Court of Criminal Appeal

Hon. Madame Justice Dr. Consuelo Scerri Herrera, LL.D., Dip Matr., (Can), Ph.D.

Appeal Nr: 16 / 2023

The Police

Inspector Bernard Charles Spiteri

Vs

Hilary Clare Pinfold

Today the, 30th October 2023

The Court;

Having seen the charges brought against Hilary Clare Pinfold holder of Identity Card number 35345 A, before the Court of Magistrates (Gozo) as a Court of Criminal Judicature of having:

On the 12th September 2022 at 16:50hrs whilst in Triq Frangisk Portelli, Nadur, Gozo, she drove, attempted to drive, or was in charge of a motor vehicle, make Daihatsu, Registration No. KBF 834 or other vehicle on a road or other public place after consuming so much alcohol that the preparation of it in her breath, blood or urine exceeded the prescribed limit Art. 15B(1) Chapt. 65.

Having seen the judgment meted by the Court of Magistrates (Gozo) as a Court of Criminal Judicature delivered on the 22nd June, 2023 whereby the Court found Hilary Claire Pinfold guilty of the charge brought against her and after having

seen Article 15H of Chap. 65 of the Laws of Malta, condemned her to a fine (multa) of two thousand three hundred Euros (€2,300).

Moreover, with the application of Article 15H(2) of Chap. 65 of the Laws of Malta, the Court disqualified the offender from holding or obtaining a driving licence for a period of six (6) months from date of judgment.

Having seen the appeal application presented by Hilary Clare Pinfold in the registry of this Court on the 5th July, 2023 whereby this Court was requested to revoke the judgement given by the Court of Magistrates (Gozo) As a Court of Criminal Judicature of the twenty second (22nd June, 2023), and declares the accused not guilty and acquits her from the charge brought against her.

Having seen the grounds for appeal:

1. The appellant states that the caution given to the accused by PS 2100 before being requested to provide a specimen of her breath for the breath test was very questionable and cannot be relied on as admissible evidence.

The Court of First instance argued that as the accused was not "*detained*" and as there "*was no questioning*", the provisions of Article 355AUA (6) of Chapter 9 were "*completely inapplicable as the ingredients for this Article do not subsist*". With all due respect the appellant does not and cannot agree with this line of reasoning adopted by the Court of First Instance. Article 355AU(1) of Chapter 9 of the Laws of Malta makes it clear that the provisions of Sub-Title IX of Title I of Part 1 of Book Second of the Criminal Code: Right to Legal Assistance And Other Rights During Detention, apply to suspects or accused persons in criminal proceedings from the time when they are made aware by the Executive Police or by any other law enforcement or judicial authority, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. Article 534A of the Criminal

Code also emphasises the principle that the provisions of Title VI Of The Rights of Suspects And Accused shall apply to a person from the time that he is made aware by the Executive Police that he is suspected of having committed an offence and to a person charged or accused of having committed an offence until the conclusion of the criminal proceedings, including, where applicable, the passing of sentence and the determination of an appeal.

In this regard, the Court of Criminal Appeal in its judgement: **Il-Pulizija vs Alexia Borg decided** on the 26th January 2021, held that:-

> *"63. Skont il-Ligi, sabiex Ufficjal tal-Pulizija jkun jistà jezigi li s-sewwieq joqghod ghat-test tan-nifs, dan l-Ufficjal ikun irid qieghed jagixxi in segwitu ghal suspett ragionevoli - li jkun tnissillu qabel li s-sewwieq ikun qieghed isuq taht l-influwenza tax-xorb jew l-alkohol. Meta dan is-suspett ragonevoli jitnissel minħabba l-imgieba tas-sewwieq u s-sewqan tieghu, l-agent tal-Pulizija jistà jezigi lis-sewwieq sabiex joqghod ghat-test tan-nifs - minghajr il-htiega li huwa, f' dak u sa dak l-istadju, jarresta lis-sewwieq fis-sens ta' din l-Ordinanza.*
>
> *64. Meta l-Agent tal-Pulizija jitnissillu s-suspett li s-sewwieq ikun ikkommetta reat kriminali, mill-banda l-ohra s-sewwieq imbaghad jitnissillu d-dritt li huwa jigi mgharraf li jkun jinsab taht suspett li huwa jkun qieghed isuq taht l-influwenza ta' xorb jew drogi. Ghalhekk il-mument li l-Ufficjal tal-Pulizija jwaqqaf lis-sewwieq u jigih is-suspett ragionevoli li s-sewwieq jistà jkun li kkommetta r-reati taht l-artikoli 15A jew 15B(1) tal-Ordinanza, l-agent tal-Pulizija jistà jezigi lis-sewwieq li dan joqghod ghat-test tan-nifs. Din l-ordni tal-agent tal-Pulizija hija ordni legittima fiha nnifisha; iżda hija wkoll stqarrija inekwivokabbli li l-agent tal-Pulizija jkun ifforma dak is-suspett ragjonevoli fis-sewwieq.*

65. Fil-kaz li din il-manifestazzjoni ta' suspett ragjonevoli fis-sewwieq tkun li huwa kkommetta reat ta' natura serja, allura din iggib maghha wkoll il-konsegwenza li minn dak il-mument il-quddiem, is-sewwieq ikun akkwista l-istatus legali ta' suspettat fil-kommissjoni ta' reat serju u b'hekk għandu jgawdi mhux biss id-dritt li jigi mwissi bit-tifsira tat-test tan-nifs u l-konsegwenzi tar-rizultat ta' dan it-test u d-drittijiet naxxenti mill-Ordinanza u r-Regolamenti, izda wkoll il-konsegwenzi tar-rifjut li huwa jaghmel dan it-test, kif ukoll li s-sewwieq ghandu jgawdi mid-drittijiet tà persuna suspettata skont l-artikolu 534A tal-Kodiċi Kriminali."

