Court of Criminal Appeal

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

Appeal Nr: 9 / 2023

The Police

Inspector Josef Gauci

Vs

Anukam Gift and Carmel Cordina

Today the, 30th October 2023

The Court;

Having seen the charges brought against **Anukam Gift & Carmel Cordina** holders of ID card numbers 74581 A & 50663 G, before the Court of Magistrates (Gozo) as a Court of Criminal Judicature of having:

1. Without intent to steal or to cause any wrongful damage, but only in the exercise of a pretended right, of your own authority, compelled Zammit Michael Angel to pay a debt, or to fulfil any obligation whatsoever, or disturbed Zammit Michael Angel in the possession of anything enjoyed by him or in any other manner unlawfully interfered with his property;

2. And Anukam Gift only that on the 28th August 2022 at around 18:00hrs at No 6 Triq Taħt Putirjal, Rabat, Gozo uttered insults or threats not otherwise provided for in this Code against Zammit Michael Angel;

Having seen the judgement meted by the Court of Magistrates (Gozo) as a Court of Criminal Judicature proffered on the 4th May, 2023 whereby the Court on the basis of the above, after having seen Article 85 and 339(1)(e) of the Criminal Code, Chapter 9 of the Laws of Malta, finds Anukam Gift and Carmel Cordina not guilty of the charges brought against them.

Having seen the appeal application presented by the Parte Civile Michael Angelo sive Michael Zammit in the registry of this Court on the 15th of May, 2023 whereby accordingly;

The Appellant interposed this humble Appeal from the Judgment thus given during the Sitting held on the 4th May 2023, by the Court of Magistrates (Gozo) as a Court of Criminal Judicature in the names "**The Police (Inspector Josef Gauci) vs. Anukam Gift** holder of Identity Card No: 74581A and Carmel Cordina holder of Identity Card No: 50663G" and humbly asks this Honorable Court to consider this Appeal by cancelling and revoking the same Judgment thus Appealed where:

> *"….Therefore, on the basis of the above, the Court, after having seen Article 85 and 339(1)(e) of the Criminal Code, Chapter 9 of the Laws of Malta, finds Anukam Gift and Carmel Cordina* ***not guilty*** *of the charges brought against them…."*

and this by declaring them both due to the circumstances of the Case, and on **the above basic Legal Principles, guilty of all the charges brought against them**.

Having seen the grounds for appeal of Anukam Gift & Carmel Cordina;

It has been held that:

> *"….nella nozione di profitto rientre qualsiasi utilità o sodisfazione, anche puramente morale, che l agente intenda ricavare dall impossessamento della cosa...."*[1]

That in other words, the Italian Corte di Cassazione, the notion of profit includes any utility or satisfaction, even purely moral, which the agent intends to derive from the possession of the thing**;**

Wrong interpretation of the Law:

That with all due respect and without prejudice with what is going to be stated, the Appellant *Parte Civile* Michael Angelo sive Michael Zammit holder of Identity Card No: 31156 G was aggrieved by this Judgment and is therefore interposing this humble Appeal against this same Judgement handed down during the Sitting of the 4th May 2023, by the Honourable Court of Magistrates (Gozo) as a Court of Criminal Judicature {Magistrate Dr. Leonard Caruana LL.D., M.A. (Fin. Serv)} simply because the same Court failed to invoke amongst other things the Latin Maxim *CONFESSOS IN IURE PRO IUDICATIS HABERI PLACET* means that *Confessions should be regarded as judged in law;"*

That the Affidavit of PS 2100 Lorraine Grech Mifsud states that:

> *On the 29/08/2022, Michael Angelo Zammit reported again at Victoria Police Station were he stated that the day before, that is on the 28/08/2022, at about 18.00*

[1] Corte di Cassazione, 9th October 1980. This is also the opinion expressed by Prof. Sir A. Mamo [Notes on Criminal Law, 1958, Vol. II);

hrs, he went to his abome mentioned property were he found door leading to yard locked by a gaġetta . Same stated that when he saw this, he spoke to the tenant about it were she told him the words:

> *....You are crazy, the owner told me to do so, I don t care about the police, I will get my friends to hit you...."*

I, the undersigned call on site African Gift Shop, No: 6, Triq Taħt Putirjal, Victoria were I spoke with Anukam Gift, ID: 74581 M, b/o 01/01/1985 at the Ivory Coast, Res: Regina Court, Flat 1, Triq l-Ewropa, Rabat....were she stated that she had locked the yard door as instructed by the owner. I inspected this yard, were it was confirmed that this door was locked from the yard side, in a way that there was no access from dwelling No. 5 towards the yard. Anukam Gift stated that it was true that she called Michaelangelo crazy but stated that she had never threatened him in any way, however, she added that this incident was not on the 28/08/2022 but the Sunday before.

I also spoke with Carmel Cordina were he stated that although he is the owner of the mentioned yard he never instructed Anukam to lock the door...."

