee-shop across the road, took place in February 2022 and not in April 2022, and therefore falls within the parameters of time within which the person accused is charged with having committed the crime of harassment.

The defence submitted that the complainant's version that she felt harassed and intimidated by the accused is not credible because the parties had a good relationship between them as evidenced by the fact that there were ongoing messages and communication between the parties and that they used to meet on an "on-off basis". However, the accused himself declared in his statement to the Police that after the first

two weeks of September 2021, before the complainant went on a holiday, there was no communication between them. It is evident therefore, that the injurious conduct occurred subsequently to the period of time when the parties were still in contact, further corroborating complainant's version.

In the Court's view, this conduct on the part of the person accused, taken as a whole, is altogether improper, unreasonable and also entirely irreconcilable with the behaviour expected of an ordinary and civilised adult. Moreover, he failed show that this course of conduct was pursued for the purpose of preventing or detecting crime or under any enactment, regulation or rule, or to comply with any condition or requirement imposed by any person under any enactment¹⁷. The elements of the crime of harassment as envisaged in article 251A of the Criminal Code, have therefore been proved to the satisfaction of the Court beyond a reasonable doubt.

Having considered;

That the course of conduct pursued by the person accused in this case, clearly also amounts to stalking, that is the crime envisaged in article 251AA of the Criminal Code.

With the introduction of article 251AA of the Criminal Code, the legislator specifically formulated a further separate offence, comprised of those particular acts which would fall to be classified as stalking which is a graver form of the general crime of harassment.

Article 251AA expressly defines stalking as a course of conduct which:-

- a) amounts to harassment of another person for the purposes of article 251A,
- b) constitutes any of the acts mentioned in sub-article (3),

¹⁷ Paragraph (b) and (c) of article 251A(3) of Chapter 9.

- c) the person, whose course of conduct it is, knows or ought to know that the course of conduct amounts to harassment of the other person, and
- d) it is repeated conduct that causes the other person to fear for his safety.

For the purposes of sub-article (3) of article 251AA, the following are some of the acts which are deemed to constitute acts of stalking:- following a person, contacting, or attempting to contact, a person by any means, loitering in any place, whether public or private and watching or spying on a person.

The Court agrees that the course of conduct of the person accused in this case, satisfies all the essential elements of the crime of stalking, specifically because it is a repeated conduct that caused Catherine Ann Buttigieg to fear for her safety and amounts to harassment. Moreover, the person accused ought to have known that his course of conduct harassed Catherine Ann Buttigieg, what with her repeated requests to leave her alone and to desist from loitering around her place of work. Above all, the accused's course of conduct consists of watching Catherine Ann Buttigieg, attempting to speak to her and loitering around her place of work.

However, the Prosecution did not charge Mark Heath with the crime of stalking under article 251AA but only with the generic crime of harassment under article 251A(1) of the Criminal Code. The Court therefore cannot find him guilty of this specific and graver offence.

Reference must also be made to the decision of this Court, differently presided, in the case **Il-Pulizija vs Paul Lughermo**¹⁸ where it was held:-

“Din il-Qorti hija moralment konvinta li dan huwa każ partikolari ta’ fastidju li jieħu l-forma ta’ insegwiment. Issa f’dan il-każ il-Qorti rat li l-Prosekuzzjoni addebitat lill-imputat ir-reat ta’ fastidju ġenerali taħt l-Artikolu 251A tal-Kodiċi Kriminali. Din il-

¹⁸ Deċiża 19 ta’ Diċembru, 2016

Qorti kienet tilqa' din it-tezi tal-Prosekuzzjoni li kieku din il-kawża kienet magħmula qabel id-dahla fis-seħħ tal-Artikolu 251AA bl-Att XXIV tal-2014.