Although the Police Officer declared in her affidavit in a scant and generic sense that she had given the accused the right of access to a lawyer and had informed her of her rights, it did not result however, that before the accused was required to provide a specimen of her breath for a breath test she was cautioned and made particularly aware of the consequences of a breath test result, and was not warned that the failure or refusal to comply with the Police officer's request could constitute an offence. In her cross examination, PS 2100 when asked to specify what rights did she give to the accused and to what rights she was referring to that she had informed the accused about, she only answered that she had informed the accused that "she had the right not to do the breathalyser test and that she could speak to her lawyer before". This brings in very serious doubts the validity of how the breath test was taken.

The Court of Criminal Appeal in its judgement: **Il-Pulizija vs Claude Formosa** decided on 23 July 2019, held that:-

"Illi l-Qorti tqies illi t-twissija meta jkun ser jigi issomministrat it-test tan-nifs ghandha tigi spjegata car u tond u jidher li f'dan il-kaz din il-materja ma hiex qed tigi kkontestata. Dan ghaliex din

mhijiex is-solita twissija li hija ikkontemplata fil-ligi ghaliex il-ligi tippresuponi l-htija meta jkun hemm ir-rifjut u allura l-pulizija investigattiva ghandha tkun attenta doppjament meta jinghata l-caution f'dawn il-kazijiet fejn allura l-persuna suspettata ghandha tinghatat d-dritt li tikkonsulta ma' avukat qabel ma taghti t-twegiba taghha billi b'tali twegiba tkun tistà tinkrimina ruhha. Fil-fatt il-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem testendi t-tifsira ta' 'criminal charge' mill-mument illi persuna tkun ser tigi affetwata minn xi att investigattiv tal-pulizija (ara Alexander Zaichenko vs Russia - 18/02/2010): 'The Court reiterates that in criminal matters, Article 6 of the Convention comes into play as soon as the person is 'charged'; this may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when the preliminary investigations were opened. 'Charge' for the purposes of article 6(1) may be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" a definition that also corresponds to the test whether the situation of the person has been substantially affected."

The interpretation given by the First Court also goes against the spirit of Directive 2013/48/EU that was transposed into Maltese law under Sub-Title IX of Title I of Part I of Book Second of the Criminal Code. The said Directive "*applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal*." (Art. 2.1).

According to the said Directive:

- this "*also applies, under the same conditions as provided for in paragraph 1, to persons other than suspects or accused persons who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons.*" *(Art. 2.3)*

> - "*Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.*" *(Art. 3.1)*
>
> - "*Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:*
>
> *(a) before they are questioned by the police or by another law enforcement or judicial authority;*
>
> *(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3; (c) without undue delay after deprivation of liberty;*
>
> *(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.*" *(Art. 3.2)*
>
> - "*Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 10:*

(a) the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and (b) the waiver is given voluntarily and unequivocally." (Art. 9.1)

- "The waiver, which can be made in writing or orally, shall be noted, as well as the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned."

According to the relevant provisions of the Criminal Code Chapter 9 of the Laws of Malta:

- the suspect is defined as "a person who is detained or arrested by the Executive Police or any other law enforcement or judicial authority where such person has not been charged before a court of justice of criminal jurisdiction and who is being questioned by the Executive Police or any other authority as aforesaid in relation to any criminal offence." (Art. 355AT(2)(a))

- "This Sub-title applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the Executive Police or by any other law enforcement or judicial authority, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty." (Art. 355AU(1))

- "Where the person detained chooses not to seek legal assistance the Executive Police, investigating officer or any other law enforcement or judicial investigating authority shall record this

fact in writing in the presence of two witnesses and thereupon questioning may proceed immediately. It shall not be admissible for the prosecution to comment during any proceedings before a court of justice of criminal jurisdiction on the fact that the suspect or the accused person did not avail himself of the right to legal assistance in the course of his detention under arrest." (Art. 355AUA(6))

According to Article 355AU(1) of the Criminal Code the right to legal assistance is afforded by the State to suspects or accused persons in criminal proceedings "*from the time when they are made aware by the Executive Police or by any other law enforcement or judicial authority, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty*." It is thus considered expedient for the Court to interpret the definition of "*suspect*" under Art. 355AT(2)(a) to include not just suspected persons who have been detained but also suspected persons who are questioned by the Police. It is expedient that by application of the EC doctrine of indirect effect (also known as the obligation of harmonious interpretation) to extend the procedural safeguards in relation to waivers under Art. 355AUA(6) of the Criminal Code to persons who are not detainees. This in spirit of Directive 2013/48/EU which should have been transposed accurately and in full by the Maltese legislator by 27 November 2016.