That the Latin Maxim *CONFESSIO SOLI CONFITENTI NOCET* means that *"Confession harms only the one who confesses;"*

That as a matter of fact, a distinction has to be made between the admissibility of evidence and the probabative value of that evidence;

That Article 632 of Chapter 12 of the Laws of Malta states that:

"(1) Any declaration made by a party against his interest, or any other writing containing any admission, agreement, or obligation is admissible as evidence:

(2) Any writing, whether printed or not, and any inscription, seal, banner, instrument or tool of any art or trade, tally or score, map, sign or mark, which may furnish information, explanation or ground of inference in respect of the facts of the suit, are admissible as evidence:"

That **Article 693 of Chapter 12** of the Laws of Malta states that:

"Any admission of a fact whether written or verbal, made in or out of court, may be received in evidence against the party who made it:"

That **Article 694 of Chapter 12** of the Laws of Malta states that:

"(1) An extrajudicial admission is no evidence except against the party who made it;"

(2) An admission made upon a reference to the oath of one of the parties may be received in evidence of a fact even against the other parties to the suit;"

(3) In all cases, only such part of an admission as the court may deem worthy of credit shall constitute evidence;"

That Article 658 of Chapter 9 of the Laws of Malta provides as follows:

Any confession made by the person charged or accused, whether in writing, orally, by audiovisual means or by other means, may be received in evidence against or in favour of the person, as the case may be, who made it, provided it appears that such

confession was made voluntarily, and not extorted or obtained by means of threats or intimidation, or of any promise or suggestion of favour;"

That as stated above, a distinction has to be made between the admissibility of evidence and the probabative value of that evidence;

That in his notes on **Criminal Procedure, Professor Mamo** teaches that:[2]

"….Extrajudicial Confessions are those where the defendant either expressly confesses his guilt or makes admission of facts from which his guilt may be implied, under any circumstances other than those described in respect of judicial confessions. They may be in writing or oral. So that a confession may be received in evidence against the person who made it the law (sec.658) requires that it shall appear that such confession was made voluntarily and was not extorted or obtained by means of threats or intimidation, or of any promise or suggestion of favour. There is no presumption in law that a confession not free and voluntary is false; it is excluded on the ground that improper threats or promises may influence an accused or suspected person to say what is not true, and therefore a confession made in such circumstances cannot be safely acted upon. It is obviously right that a person knowing his guilt should, if he so wishes confesses at the earliest opportunity, and there is no reason why he should be discouraged from so doing. But the law requires that the confession shall have been made voluntarily and, in the practice of our courts, the prosecution must give affirmative 'prima facie' evidence that it was so made. The law says 'voluntarily' and not 'spontaneously'…."

[2] Pages 100-101

The facts of the Case:

That the Appellant *Parte Civile* is the owner of 5 Main Gate Street, Rabat, Gozo;

That the Defendant Carmel Cordina holder of Identity Card No: 50663G is the owner of 6 Main Gate Street, Rabat, Gozo;

That round about 2 years before, the Appellant *Parte Civile* and the Defendant Carmel Cordina had entered into a Public Deed with the heirs of the late lessee Rosanna Agius to repossess their above respective properties;

That the Defendant Carmel Cordina eventually leased 6 Main Gate Street, Rabat, Gozo to the other Defendant Anukam Gift, holder of Identity Card No: 74581 M, b/o 01/01/1985 at the Ivory Coast, Res: Regina Court, Flat 1, Triq l-Ewropa, Rabat;

That in August 2022, the Appellant *Parte Civile* who as stated above is the owner of 5 Main Gate Street, Rabat, Gozo, found out that the Defendant Anukam Gift was also using his property;

That the Defendant Carmel Cordina who as stated above is the owner of 6 Main Gate Street, Rabat, Gozo kept insisting with the Appellant *Parte Civile* that he intends to allow the other Defendant Anukam Gift to fully enjoy also 5 Main Gate Street, Rabat, Gozo;

That the Defendant Carmel Cordina knows that he has no right over 5 Main Gate Street, Rabat, Gozo;

That as a matter of fact, the Appellant *Parte Civile* and the Defendant Carmel Cordina had agreed that once they entered into a Public Deed with the heirs of the late lessee Rosanna Agius to repossess their above respective properties, the doors that were opened by the late lessee Rosanna Agius to joint both properties had to be blocked once and for all;

That the Appellant *Parte Civile* is also aware of the fact that apart from the Public Deed with the heirs of the late lessee Rosanna Agius to repossess their above respective properties, the Defendant Carmel Cordina had filed a Constitutional Case 90/2020 in the names *CORDINA CARMEL vs L-AVUKAT TAL-ISTAT ET;*

That the Appellant *Parte Civile* is also aware of the fact that amongst other things, and as part of his evidence in his Constitutional Case 90/2020, the Defendant Carmel Cordina knows that the source of ownership of 6 Main Gate Street, Rabat, Gozo is the Public Deed done before Notary Public Francesco Refalo dated the fifth (5) day of May of the year 1938;

That the parties to that deed were Francesco Azzopardi et (Sellers) and Hili Emmanuel who eventually became a priest (Buyer);

That the Appellant *Parte Civile* is also aware of the fact that the Defendant Carmel Cordina is the successor in title of part of the estate of Dun Hili Emmanuel;

That the Appellant *Parte Civile* is also aware of the fact that the Defendant Carmel Cordina knows that the source of ownership of 6 Main Gate Street, Rabat, Gozo is

the Public Deed done before Notary Public Francesco Refalo dated the fifth (5) day of May of the year 1938;