Bis-saħħa ta' dak l-Att ir-reat ta' fastidju taħt l-Artikolu 251A tal-Kodiċi Kriminali assumu aktar minn qatt qabel il-karattru ta' genus b'tipologija ta' azzjonijiet li sa dakinhar setgħu ikunu klassifikati li jaqgħu taħtu issa jiġu misluta u konċentratu f'reati ad hoc li jassumu karattru ta' species."

The Court in the above-mentioned judgement continued to explain:-

"Meta l-fattispecie jkunu għalhekk tali li jaqgħu lok għal dan ir-reat, il-Prosekuzzjoni trid taddebita dan ir-reat lill-imputat u mhux ir-reat ta' fastidju ġeneriku, anke jekk dak jikkostitwixxi l-genus.

Ladarba l-Liġi tippreskrivi species ta' reat, il-Prosekutur għandu jaddebita dak l-ispecies u mhux jistrieħ fuq il-genus. Ma kienx l-iskop tal-Legislatur li joħloq dan ir-reat speċifiku u fl-istess waqt iħalli li l-Prosekuzzjoni tkompli titmexxa in baži għar-reat ġeneriku. Dan ir-reat ġie maħluq speċifikament sabiex dik il-fattispecie partikolari tas-segwiment tiġi indirizzata speċifikament b'reat ad hoc u b'pieni maġġorati in kwantu huma oġġla minn dawk preskritti fir-rigward tar-reat tal-fastidju ġeneriku.

Għalhekk minkejja li r-reat ta' fastidju taħt l-Artikolu 251A tal-Kodiċi Kriminali huwa l-genus, bil-mod ta' kif ġie promulgat l-Artikolu 251AA, tal-Kodiċi Kriminali, inkluż kemm bil-fatt li :-

- (a) dan ir-reat li huwa bażat fuq fattispecie li titnissel u li tinkwadra ruħha fil-parametri tal-Artikolu 251A tal-Kodiċi Kriminali tant li l-imġieba tal-Artikolu 251A trid tkun saħansitra wieħed mill-elementi kostituttivi tar-reat ta' segwiment,*
- (b) kif ukoll minħabba li l-piena preskritta għar-reat ta' segwiment hija maġġuri għal dik infliġġenda fil-każ ta' fastidju ġeneriku,*

ma jistax jingħad li r-reat ta' segwiment huwa reat minuri iżda kompriż u involut fir-reat ta' fastidju.

Mill-banda l-oħra qajla jkun jagħmel sens ġuridiku li jingħad li r-reat aktar ampju u li minnu tnissel u li fuqu huwa bbażat ir-reat ta' segwiment u ċjoe ir-reat ta' fastidju taħt l-Artikolu 251A tal-Kodiċi Kriminali huwa reat li huwa minuri iżda kompriż u involut fir-reat ta' segwiment.”

This Court agrees that when the Prosecution's witnesses testified about circumstances that clearly fall within the parameters of the particular crime of stalking, the person accused had to also be charged with this specific and graver crime under article 251AA of the Criminal Code, rather than only with the generic crime of harassment. Nonetheless, this Court does not agree that the course of conduct amounting to stalking can be completely detached from the generic crime of harassment under article 251A. Indeed, while it is true that stalking constitutes a specific and aggravated crime and not merely one of the examples of harassment, one of its constitutive elements as defined in article 251AA(1), is precisely a course of conduct in breach of article 251A(1) of the Criminal Code, that is harassment. Only that, for the crime of stalking to subsist, proof of additional and distinct formal elements and material acts, is required. After all, stalking is a course of conduct which, despite amounting also a separate offence, comprises one of the essential elements of the crime of stalking: Blackstone, cited earlier on, describes “*the practice of stalking ... [as] arguably the prime example of harassment (Curtis [2010] 1 Cr App R (S) 193)*”.