From the moment the investigating officer had formed "*a reasonable suspicion*" and decided to give the accused the right to seek legal assistance and allegedly informed her of her legal safeguards before requiring the accused to submit herself to a breath test and provide a specimen of her breath until appellant was let go to the hospital for medical assistance, she cannot but be considered a "detained person" by mere operation of the law given that to become a suspect it is necessary to be detained. There is no doubt that the accused was being considered as "a suspect" and treated as such at that particular point in time even though she was not deprived of her liberty, but should she had refused or failed

to provide a specimen of her breath, the Police officer could and had the power to proceed to her arrest under Article 15D of Chapter 65 of the Laws of Malta. It was held in the judgement: **Il- Pulizija vs Claude Pisani** decided by the Criminal Court of Appeal on the 26th November 2020 that:-

> *"Issa l-mument li l-Agent tal-Pulizija jwaqqaf lis-sewwieq, jigih is-suspett ragionevoli li dan jistà jkun li kkommetta r-reati taht l-artikoli 15A jew 15B(1) tal-Ordinanza u jezigi mis-sewwieq li dan joqghod ghat-test tan-nifs, din l-ordni legittima fiha nnifisha hija manifestazzjoni tas-suspett ragjonevoli li dan l-Agent tal-Pulizija jkun ifforma fis-sewwieq. In kwantu tali ghalhekk f' dak il-mument is-sewwieq ikun akkwista l-istatus legali tà suspettat u ghandu jgawdi mhux biss mid-dritt li jigi mwissi bit-tifsira tat-test tan-nifs u l-konsegwenzi tar-rizultat ta' dan it-test u d-drittijiet naxxenti mill-Ordinanza u r-Regolamenti, nonche l-konsegwenzi tar-rifjut li huwa jaghmel dan it-test, izda ghandu wkoll igawdi mid-drittijiet ta' persuna suspettata skont l-artikolu 534A tal-Kodici Kriminali."*

2**. Waiver to the right of access to a lawyer before the accused was required to provide a specimen of her breath for breath test to be safe and satisfactory.**

At the point when the accused refused to consult a lawyer of her choice, the Police officer had no other option other than to consider this as a refusal on the accused's part to consult a lawyer prior to proceeding to administer the breathalyser test. According to Article 355AUA(6) of Chapter 9 of the Laws of Malta, when the accused refused legal assistance the Police officer should have recorded this fact in writing in the manner referred to in such Article. This was not carried out as the law dictates. Since the waiver was not recorded in terms of law, it cannot be said that such waiver was given in an "*unequivocal manner*" and "*attended by the minimum safeguards commensurate to its importance*" as was held in the judgement: **Paskal vs Ukraine** decided by the ECtHR on 15 September 2011.

Therefore the right of access of the accused to a lawyer prior to the attempted administration of the breathalyser test cannot be said that it was granted to her in accordance to law.

Although the term "*suspect*" is not defined in the Directive, it is clear that the right to legal assistance, of being informed of such right as well as the procedural safeguards in relation to a waiver of such right is afforded to suspects even though they are not deprived of liberty as this arises in the Directive itself (Art. 2.1). And if the appellant in the particular circumstances was a "*suspect*", if the provisions of Article 355AUA(6) were not applicable as the First Court had argued, the provisions of Article 355AUG(1)(2) would definitely have been applicable in the circumstances which in this case were not adhered to as well by the Police officer. Article 355AUG states that:-

> "*(1) Without prejudice to the provisions of this Sub-title requiring the mandatory presence or assistance of a lawyer, in relation to any waiver of a right as referred to in articles 355AUA and 355AUH:*
>
> *(a) the suspect or accused person shall be provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; (b) the waiver shall be given voluntarily and unequivocally.*
>
> *(2) The waiver, which can be made in writing or orally, shall be noted as well as the circumstances under which the waiver was given, using any recording procedure permitted by law.*"

In the judgement given by the ECtHR: **Pishchalnikov v. Russia** No. 7025/4 decided on 24 September 2009, for safeguards to be effective, a waiver must: (i) be established in an unequivocal manner; (ii) be attended by minimum

safeguards commensurate to its importance; (iii) be voluntary; (iv) constitute a knowing and intelligent relinquishment of a right; and (v) if implicit from the accused's conduct, it must be shown that the accused could reasonably have foreseen the consequences of his/her conduct.

Considering that the charge is not of a minor nature, when the Police officer in question informed the accused of her right to legal assistance and the latter allegedly refused such right, the Police should have recorded this fact in writing in the presence of two witnesses before having proceeded to question the accused. Failure to do so quite simply means that the waiver was neither established in an "*unequivocal manner*" nor was it "*attended by the minimum safeguards commensurate to its importance and was therefore not valid*". Article 355AUG (2) makes it clear that whether the waiver is done "*in writing or orally, shall be noted as well as the circumstances under which the waiver was given, using any recording procedure permitted by law*", which in this case neither the provisions of Article 355AUA(6) nor the provisions of Article 355AUG(1)(2) were adhered to by the Police officer.

There are also serious doubts as to whether the Police officer in question informed the accused of her rights using "*clear and sufficient information in simple and understandable language*". It was imperative for the Police officer to adhere strictly to the procedural safeguards (such as for instance by making it clear in writing in the presence of two other witnesses that the accused could understand the content of the right concerned and the possible consequences of waiving it) not least to prove in any subsequent criminal proceedings that these were indeed adhered to considering the alleged vulnerable state of the accused at that particular moment in time. When the Police officer in question informed the accused of her right to legal assistance and the latter allegedly refused such right, the Police should have recorded this fact in writing in the presence of two witnesses before starting the questioning. Failure to do so quite simply means that the waiver was neither established in an "*unequivocal manner*" nor was it

"*attended by minimum safeguards commensurate to its importance and cannot be considered as valid*".