That the Appellant *Parte Civile* is also aware of the fact that the Defendant Carmel Cordina knows that at Fol 319 of the said Public Deed dated the fifth (5) day of May of the year 1938 clearly states that:

> ***"….and Maria widow of Giovanni Azzopardi in the name as above do hereby sell, convey and transfer (?)…the said Giuseppe Hili as above who accepts by way and title of purchase three small houses (mezzanini) situated at Victoria Gozo Strada Porta Reale marked with the numbers <u>six</u>, <u>seven</u> and <u>eight</u> fore and exempt from any payment…."***

That the Appellant *Parte Civile* is also aware of the fact that the Defendant Carmel Cordina knows that he **<u>does not even enjoy the ownership of the airspace 6 Main Gate Street, Rabat, Gozo</u>;**

That as a matter of fact, the Defendant Carmel Cordina knows that one finds clearly written at Fol 323 of the said Public Deed dated the fifth (5) day of May of the year 1938 that:

> ***"….****The contracting parties have agreed upon:*
>
> ***I.*** *That the said purchaser Hili as above shall be entitled and shall have the right of access from the dwelling house situated at Victoria Gozo Strada Porta*

Reale marked number Seven lying close and adjacent and contiguous to the above named tenements (mezzanine) as above sold, on account that he may repair the roofs of the said premises when occasion shall arise of selling right such roofs;

II. *That the said purchaser Hili as above shall enjoy fully the right of building and exerting additional a supplementary accommodations on the roofs of the said mezzanini...."*

That in other words, the Defendant Carmel Cordina knows that he has no rights over 5 Main Gate Street, Rabat, Gozo;

That the Appellant *Parte Civile* is also aware of the fact that the Defendant Carmel Cordina knows that according to the "*Denunzja ta' Proprjetà Taxxabbli*" of the Late Rev Emmanuel Hili who died on the 1st January 1982, presented to the Death and Donation Duty Department on the 12th March 1982 Number G107/82 clearly states that:

"….Post żgħir, No 6 Main Gate Street, Victoria Għawdex, jikkonsisti f'kamra isfel u oħra fuq. Dan il-post hu mikri u ma hemm l-ebda tama li r-residenti joħorġu minnu…."

That in other words, the Appellant *Parte Civile* is also aware of the fact that up till 1982, the Defendant Carmel Cordina knows that 6 Main Gate Street, Rabat, Gozo still had its own yard:

That the Appellant *Parte Civile* is also aware of the fact that amongst other things, the Defendant Carmel Cordina knows that the source of ownership of 5 Main Gate Street, Rabat, Gozo is the Public Deed done before Notary Public Maurice Gambin dated the seventh (7) day of October of the year 1972;

That the parties to that deed were Frank Gulia et (Sellers) and Enrico Zammit (the buyer) who is also the father the Appellant *Parte Civile;*

That the Appellant *Parte Civile* is also aware of the fact that amongst other things, the Defendant Carmel Cordina knows that there are a number of Addendums to the said Public Deed done before Notary Public Maurice Gambin dated the seventh (7) day of October of the year 1972;

That the Appellant *Parte Civile* is also aware of the fact that the Defendant Carmel Cordina knows that Addendum No 9 clearly states**:**

> *"….(9) ADDE: "<u>consisting of a terrano</u>, <u>a basement and with its own yard</u>…."*
>
> *That the Appellant Parte Civile is also aware of the fact that the Defendent Carmel Cordina knows that the Appellant Parte Civile is a vulnerable person and had been hospitilised and house bound from early January 2022 to practically end of June and early July 2022;*

Affidavit of PS 2100 Lorraine Grech Mifsud:

That the Affidavit of PS 2100 Lorraine Grech Mifsud states that:

On the 29/08/2022, Michael Angelo Zammit reported again at Victoria Police Station were he stated that the day before, that is on the 28/08/2022, at about 18.00 hrs, he went to his abome mentioned property were he found door leading to yard locked by a ganġetta . Same stated that when he saw this, he spoke to the tenant about it were she told him the words:

....You are crazy, the owner told me to do so, I don t care about the police, I will get my friends to hit you...."

I, the undersigned call on site African Gift Shop, No: 6, Triq Taħt Putirjal, Victoria were I spoke with Anukam Gift, ID: 74581 M, b/o 01/01/1985 at the Ivory Coast, Res: Regina Court, Flat 1, Triq l-Ewropa, Rabat....were she stated that she had locked the yard door as instructed by the owner. I inspected this yard, were it was confirmed that this door was locked from the yard side, in a way that there was no access from dwelling No. 5 towards the yard. Anukam Gift stated that it was true that she called Michaelangelo crazy but stated that she had never threatened him in any way, however, she added that this incident was not on the 28/08/2022 but the Sunday before.

I also spoke with Carmel Cordina were he stated that although he is the owner of the mentioned yard he never instructed Anukam to lock the door...."