It is therefore this Court's view that if the course of conduct of person charged **only** with the generic crime of harassment under article 251A of Criminal Code is also found to constitute the separate and also graver offence of stalking, he can be found guilty of harassment but not also of the graver offence. **It certainly cannot mean that the Court must exclude a finding of guilt also for the generic crime of harassment - of which one of the prime examples is stalking - even if stalking is now an *ad hoc* crime.** Any interpretation to the contrary would yield absurd results,

where a person evidently guilty of a particular form of harassment which constitutes a specific crime, but who has been charged only with the generic crime, could not be found guilty of that lesser crime.

Therefore, contrary to the pronouncement of the Court in the aforementioned judgement, this Court is of the firm view that the crime of harassment under article 251A of the Criminal Code is indeed the minor offence – from the perspective of punishment - comprised and included in the graver distinct offence of stalking and as such, **nothing excludes a finding of guilt for the lesser but more-encompassing offence when the graver offence, despite being proved in all its constitutive elements, is not specifically attributed in the *avviso da comparire*.**

Therefore, since all the elements of the offence of harassment under article 251A of the Criminal Code, as established in settled case-law (cited above), have been identified and proved beyond a reasonable doubt, such that the course of conduct of the person accused between the 1st January 2022 and the 6th February 2022, harassed Catherine Ann Buttigieg, he must be found guilty of the crime under the said article 251A of the Criminal Code.

Having considered;

That Mark Heath was charged as having harassed his “*ex-partner*”. It was abundantly proved, even *ex admissis* in his own statement to the Police, that the parties were in a relationship and lived together for several months, although this relationship had come to an end several months before the events which led to the institution of these proceedings. This means that the aggravating factor envisaged in article 251H(1)(a) of the Criminal Code, that is, where the offence was committed against a former or current spouse or partner, has been proved, such that the punishment applicable in terms of article 251A shall be increased by one or two degrees.

Articles 221(1)(a) and 251HA of the Criminal Code are also applicable in this case since they both refer to article 202 of the same Code, which in paragraph (h), sub-paragraph (vi), provides that when the crime is committed on another person who is or was in a relationship with the offender, the punishment shall be increased by one or two degrees¹⁹. However, since the aggravating circumstance where the victim of the crime was a former partner or was in a relationship with the offender, is common to both provisions of law, that is article 251H(a) and article 251HA (which refers to article 202), the Court shall only apply one aggravating circumstance for the purposes of an increase in punishment, that is, it shall not apply an increase in punishment under both provisions of Law even though the punishment is aggravated under two different provisions of Law. This reasoning is supported by the provisions of article 251HA itself, when it is stated that the punishment shall be increased in each of the cases referred to in article 202: *“provided that where an aggravation of punishment in respect of the circumstances mentioned in this article is already provided for under this Code or under any other law”*, in which case, the higher punishment may be applied.

Having considered;

That the person accused is also being charged with the crime envisaged in article 49 of Chapter 399 of the Laws of Malta (Electronic Communications (Regulation) Act), that is, with having on the 6th February 2022 and in the preceding days and or months, by means of an electronic communications network or apparatus, threatened the commission of any crime, or with the intent to induce his ex-partner Catherine Ann Buttigieg to do or omit from doing anything or any other improper use thereof.

¹⁹ The aggravating circumstances mentioned in article 202(h), sub-paragraph (i), which speaks of *“the current or former spouse, civil union partner or cohabitant,”* and that mentioned in sub-paragraph (v) which speaks of *“another person living in the same household as the offender or who had lived with the offender before the offence was committed”*, shall not be applied since the offender in this case was not expressly charged as having committed the crime of harassment on the person of his former cohabitant or a person who used to live with him before the crime was committed, but only on his *“ex-partner”* without any mention of the cohabitation or same household factor.

The Court is of the view that the person accused cannot be found guilty of this crime. It has already been found that while the evidence shows that the messages he allegedly sent to Catherine Ann Buttigieg’s mobile phone via SMS were sent between 26th October 2021 and 1st January 2022, the crimes with which he is charged were alleged to have been committed in the days and months prior to the 6th February 2022 – that is, beyond the parameters of time specifically attributed in the *avviso da comparire*. Moreover, as already established, the Prosecution failed to bring the best evidence to prove beyond all reasonable doubt that it was Mark Heath who sent the SMS messages exhibited in the messages exhibited by Catherine Ann Buttigieg.