The First Court had also argued that that there was no questioning of the accused. With all due respect this argument is fallacious. How could the accused have accepted to provide a specimen of her breath if she was not asked by the Police Officer of being required to do so and without informing her of the offence she was suspected or accused of having committed? The law does not require a sacred formula how the questioning is done, but for the first Court to argue that there was no questioning of the accused would bring further in serious doubt whether and if, and how the procedural safeguards of the accused could be said to have been sufficiently secured in the circumstances. In the judgement of the Criminal Court of Appeal decided on 6th February 2020, in the case: **Il-Pulizija vs Matthew Vella** it was held:

> "*Galadarba ma hemmx prova li qabel ma gie maghmul it-test tal-breathalyser Vella kien gie moghti d-dritt li jikkonsulta ma' avukat u galadarba ma hemm ebda prova dokumentarja jew prova ohra relattiva ghall-fatt jekk dan avalixxiex minn dan id-dritt jew le, din il-Qorti ma tistax tqis li jkun 'safe and satisfactory' li tistrieħ fuq il-konkluzjoni ta' test tal-breathalyser maghmul mill-appellant f'dan ix-xenarju probatorju.*"

Again it was held by the Court of Criminal Appeal in the judgement: **Il-Pulizija vs Alexia Borg** decided on 26 January 2021, that:-

> "*F'dan il-kaz, minn imkien ma jirrizulta jekk f'xi hin, qabel ma l-appellanta giet mistoqsija jekk kienetx taccetta li jsirilha t-test tan-nifs, ingħatatx il-jeddijiet tagħha jew it-twissijiet imsemmija f'din is-sentenza u anke fil-gurisprudenza l-oħra citata.*

F'dan il-kuntest, din il-Qorti ma tistax tqis li s-sejbien to htija tal-appellanta mill-Qorti tal-Magistrati ghar-reat imsemmi fl-artikolu 158(1) tal-Kapitolu 65 tal-Ligijiet ta' Malta mingħajr ma procedura giet debitament segwita skont il-Ligi jistà jitqies li kien 'safe and satisfactory'. Dan it-test tan-nifs gie magħmul mingħajr ma gew imharsa l-kawteli u twissijiet statutorji, fejn hemm konsegwenzi legali serji li jitnisslu kemm jekk dan it-test isir (bhala prova ammissibbli fi proceduri kriminali) u kemm jekk dan it-test ma jsirx (li l-fatt semplici jikkostitwixxi reat ad hoc)."

3. Failing the Breathalyser Test Result, no other objective evidence subsists.

Failing the breathalyser test result as admissible evidence, the testimony of Joseph Mercieca in itself does not constitute proof beyond reasonable doubt that the accused was in a drunken state. All that the said witness had said when he testified was that he saw the accused did not look well. The fact that the witness had testified that the accused "*ma kinitx f'kundizzjoni sewwa*", "*ma kinitx f'kundizzjoni li ssuq*", "*ma kinitx f'kundizzjoni stabbli*", u "*ma kinitx f'kundizzjoni hekk f'sikkitha*", such phrases cannot be taken to be understood that the accused was drunk or in a drunken state. The Police Officer did at no stage testify that she did smell a noticeable odour of alcohol on the accused's breath. No damage to the car or the lamp post was noted contrary to what the First Court had observed that the accused crashed into a lamp post when the witness had testified that she hit slightly the lamp post. In the judgement quoted above in the case: **Il-Pulizija vs Matthew Vella**, it was held that:-

"Biss jekk din il-Qorti tigi priva mill-prova teknika tar-rizultat tal-breathalyser test, tigi f'sitwazzjoni simili ghal dik li din il-Qorti diversament presjeduta sabet ruhha fiha fl-appell kriminali:
*- **Pulizija vs Raymond Debono** deciz nhar il-21 ta' Jannar*

2016 fejn għalkemm il-Pulizija xammew riha ta' xorb fuq is-sewwieq, ma kienx hemm provi ohra oggettivi li setghu jaghtu indikazzjoni aktar b'saħħitha dwar il-mod tas-sewqan tal-appellant, u jekk kienx hemm indikaturi ta' spavalderija jew erraticità inspjegabbli fis-sewqan tal-appellant, li setghu kienu kagun tal-incident u li huma wkoll ritenuti bhala indikaturi li sewwieq ikun taħt l-effett ta' xorb alkoholiku mill-appelli kriminali: **Il-Pulizija vs. Brenda Agius** *deciz nhar il-15 ta' Mejju 2008 u* ***Il-Pulizija vs. Martin Zammit*** *deciz nhar it-13 ta' Frar 2013.*

Biss apparti minn hekk, ma hemmx provi ohra li jindikaw il-kliem u l-imgieba tal-appellant li minnhom din il-Qorti tistà tasal tikkonkludi li huwa kien jikkwalifika bhala persuna li tkun qeghda ssuq jew tipprova ssuq jew ikollha l-kontroll ta' vettura bil-mutur jew vettura oħra li tkun fit-triq jew f'post pubbliku ieħor u ma tkunx f'kundizzjoni li ssuq minhabba xorb jew drogi minhabba li l-kapacità tieghu li jsuq sew kienet ghal xi hin imnaqqsa minħabba tali xorb jew droga.