That in other words, *HABEMUS CONFITENTEM REUM* which means that *We have a confessed offender"* simply because PS 2100 Lorraine Grech Mifsud had confirmed that:

a) ***....Anukam Gift....stated that she had locked the yard door as instructed by the owner...." the Defendant Carmel Cordina***

b) She, PS 2100 Lorraine Grech Mifsud ***....inspected this yard, were it was confirmed that this door was locked from the yard side, in a way that there was no access from dwelling No. 5 towards the yard...."***

c) ***....Anukam Gift stated that it was true that she called Michaelangelo crazy ...."***

Admissions – The Queen of all Evidence:

That the Appellant *Parte Civile* is aggrieved by the fact that the Honourable Court of Magistrates (Gozo) as a Court of Criminal Judicature failed to consider the Affidavit of PS 2100 Lorraine Grech Mifsud as being relevant to find the Defendants guilty as charged;

That as stated above, as the Honourable Court of Magistrates (Gozo) rightly stated, the Defendants were charged as follows:

"….Having seen the charges brought against the Anukam Gift, holder of Maltese Identity Card number 74581A, born in the Ivory Coast on the 1st January 1985 and residing at Regina Court, Flat 1, Triq l-Ewropa, Victoria, No 6, Triq Taħt Putirjal, Victoria; and Carmel Cordina, holder of Maltese Identity Card No 50663G, son of Joseph and Maria Stella neè Hili, born in Rabat, Gozo, on the 23rd November 1963 and residing at "Sunshine Lodge," Triq Cordina Għajnsielem, having been accused that on the 29th August 2022 and in the preceding weeks, in Triq Taħt Putirjal, Rabat Gozo:

1. Without intent to steal or to cause any wrongful damage, but only in the exercise of a pretended right, of your own authority, compelled Zammit Michael Angel to pay a debt, or to fulfil any obligation whatsoever, or disturbed Zammit Michael Angel in the possession of anything enjoyed by him or in any other manner unlawfully interfered with his property

2. And Anukam Gift only that on the 28th August 2022 at around 18:00hrs at No 6 Triq Taħt Putirjal, Rabat, Gozo uttered insults or threats not otherwise provided for in this Code against Zammit Michael Angel…."

That in other words, both Defendants were charged with **"....***Without intent to steal or to cause any wrongful damage, but only in the exercise of a pretended right, of your own authority, compelled Zammit Michael Angel to….fulfil any obligation whatsoever, or*

disturbed Zammit Michael Angel in the possession of anything enjoyed by him or in any other manner unlawfully interfered with his property…."

That as stated above, the Defendant Carmel Cordina holder of Identity Card No: 50663G was well aware of the fact that:

a) He did not own the Yard and basement of 5 Main Gate Street, Rabat, Gozo;

b) He agreed to block the door of the kitchen which currently opens to the Yard and basement of 5 Main Gate Street, Rabat, Gozo;

c) He was and is Still well aware of the fact that according to the Map of 1968, like other buildings on the same side of the road, both 5 and 6 Main Gate Street, Rabat, Gozo had their own back yard:

d) The Defendant Carmel Cordina was aware that sometime after 1968 he lost his back yard because the lessee Rosanna Agius, who at the time was paying to lease 6 Main Gate Street, Rabat, Gozo had converted his own back yard into a kitchen;

e) That as already stated above, the Appellant *Parte Civile* is also aware of the fact that the Defendant Carmel Cordina knows that according to the *"Denunzja ta' Proprjetà Taxxabbli"* of the Late Rev Emmanuel Hili who died on the 1st January 1982, presented to the Death and Donation Duty Department on the 12th March 1982 Number G107/82 clearly states that:

"….Post żgħir, No 6 Main Gate Street, Victoria Għawdex, jikkonsisti f'kamra isfel u oħra fuq. Dan il-post hu mikri u ma hemm l-ebda tama li r-residenti joħorġu minnu…."

f) That in other words, the Appellant *Parte Civile* is also aware of the fact that up till 1982, the Defendant Carmel Cordina knows that 6 Main Gate Street, Rabat, Gozo still had its own yard;

g) That this allegation was even accepted by the same Honourable Court of Magistrates (Gozo) when the Parte Civile gave his testomony on the 15th December 2022:

h) That in other words, the Appellant *Parte Civile* is also aware of the fact that up till 1982, the Defendant Carmel Cordina was also aware that before 1968, the same lessee Rosanna Agius was paying and enjoying the leases of both 5 Main Gate Street, Rabat, Gozo and 6 Main Gate Street, Rabat, Gozo;

i) He was also aware that sometime after 1968, the Defendant Carmel Cordina not only lost his back yard because the lessee Rosanna Agius, who at the time was paying to lease 6 Main Gate Street, Rabat, Gozo had converted his own back yard into a kitchen, but also, the lessee Rosanna Agius connected 6 Main Gate Street, Rabat, Gozo with 5 Main Gate Street, Rabat, Gozo by opening two independent doors through the common wall of both houses;

That Anukam Gift admitted to have uttered insults and threats not otherwise provided for in the Criminal Code against the Appellant *Parte Civile;*

<u>*CONFESSIO EST REGINA PROBATIONUM* – L-Ammissjoni hija r-reġina tal-evidenza</u>:

That it has been held that:

> *"….nella nozione di profitto rientra qualsiasi utilità o sodisfazione, anche puramente morale, che l'agente intenda ricavare dall'impossessamento della cosa...."*[3]

That in other words, the Italian Corte di Cassazione, the notion of profit includes any utility or satisfaction, even purely moral, which the agent intends to derive from the possession of the thing;

That in the Case of *ORAZIO PETRALIA [K.I. NRU. 347389M] VERSUS NADEZHDA DIMITROVA [K.I. NRU. 58024A],"*[4] the Small Claims Tribunal stated that:

> *....In vista ta' tali ammissjoni, l-ġbir ta' provi, naturalment, ma ssoktax u dan għar-raġunijiet li sejrin isegwu infra.*

[3] Corte di Cassazione, 9th October 1980. This is also the opinion expressed by Prof. Sir A. Mamo [Notes on Criminal Law, 1958, Vol. II);

[4] Decided 30th November, 2021 by ĠUDIKATUR AVV. DR. KEVIN CAMILLERI XUEREB - Avviż tat-Talba numru: 4/2021

Hu prinċipju antik illi "CONFESSIO EST REGINA PROBATIONUM."[5] *cioè li l-ammissjoni hija l-aqwa forma t'evidenza li parti tista' tressaq ("PROBATIO PROBATISSIMA").*[6]

Hu dottrinalment rilevat illi l-konfessjoni:[7]

"....è la dichiarazione che una parte fa della verità di fatti ad essa sfavorevoli e favorevoli all'altra parte...."[8]

ossia hi:

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[5] Regarding this principle see, inter alia, *Carmelo Bonnici noe v. Ronald Farrugia et al* (Superior Appeal, 26 of October, 1970; unpublished); *Massimo Vella v. V. Petroni (Imports) Ltd* (Lower Appeal, 28 of November, 2007); *Galscer & Bilom Ltd v. Anthony Azzopardi* (Lower Appeal, May 22, 2009); and *APS Bank Ltd v. Francis Xavier Micallef* (Lower Appeal, July 7, 2010);

[6] Dwar dan ara *"Massime, Enunciazioni e Formule Giuridiche Latine"* (Hoepli 1993) ta' UMBERTO ALBANESE, f'paġna 295. Ara wkoll *"Il Latino In Tribunale: Dizionario dei Broccardi e Termini Latini"* ta' FEDERICO DEL GIUDICE (Simone ed. IV, 2011), f'paġna 260 fejn hemm magħdud, inter alia, li, *"Con il termine probatio probatissima si è soliti fare riferimento alla confessione che è il mezzo probatorio per eccellenza."*

[7] *"....In view of such an admission, the collection of evidence, of course, did not continue and this is for reasons that will follow infra.*

It is an old principle that "CONFESSIO EST REGINA PROBATIONUM" i.e.: that the admission is the best form of evidence that a party can present ("PROBATIO PROBATISSIMA");

It is doctrinally stated that the confession:

[8] GIORGIO BIANCHI, *"LA Prova Civile"* (CEDAM, ed. 2009; p. 233):

It is doctrinally stated that the confession:

> *"....is the declaration that one party makes of the truth of facts unfavorable to it and favorable to the other party...."*

"....dichiarazione libera di verità contra se, resa al destinatario, e in tal senso si tratta senz'altro di atto giuridico non negoziale...."[9]

L-effetti probatorji tagħha huma indiskussi w cioè:[10]

"....al pari di qualsiasi altra prova legale, produce effetti sul piano processuale in quanto sulla sua base il giudice non può che porre come vero il fatto confessato, benché sia innegabile la sua natura sostanziale...."[11]

u l-konfessjonijiet tal-partijiet:[12]

"....a differenza delle prove libere, vincolano la pronuncia del giudice e determinano in modo prestabilito ed univoco la posizione dei fatti influenti sulle situazioni giuridiche sostanziali...."[13]

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[9] 4 ALESSANDRO IACOBONI, *"Prova Legale e Libero Convincimento del Giudice"* (Giuffrè, ed. 2006; §3.3.1., p. 54).

It is doctrinally stated that the confession:

> "....free declarationof contra se truth, made to the addressee, and in this sense it is certainly a non-negotiation legal act...."

[10] Its probative effects are indisputable, namely:

> *"....like any other legal proof, it produces effects on the procedural level since on its basis the judge can only establish the confessed fact as true, although its substantial nature is undeniable...."*

[11] ibid.

[12] and the confessions of the parties:

> *"....unlike free trials, they bind the judge's ruling and determine in a pre-established and unambiguous way the position of the influential facts on the substantial legal situations...."*

[13] ibid.

Biex ikollha tali effett probatorju, l-ammissjoni:[14]

> *"....deve constare di un element soggettivo, consistente nella consapevolezza e volontà di ammettere e riconoscere la verità di un fatto a sé sfavorevole e favorevole all'altra parte, e di un elemento oggettivo, consistente nell'ammissione del fatto obiettivo che forma oggetto della confessione da cui deriva un concreto pregiudizio all'interesse dell'dichiarante e al contempo un corrispondente vantaggio nei confronti del destinatario della dichiarazione...."*[15]

L-Art. 632(1) tal-Kapitolu 12 tal-Liġijiet ta' Malta jgħid li:[16]

> *"Kull dikjarazzjoni magħmula mill-parti kontra tagħha nfisha, w kull kitba oħra li jkun fiha konfessjonijiet, konvenzjonijiet jew obbligi, jistgħu jingħiebu bi prova;"*

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[14] To have such probative effect, the admission:

> *"....must consist of a subjective element, consisting in the awareness and willingness to admit and recognize the truth of a fact which is unfavorable to oneself and favorable to the other party, and of an objective element, consisting in the admission of the objective fact which forms the object of the confession from which derives a concrete prejudice to the interest of the declarant and at the same time a corresponding advantage towards the addressee of the declaration...."*

[15] GIORGIO BIANCHI (op. cit., p. 233)

[16] That Article 632 of Chapter 12 of the Laws of Malta states that:

> *"(1) Any declaration made by a party against his interest, or any other writing containing any admission, agreement, or obligation is admissible as evidence:*
>
> *(2) Any writing, whether printed or not, and any inscription, seal, banner, instrument or tool of any art or trade, tally or score, map, sign or mark, which may furnish information, explanation or ground of inference in respect of the facts of the suit, are admissible as evidence:"*

w l-Art. 693 ta' l-istess Kapitolu jipprovdi illi:[17]

> *"Kull ammissjoni ta' fatt, sew bil-miktub kemm bil-fomm, magħmula fil-qorti kemm barra mill-qorti, tista' tittieħed bħala prova kontra l-parti li tagħmilha;"*

Ergo, dak reġistrat mill-konvenuta w id-difensur għan-nom tagħha fl-udjenza tal-11 ta' Novembru, 2021, jissodisfa l-għanijiet ta' dawn iċ-ċitati żewġ dispożizzjonijiet.

L-ammissjoni (jew konfessjoni) da parti tal-konvenuta, f'dan il-każ, ma kinitx waħda li rriżultat minn xi dokument jew minn xi inferenza li wieħed jista' jislet mill-provi miġjuba mill-partijiet, iżda kienet waħda sottomessa w mogħtija formalment waqt udjenza bil-miftuħ, b'mod volontarju w wara li l-implikazzjonijiet relattivi aċċessorji għall-istess konfessjoni ġew spjegati lill-istess parti konvenuta seduta stante hekk kif senjalat fil-verbal appożitu.

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[17] That Article 693 of Chapter 12 of the Laws of Malta states that:

> *"Any admission of a fact whether written or verbal, made in or out of court, may be received in evidence against the party who made it:"*

That Article 694 of Chapter 12 of the Laws of Malta states that:

> ***"(1) An extrajudicial admission is no evidence except against the party who made it;"***
>
> ***(2) An admission made upon a reference to the oath of one of the parties may be received in evidence of a fact even against the other parties to the suit;"***
>
> ***(3) In all cases, only such part of an admission as the court may deem worthy of credit shall constitute evidence;"***

Għalhekk, hekk kif tgħid il-massima Latina, "CONFESSIO FACTA IN JUDICIO OMNI PROBATIONE MAJOR EST"[18] *(li tfisser illi ammissjoni magħmula fi proċediment ġudizzjarju, jew formalment waqt xi proċeduri oħra ta' indole ġudizzjarja jew kważi-ġudizzjarja), għandha aktar forza w qawwa minn kwalsiasi evidenza oħra.*[19]

Infatti, nsibu ritenut illi:

> *"....Se resa in giudizio essa vincola il giudice, il quale dovrà ritenere raggiunta la prova in ordine alla veradicità dei fatti ammessi, traendone ogni conseguenza in sede di decisione della causa...."*[20]

In vista ta' l-imsemmija ammissjoni tal-konvenuta, reġistrata formalment kif fuq appena mfisser, dan it-Tribunal m'għandux triq oħra għajr li jiddikjara lill-istess konvenuta bħala debitriċi ta' l-attur

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[18] Dwar dan ara *"Trayner's Latin Maxims"* (Sweet & Maxwell, 4th edition, 1993) pp. 92–93

[19] Ergo, the one registered by the defendant and the defender on her behalf in the audience of the 11th November, 2021, meets the objectives of these two cited provisions;

The admission (or confession) on the part of the defendant, in this case, was not one that resulted from any document or from any inference that can be drawn from the evidence brought by the parties, but was one submitted and given formally during an open audience, voluntarily and after the relative implications attached to the same confession were explained to the same defendant party sitting as indicated in the appropriate verbal;

Therefore, as the Latin maxim says, *"CONFESSIO FACTA IN JUDICIO OMNI PROBATIONE MAJOR EST"* (which means that an admission made in a judicial proceeding, or formally during any other proceedings of a judicial or quasi-judicial nature), has more force and strength from any other evidence;

[20] Ara *"Il Latino In Tribunale: Dizionario dei Broccardi e Termini Latini"* ta' FEDERICO DEL GIUDICE (Simone ed. IV, 2011) pagna 67.

u, bħala korollarju naturali, li l-konvenuta hi tenuta tħallas lill-istess attur l-ammont ta' erbat'elef u tnejn u tmenin ewro (€4,082.00c)...."[21]

That **Article 658 of Chapter 9** of the Laws of Malta provides as follows:

Any confession made by the person charged or accused, whether in writing, orally, by audiovisual means or by other means, may be received in evidence against or in favour of the person, as the case may be, who made it, provided it appears that such confession was made voluntarily, and not extorted or obtained by means of threats or intimidation, or of any promise or suggestion of favour;"

That as stated above, a distinction has to be made between the admissibility of evidence and the probabative value of that evidence;

That in his notes on **Criminal Procedure, Professor Mamo** teaches that:[22]

"....Extrajudicial Confessions are those were the defendant either expressly confesses his guilt or makes admission of facts from which his guilt may be implied, under any circumstances

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[21] In fact, we find that:

> *"...If brought before the court, it is incumbent on the judge, who should consider the proof joined with regard to the veracity of the admitted facts, drawing any consequences from it when deciding the case...."*

In view of the aforementioned admission of the defendant, formally registered as just explained, this Tribunal has no other way than to declare the same defendant as a debtor of the plaintiff and, as a natural corollary, that the defendant was ordered to pay the same plaintiff the amount of four thousand and eighty two euros (€4,082.00c)...."