Consequently, even because it is evident, upon an examination of the messages that were exhibited by Catherine Ann Buttigieg, that no crime was threatened to be committed and it does not result either that any improper use of the electronic communications network was made²⁰ or that the person accused induced the recipient to do or omit from doing anything, the Court cannot find the accused guilty as charged under article 49 of Chapter 399.

Having considered;

That in so far as the third charge, imputing the contravention under article 339(1)(e) of the Criminal Code, is concerned, it is immediately obvious that the Court cannot find guilt since Mark Heath was charged with having “*insulted, threatened or provoked his partner Michelle Ryle*”. Nowhere does it result from the evidence adduced that the person accused’s partner is Michelle Ryle and moreover, no mention of any person named Michelle Ryle was made by any of the witnesses for the Prosecution: indeed, the Court is convinced that this was purely a *lapsus calami* on the Prosecution’s part in the drafting of the charge, which was intended to refer to Catherine Ann Buttigieg not Michelle Ryle. However, since the Prosecution never

²⁰ “*Huwa assodat illum fil-ġurisprudenza in materja illi l-frażi “użu iehor mhux xieraq” ma jfissirx kwalunkwe użu jew kull offiża, insult jew kelma żejda, iżda għandha tiġi interpretata b’mod ferm aktar strett biex tirreferi b’mod ewlieni għal theddid, estorsjoni u attivitajiet illeċiti.*” – **Il-Pulizija v Carmelo Calleja**, decided by this Court on 28.7.2022

requested a correction of the name of the alleged victim of this offence, the Court in the absence of any evidence in support of the charge, cannot find the person accused guilty of this contravention.

Having considered;

That for the purposes of punishment, the Court upon a finding of guilt for the crime of harassment under article 251A of the Criminal Code, must take into account that the crime of harassment is a serious one as its necessary effect is the emotional distress of the victim and the resultant destabilisation of his or her ordinary sense of safety. However, the offender has a completely clean criminal conduct and this must also be taken into account. Consequently, a restraining order would be appropriate in the circumstances of this case, together with a punishment of imprisonment in the minimum, although the prescribed minimum punishment must be increased by one degree upon application of article 202(h)(vi), 251HA and 251HA. The Court will also order that the term of imprisonment is suspended in order that the offender will understand the gravity of his behaviour and henceforth gauge his movements and actions and their consequences before acting, while also appreciating that a repetition of the same conduct, or the commission of any other crime punishable with imprisonment, would mean an effective jail term.

For all these reasons, while finding MARK HEATH not guilty of the offences attributed to him in the second and third charges, after having seen articles 18, 31, 202(h)(vi), 222(1)(a), 251A, 251C, 251H(a) and 251HA of the Criminal Code, Chapter 9 of the Laws of Malta, finds him guilty of the first charge and condemns him to imprisonment for nine (9) months but upon application of article 28A of the Criminal Code, orders that the sentence shall not take effect unless, during a period of two (2) years, the offender commits another offence punishable with imprisonment.

The Court explained to the offender in ordinary language his liability under article 28B if during the operational period he commits an offence punishable with imprisonment.

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 Catherine Ann Buttigieg, the Court orders the issue of a restraining order against MARK HEATH which shall remain in force for a period of two (2) years.

Since no experts were appointed in these proceedings, the Court abstains from taking cognisance of the Prosecution's request to apply article 533 of the Criminal Code.

Orders that a copy of this judgement is served upon the Registrar of Courts for the purpose of sub article (8) of article 28A of the Criminal Code.

**DR. RACHEL MONTEBELLO
MAGISTRATE**