Dan jipprezenta wkoll xenarju simili ghal dak riskontrat fl-appell kriminali: ***Il-Pulizija vs. Ramon Fenech*** *deciz nhar is-26 ta' Marzu 2015 fejn intqal li: 'Veru illi baqà diehel fuq il-karozza ta' quddiemu imma dan setà kien sforz ta' traskuragni jew nuqqas ta' osservanza tar-regolamenti tat-traffiku da parti tal-appellat, izda mhux minhabba xorb jew drogi. Persuna jistà jkollha riha ta' xorb però b'daqshekk ma jfissirx illi ma kinitx f'kondizzjoni li ssuq. Biex tasal ghal dik il-konkluzjoni dan irid ikun abbinat ma' xi haga ohra bhal sewqan erratiku jew inkella rizultat ta' breathalyser test mehud skont il-ligi. Ghalhekk hawn ukoll il-Qorti ssib illi ma tistax issib htija għal dak li jirrigwarda t-tieni akkuza."*

Having seen the acts of the proceedings particularly the note of submissions presented by the accused on the 22nd May 2022 which is similar in substance to the application of appeal;

Having seen the updated conduct sheet of the appealed, presented by the prosecution as requested by this Court;

Having heard the parties make their oral submissions during the sitting of the 4th September 2023;

Considers further:

That appellant's grounds of appeal are based on the First Court's wrong evaluation of the evidence. Now it has been firmly established in local and foreign case law that both in cases of appeals from judgements of the Magistrates' Courts as well as from judgements of the Criminal Court, with or without a jury, that the Court of Criminal Appeal does not disturb the evaluation of the evidence made by the Court of first instance, if it concludes that that Court could have reached that conclusion reasonably and legally. In other words, this Court does not replace the discretion exercised by the Court of first instance in the evaluation of the evidence but makes a thorough examination of the evidence to determine whether the Court of first instance was reasonable in reaching its conclusions. However, if this Court concludes that the Court of first instance could not have reached the conclusion it reached on the basis of the evidence produced before it, than that would be a valid – if not indeed a cogent reason – for this Court to disturb the discretion and conclusions of the Court of first Instance (confer: "inter alia" judgements of the Court of Criminal Appeal in the cases; **Ir-Repubblika ta'**

Malta vs. George Azzopardi[1]; **Il-Pulizija vs. Carmel sive Chalmer Pace**[2]; **Il-Pulizija vs. Anthony Zammit**[3] and others.)

This Court also refers to what was held by Lord Chief Justice Widgery in **R. v. Cooper**[4] (in connection with section 2 (1) (a) of the Criminal Appeal Act, 1968):-

> *"assuming that there was no specific error in the conduct of the trial, an appeal court will be very reluctant to interfere with the jury's verdict (in this case with the conclusions of the learned Magistrate), because the jury will have had the advantage of seeing and hearing the witnesses, whereas the appeal court normally determines the appeal on the basis of papers alone. However, should the overall feel of the case – including the apparent weakness of the prosecution's evidence as revealed from the transcript of the proceedings – leave the court with a lurking doubt as to whether an injustice may have been done, then, very exceptionally, a conviction will be quashed.*[5]*"*

The Criminal Appeal in the case **Ir-Repubblika ta' Malta vs. Ivan Gatt**, decided on the 1st December, 1994, held that:

> *"The exercise to be carried out by this Court in cases where the appeal is based on the evaluation of the evidence, is to examine the evidence, to see, even if there are contradictory versions – as in most cases there would be – whether any one of these versions could be freely and objectively believed without going against the principle that any doubt should always go in the accused's favour and, if said version could have been believed* and *was evidently*

[1] Decided by the Criminal Court of Appeal on the 14th February 1989
[2] Decided by the Criminal Court of Appeal on the 31st May 1961
[33] Decided by the Criminal Court of Appeal on the 31st May 1961
[4] [1969] 1 QB 276
[5] BLACKSTONE'S CRIMINAL PRACTICE (1991), p. 1392

believed by the jury, the function, in fact the duty of this court is to respect that discretion and that evaluation of the evidence. These principles apply equally to cases where appeals from judgements of the Court of Magistrates are lodged by the Attorney General on behalf of the prosecution.

This Court has accordingly evaluated the evidence anew with a view to establishing whether the Court of first instance could have legally and reasonably acquitted the defendant of the charge brought against her.

That from a detailed examination of the evidence tendered before the Court of first instance the following evidence was given:

PS 2100 Lorraine Grech Mifsud gave evidence by means of an affidavit exhibited in the acts of these proceedings at fol. 4 wherein she stated that on the 12th September 2022 at about 16.30 p.m whilst at work in the Rabat Police station she received a telephone call wherein the assistance of the police was requested in Frangisk Attard Street, Nadur wherein it was reported that there was a female person who was driving under the influence of alcohol and consequently crashed into an electricity pole. The person who called the police station stated that he was holding on to the key of the car so that this woman would not drive away. She went on site and there she met a certain Joe Mercieca who passed on the key of the car bearing registration number KBF 834. On the road Triq Frangisk Portelli he noticed a car with the registration number KBF 834 which was stationary with an electricity pole. There was no damage on the pole and on the car. In the car there was a lady who was later identified as the accused Hilary Claire Pinfold who appeared to be under the effect of alcohol.