[22] Pages 100-101

other than those described in respect of judicial confessions. They may be in writing or oral. So that a confession may be received in evidence against the person who made it the law (sec.658) requires that it shall appear that such confession was made voluntarily and was not extorted or obtained by means of threats or intimidation, or of any promise or suggestion of favour. There is no presumption in law that a confession not free and voluntary is false; it is excluded on the ground that improper threats or promises may influence an accused or suspected person to say what is not true, and therefore a confession made in such circumstances cannot be safely acted upon. It is obviously right that a person knowing his guilt should, if he so wishes confesses at the earliest opportunity, and there is no reason why he should be discouraged from so doing. But the law requires that the confession shall have been made voluntarily and, in the practice of our courts, the prosecution must give affirmative 'prima facie' evidence that it was so made. The law says 'voluntarily' and not 'spontaneously'…."

That apart from the fact that under Maltese law hearsay evidence is not necessary inadmissible,[23] PS 2100 Lorraine Grech Mifsud had confirmed her Affidavit, as

[23] See Article 599 of the Code of Organization and Civil Procedure, made applicable to these proceedings by Article 645 of the Criminal Code;

evidence of what third parties, including the suspected person, Anukam Gift actually told her a *TEMPO VERGINE,* and as evidence of her own personal involvement in the case;

That evidence is admissible even if it turns out that it has no or little probabative value;

That in the (preliminary) judgement *Ir-Repubblika ta' Malta vs. Meinrad Calleja,"*[24] decided on the 14th December 1998 and subsequently confirmed on appeal,[25] the Criminal Court referred to the dicta of Lord Chief Justice Goddard in the case *Kuruma, son of Kaniu v. The Queen,"*[26] where in page 203 it is stated as follows:

> ***"....the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible, and the court is not concerned with how the evidence was obtained. While the proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordship's opinion it is plainly right in principle...."***

[24] Bill of Indictment number 20/97

[25] Decided on the 3rd May 2000.

[26] [1955] AC 197;

That in the case ***Il-Pulizija vs David Sant***" decided on the 15th October 2007, the Court of Criminal Appeal (in its inferior jurisdiction)[27] stated as follows, with reference to the dicta of Lord Chief Justice Goddard above quoted:

> *"....Għalkemm dan intqal fil-kuntest ta' allegazzjoni li l-prova kienet inkisbet b'mod illegali, l-prinċipju jibqa' li t-test huwa dak tar-relevanza: jekk il-filmat jew ritratti jew reġistrazzjoni hu jew jista' jkun relevanti – jiġifieri mhux manifestament irrelevanti – allura, fin-nuqqas ta' xi exclusionary rule of evidence dak id-dokument hu ammissibbli, salv dejjem kif ingħad il-kwistjoni tal-valur probatorju. Mill-banda l-oħra, jekk ir-relevanza tad-dokument ma tkunx tista' tiġi stabbilita mill-istess filmat jew ritratt jew reġistrazzjoni, allura, fin-nuqqas ta' xi xhud li jkun jista' jistabilixxi dik ir-rilevanza, l-Qorti tista' tasal għall-konkluzzjoni li dak l-istess dokument hu manifestament irrelevanti w allura anqas biss tqisu...."*

That in other words, with reference to the dicta of Lord Chief Justice Goddard, in the case ***Il-Pulizija vs David Sant,"*** the Court of Criminal Appeal (in its inferior jurisdiction) stated that although it was said in the context of an allegation that the evidence had been obtained illegally, the principle remains that the test is that of relevance: if the video or photographs or recording is or can be relevant - that is to say, it is not manifestly irrelevant - so, in the absence of any exclusionary rule of

[27] Per Chief Justice Vincent De Gaetano.

evidence, that document is admissible, except as always the question of probative value;

That on the other hand, if the relevance of the document cannot be established from the same video or photograph or recording, then, in the absence of any witness who can establish that relevance, the court can come to the conclusion that that same document is manifestly irrelevant and then it will not even consider it;

That the Court of Appeal in the case **Il-Pulizija vs Renard Cassar**," decided on September 24, 2009 held that:

> *....Hija prattika sanċita mill-liġi, li xhieda ordinarja w ċioè mhux persuni maħtura bħala espert mill-Qorti, ma jistgħux jagħtu jew jesprimu opinjoni imma jistgħu jiddeponu biss fuq dak illi huma kkonstataw bis-sensi tagħhom. Meta jkun meħtieġ xi ħila jew sengħa speċjali biex jiġi eżaminat xi oġġett, għandha tiġi ordnata perizja (Artikolu 650(1) tal-Kap 9)...."*