She states that she confirmed the particulars of the lady and was informed of her rights. She also states that the lady refused to be assisted by a lawyer of her choice. She accepted to take the breathalyser test and this gave a result of

177.8mg/100ml. A copy of this result was annexed to the affidavit and marked as dok GM1. The lady then went to Hospital by ambulance accompanied by the nurse Antida Formosa. The key of the car was given to the father of Hilary at the place of the incident.

Under cross examination she confirms that she had informed the accused person of her legal rights prior to her taking of the breathalyser test and to her verbal statement. Asked to explain what rights were given to her she states that she had given her the right to be able to speak to a lawyer prior to taking the test and that she had a right not to do the test. Asked if she had signed a declaration with regards to her refusal to be assisted by a lawyer and she stated in the negative. She was not offered the declaration to sign her refusal. She confirms that she only spoke to the accused when she was on site.

Joseph Mercieca gave evidence on the 12th January, 2023 stated that he was in the road removing bricks when he saw the accused driving slowly in Frangisk Attard Street, Nadur. He claims that she was driving very slowly on first gear and she was not in a good condition, in the sense that she crashed into the electricity pole. She just brushed by. He went over to see what had happened to her since he works in hospital, and he found her not to be in a good condition and concluded that she was not able to drive. He told her '*no drive, no drive*'. He then called the police station to pretend to ask for help. He said that she lived rather close to him. The police then went on site, and he passed on the key of the car to them. He recognised the lady as the accused here in court as the driver of the car. He confirms that this took place on the 12th September 2022 at about 16.30 p.m / 17.00 p.m.

He confirms under cross examination that when he spoke to her on the day of the incident she told him that she was under some medication. He insists that she was not in a stable condition. He states that she had told him something though she was not clear and he does not understand English. She did not appear

to be in her right senses so he removed the key from the ignition. Her father then came to the place of the incident and thanked them for their help.

Saviour Farrugia gave evidence on behalf of Transport Malta in his capacity as Assistant Principal. He confirmed that the car Daihatsu Terios bearing registration number KBF 835 is registered in the name of the accused and this since 9th September 2009. He exhibited a copy of the logbook which was marked as dok SF.

Considers further:

It appears from the above evidence that the accused was stopped in Frangisk Attard Street, Nadur on the 12th September 2022 at about 4.30p.m by a certain Joe Mercieca as he was removing some bricks. He says that the accused was not fit to drive and thus took her key from the ignition to prevent her from driving. It also results from the evidence of this Joe Mercieca that the accused brushed the electricity pole whilst driving very slowly.

On site it appears that PS **2100 Lorraine Grech Mifsud spoke with the accused and investigated the incident. She confirms in her sworn affidavit and under cross examination that she had given the right to the accused before she uttered a word namely she says her right to speak to a lawyer and her right not to take a breathalyser test. However it immediately appears evident that the rights given were not those emanating from the law. The Sergeant should have first informed her of her right as written in the Criminal code namely section 355AUA which provides the following.**

> 355AUA. (1) The suspect or the accused person shall have the **right of access to a lawyer in such time and in such a manner so as to allow him to exercise his rights of defence practically and effectively**[6].

[6] Emphasis of this court

(2) The suspect or the accused person shall have access to a lawyer without undue delay. In any event, the suspect or the accused person shall have access to a lawyer from whichever of the following points in time is the earliest:

(a) before they are questioned by the Executive Police or by another law enforcement or judicial authority in respect of the commission of a criminal offence;
(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with sub-article(8)(e);
(c) without undue delay after deprivation of liberty;

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(3) A request for legal assistance shall be recorded in the custody record together with the time when it was made unless the request is made at a time when the person who makes it is at court after being charged with an offence in which case the request need not be so recorded

In this case it is evident that the police sergeant never explained to the accused her right to be duly assisted throughout the investigation but only told her that she had a right to speak to a lawyer. The law explains what the right to legal assistance really means in sub section (8) of section 255AUA of the Criminal Code namely:

(8) The right of access to a lawyer shall entail *inter alia* the following:

(a) the suspect or the accused person (therefore this right has to be given to suspects in pretrial proceedings too), if he has elected to exercise his

right to legal assistance, and his lawyer, shall be informed of the alleged offence about which the suspect or the accused person is to be questioned. Such information shall be provided to the suspect or the accused person prior to the commencement of questioning, which time shall not be less than one hour before questioning starts;

At no moment in time does it result that the police sergeant explained to the accused the offence she has allegedly committed. The fact that she asked her to take a breathalyser test does not mean that she was being investigated solely on this offence

(b) the suspect or the accused person shall have the right to meet in private and communicate with the lawyer representing him, including prior to questioning by the police or by another law enforcement or judicial authority;

At no moment in time did the police sergeant give this option to the accused informing her of her right to speak to the lawyer alone.

(b) the suspect or the accused person shall have the right or his lawyer to be present and participate effectively when questioned. Such participation may be regulated in accordance with procedures which the Minister responsible for Justice may by regulations establish, provided that such procedures shall not prejudice the effective exercise and essence of the right concerned.

The police sergeant only told the accused that she had a right to speak with a lawyer. This in no way means that she had a right to be assisted by a lawyer through the investigation including during the taking of the breathalyser test .

The sergeant having seen that the accused allegedly refused to be assisted by a lawyer should have gone a step further and abide by sub section (6) in that the refusal given by the accused to the right to legal assistance should have been recorded in writing in the presence of two witnesses and it is only after that questioning may be proceeded with. Therefore here again the right was wrongly exercised.

Also this court notes that the right not to take the test was given wrongly in that the accused should have been informed that failure to take the test is tantamount to admission to the offence of drink driving namely of being in excess of the amount prescribed by law for being able to drive.

At this juncture the court makes reference to the judgment in the names **il-Pulizija vs Raymond Grech Marguerat** [7]which gave the following direction:-

> *Illi l-Qorti tqies illi t-twissija meta jkun ser jigi issomministrat it-test tan-nifs ghandha tigi spjegata car u tond. Dan ghaliex din mhijiex is-solita twissija li hija ikkontemplata fil-ligi ghaliex il-ligi tippresuponi l-htija meta jkun hemm ir-rifjut u allura l-pulizija investigattiva ghandha tkun attenta doppjament meta jinghata l-caution f'dawn il-kazijiet fejn allura l-persuna suspettata ghandha tinghatat d-dritt li tikkonsulta ma' avukat qabel ma taghti t-twegiba taghha billi b'tali twegiba tkun tista' tinkrimina ruhha. Fil-fatt il-Qorti Ewropeja dwar id-Drittijiet tal-Bniedem testendi t-tifsira ta' "criminal charge" mill-mument illi persuna tkun ser tigi affetwata minn xi att investigattiv tal-pulizija (ara **Alexander Zaichenko vs Russia** – 18/02/2010):*
>
> *"The Court reiterates that in criminal matters, Article 6 of the Convention comes into play as soon as the person is "charged"; this may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when the preliminary investigations were opened. 'Charge' for the purposes of article 6(1) may be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal*

[7] Decided by the Criminal Court of Appeal on the 28th June 2017

offence" a definition that also corresponds to the test whether the situation of the person has been substantially affected."

In the judgment delivered by the Criminal Court of appeal in the names **Il-Pulizija vs. Marlon Montebello**[8], the court held that *:*

*Kif din il-Qorti kellha okkazzjoni tosserva fis-sentenza taghha tat-2 ta' Settembru, 1999 fl-ismijiet **Il-Pulizija v. Francis Pace**, biex jigi deciz jekk persuna kienitx qed issuq "meta l-kapacita` taghha li ssuq sew [kienet] ghal xi hin imnaqqsa"[1] minhabba xorb (jew drogi) bi ksur ta' l-Artikolu 15A, wiehed jista' jiehu in konsiderazzjoni provi ohra, cioe` apparti mir-risultat o meno ta' l-analizi maghmula skond l-Artikolu 15E. Tali prova ohra tista' tinkludi l-komportament u l-kundizzjoni fizika tas-sewwieq, kif ukoll ir-risulatat tat-test (preliminari) tan-nifs maghmul taht l-Artikolu 15C. Kwantu ghall-hekk imsejjha "caution", din it-twissija (cioe` t-twissija li n-nuqqas jew rifjut li wiehed jaghti kampjun tan-nifs hu reat) hi mehtiega biss sabiex il-pulizija tkun tista' tarresta lil minn hekk jonqos milli jaghti l-kampjun ghat-test tan-nifs (mhux ghall-analizi), u dan skond l-Artikolu 15D(b); ghall-finijiet tar-reat kontemplat fl-Artikolu 15E(4) ebda twissija ma hi mehtiega (ara **Il-Pulizija v. Emanuel Camilleri**, App. Krim., 30 ta' April, 1999, u **Il-Pulizija v. Anthony Cutajar**, App. Krim., 2 ta' Settembru, 1999).*

Therefore, this means for the purpose of interpreting section 15A of chapter 65 of the Laws of Malta that the court may take into consideration **provi oħra apparti** the results given by a breathalyser test which may include the manner and behaviour of the accused person. For instance in the case in the names **Il-Pulizija vs Matthew Munro**[9] the court took note of other circumstances to establish a vedict of guilt: -

Din il-Qorti kellha diversi okkazzjonijiet sabiex tirrimarka, li ghal fini ta' l-Artiklu 15A tal-Kap 65 tal-Ligijiet ta' Malta, il-breathalyzer test huwa wiehed mill-provi, izda mhux l-unika, li l-Prosekuzzjoni tista' ggib quddiem il-Qorti sabiex tipprova li dak li jkun ma kienx f'kondizzjoni li jsuq minhabba xorb jew drogi. F'dan il-kaz, hemm ix-xhieda ta' PS 1074 Stivala, PC 869 Gauci u PS 928 Ramon Mifsud Grech, fejn ilkoll xhedu li l-appellant kellu riha qawwija ta' alkohol fin-nifs, kien ukoll agitat minbarra l-fatt li kien hu stess kien li ammetta maghhom illi kien xurban. Ghalhekk il-Qorti ssib illi l-ewwel Qorti, fuq il-provi illi kellha quddiemha setghet ragonevolment u legalment

[8] Decided by the Criminal Court of Appeal on the 9th February 2021
[9] Decided by the Criminal Court of Appeal on the 20th February 2014

> tasal ghal konkluzzjoni illi ssib lill-appellant hati ta' l-ewwel imputazzjoni.

The Court in this case is disregarding the result taken by the Police Sergeant as this was not taken according to law. However this court took notice of the only other piece of evidence namely that given by the witness Joe Mercieca who states that he saw the accused drive slowly and brush against a pole. He says that she was not in a position to drive because 'ma kienitx hekk f'sikkitha'. He says 'ma kienitx f'kundizzjoni stabbli'. 2 mhix f'kundizzjoni li ssuq ghax ma kienitx qeda sewwa". He never states that she had a smell of alcohol, or that she was stammering or that she was not walking straight or that her pupils were not dilated. Therefore her not being in a good state to drive does not necessarily mean that she was drunk or that she had drank more than the prescribed limit.

In the case in the names **Il-Pulizija vs Ramon Fenech**[10] the court held that : -

> *Ghal dak li jirrigwarda s-sewqan ma jidhirx illi kien hemm xi haga partikolarment hazina fis-sewqan tal-appellat. Veru illi baqa' diehel fuq il-karozza ta' quddiemu imma dan seta' kien sforz ta' traskuragni jew nuqqas ta' osservanza tar-regolamenti tat-traffiku da parti tal-appellat, izda mhux minhabba xorb jew drogi. Persuna jista' jkollha rieha ta' xorb però b'daqshekk ma jfissirx illi ma kinitx f'kondizzjoni li ssuq. Biex tasal ghal dik il-konkluzjoni dan irid ikun abbinat ma' xi haga ohra bhal sewqan erratiku jew inkella rizultat ta' breathalyzer test mehud skont il-ligi. Ghalhekk hawn ukoll il-Qorti ssib illi ma tistax issib htija ghal dak li jirrigwarda t-tieni akkuza.*

Likewise in the case **Il-Pulizija vs Raymond Debono**[11] the court held that:-

> *Dak li kellu jigi stabbilit allura, skont it-taghlim gurisprudenzjali surriferiet huwa jekk il-kumpless tal-provi kenux sufficjenti sabiex iwassal lill-Ewwel Qorti ghall-konkluzjoni b'sahhitha li l-appellanti kien xurban fil-waqt li kien*

[10] Decided by the Criminal Court of Appeal on the 26th March 2015
[11] Decided by the Criminal Court of Appeal on the 21st January 2016

qieghed isuq, u li l-istat tieghu ta' sokor kien tali li affettaw il-mod tas-sewqan tieghu. Illi din il-Qorti tqies illi fic-cirkostanzi l-provi kienu kemmxejn fjakki sabiex iwasslu ghal decizjoni lil hinn minn kull dubbju dettat mir-raguni dwar ir-reita ta' l-appellanti. Dan ghaliex ghalkemm huwa minnu illi kemm Baldacchino kif ukoll il-pulizija xammew riha ta' xorb fin-nifs ta' l-appellanti, madanakollu fin-nuqqas ta' prova xjentifika li tista' tissostanzja dawn l-allegazzjonijiet huwa kemmxejn difficli jigi stabbilit jekk l-alkohol ikkunsmat mill-appellanti kienx tali li jwasslu fi stat ta' intossikazzjoni tant severa li din kellha effett fuq is-sewqan tieghu. Fuq kollox jidher illi l-appellanti indarab serjament f'dan is-sinistru stradali u kwindi n-natura tal-griehi sofferti minnu setghu ikkontribwew ghad-dehra "zbilancjata" tieghu. Illi jigi rilevat illi l-ufficjali tal-pulizija li investigaw dan il-fatt, it-tnejn huma konkordi meta ighidu illi r-riha ta' xorb li xammew fin-nifs ta' l-appellanti kien wiehed "hafif"[4]. Maghmul dan l-apprezzament, allura huwa ferm difficli ghal din il-Qorti tasal ghal konkluzjoni illi l-appellanti kien fi stat illi ma kellux kontroll shih fuq il-vettura tieghu, anke jekk ghal xi perijodi momentanji, minhabba xi xorb li seta' ikkonsma, iktar u iktar fid-dawl tal-fatt illi l-appellanti ma kienx f'posizzjoni jiehu t-test tan-nifs minhabba l-griehi li sofra u mhux minhabba rifjut ingustifikat da parti tieghu. Prova ohra dwar jekk fil-verita l-appellanti kienx ikkonsma alkohol f'dik il-lejla ma hemmx. Din il-Qorti ma tistax tasal ghal sejbien ta' htija abbazi ta' dak li hu probabbli mic-cirkostanzi, izda biss abbazi ta' dawk il-provi lil hinn minn kull ombra ta' dubbju dwar ir-reita'. Il-provi li hemm fl-atti ma jilhqux dan il-grad u allura ma humiex sufficjenti tali illi jistghu iwasslu ghal kundanna. Ghaldaqstant abbazi ta' dawn ir-rizultanzi processwali il-Qorti ser tilqa' dan l-ewwel aggravvju mressaq 'il quddiem mill-appellanti.

Unfortunately in this case the prosecution failed to prove why the accused was not in her senses '*mhux f'sikkitha*'. Once the court is ignoring the result taken by the breathalyser test as this was not taken according to law it had to look for other evidence that could possibly tie the accused with the given offence namely that of drink driving. However, even though the prosecution proved that she was driving when not in her right senses it never proved that this was due to her consumption of alcohol. There was not even one question put by the prosecution, who must prove its case beyond reasonable doubt, directed to the fact that she was not in her right senses due to the alcohol intake. No one said she was reeking of alcohol, that she was stammering, that she had slurred speech,

that she had a poor gait or anything like that. The fact that she was not in her right senses may be due to a multiple of happenings.

Thus in view of the above reasoning the court is upholding the appeal application presented by the applicant and is revoking the judgment delivered by the first court.

(ft) Consuelo Scerri Herrera
Judge

(ft) Mary Jane Attard
Deputy Registrar

True Copy

For the Registrar