That in other words, on September 24, 2009 the Court of Appeal in the case **Il-Pulizija vs Renard Cassar,**" decided that it is a practice sanctioned by law, that ordinary witnesses and those who are not persons appointed as experts by the Court, cannot give or express an opinion but can only testify on what they have ascertained with their senses. When a special skill or skill is required to examine an item, an appraisal must be ordered (Article 650(1) of Chapter 9);

That it is in line with the spirit of the law, it is indubitable and indisputable that no witness will not be allowed to express any opinion in the course of the trial, except for those experts nominated by the Court;

That for centuries the Latin phrase *CONFESSIO EST REGINA PROBATIONUM* (in English: *Confession is the queen of evidence")* justified the use of forced confession in the European legal system;

That this famous *brocardo* means that the confession, if it is made on available rights, binds the judge, who will have to consider the proof as to the truthfulness of the facts admitted as having been achieved, drawing all reasonable consequences from it;

That the confession has this force only if made in court, or extra-judicially to the other party;

That at this stage, reference is being made to the judgment delivered by the Court of Criminal Appeal in the names of **"Il-Pulizija vs Omar Pisani:"**[28]

> *....Illi kif ġie ritenut mill-Qorti Kriminali fis-sentenza preliminari tagħha "Ir-Repubblika ta' Malta vs. John Attard" [14 ta' Settembru, 2004] il-prinċipji regolaturi bħal dak li jirrigwarda l-ammissibilita' tal-istqarrija tal-akkużat huma s-sewgenti:*
>
> ***a)*** *Kull ħaġa li l-akkużat jistqarr, sew bil-miktub kemm ukoll bil-fomm, tista' tittieħed bi prova kontra min ikun stqarrha, kemm-il-darba*

[28] Decided on the 6th January 2005

jinsab li dik il-konfessjoni tkun ġiet magħmula minnu volontarjament u ma ġietx imġiegħlha jew meħuda b'theddid jew biża', jew b'weġħdiet jew bi twebbil ta' vantaġġi (Artikolu 658 tal-Kodiċi Kriminali).

b) *Jekk il-konfessjoni saritx volontarjament jew le hi kwistjoni li trid tiġi deċiża mill-ġurati w mill-ġurati biss (ara. Appell Kriminali: "Ir-Repubblika ta' Malta vs. Emmanuel Farrugia" [20.1.1989] Kollez.Vol. LXXIII, p.5 Sect. I p 1036 u oħrajn);*

c) *Meta l-konfessjoni titniżżel bil-miktub fil-waqt li tiġi magħmula, l-kitba għandha tiġi preżentata w biss jekk jiġi pruvat li l-kitba ġiet meqruda jew mitlufa, issir prova bil-fomm, sabiex tiġi pruvata s-sustanza ta' dik il-konfessjoni. Pero' anki fejn ikun hemm konfessjoni bil-miktub xejn ma jimpedixxi li tittieħed bħala prova kull konfessjoni oħra bil-fomm li tkun saret qabel jew wara (Artikolu 659);*

d) *Illi umbagħad kif ġie ritenut mill-istess Qorti Kriminali fis-Sentenza tagħha "Ir-Repubblika ta' Malta vs. Salvatore Bugeja" [3.12.2004], hu aċċettat li kull dikjarazzjoni tal-akkużat magħmula qabel, waqt jew wara l-att inkriminat tista' tingieb bi prova kontra tiegħu w li l-konfessjoni li tkun saret volontarjament tista' tittieħed bħala prova tal-ħtija tiegħu.*

e) *Ta' spiss jingħad li l-konfessjoni tal-akkużat hija l-prova reġina għax kif intqal:*

"....A free and voluntary confession of guilt by a prisoner, whether under examination before magistrates or otherwise, if it is direct and positive, and is duly made and satisfactorily proved, is sufficient to warrant a conviction without any corroborative evidence...."[29]

f) *Jintqal ukoll li:-*

"....Admissions or confessions to persons other than magistrates, if in writing, are proved as any other written instrument....If made by parol, they are proved by parol evidence of some person who heard them. What a prisoner has been overheard to say to another, or to himself, is equally admissible; though it is evidence to be acted upon with much caution, as being liable to be unintentionally misinterpreted by the witnesses...."[30]

That as was held by the Criminal Court in its preliminary judgement "**The Republic of Malta vs. John Attard,**" [September 14, 2004] the governing principles as regards the admissibility of the accused's statements are the following:

a) Anything that the accused confesses, both in writing and orally, can be taken as evidence against the person who confessed it, as long as it is found that that confession was made by him voluntarily and was not forced or

[29] See R. v. White, R.& R. 508; R. v. Tippet, id. 509; R. v. Eldridge, id.440; R.v. Falkner, id. 481; R. v. Francia, 15 St. Tr. 859, 1 East P.C. 133 n, Fost. 240; R. v. Lambe, 2 Leach 552; R. v. Wheeling, 1. Leach 311 n

[30] See *R. v. Simons, C. & P. 540) (ARCHBOLD . p.376*

taken with threats or fear, or with promises or with promises of advantages (Article 658 of the Criminal Code).

b) Whether the confession was made voluntarily or not is a matter that must be decided by the jurors and only by the jurors (cf. Criminal Appeal: "*The Republic of Malta vs. Emmanuel Farrugia*" [20.1.1989] Kollez.Vol LXXIII, p.5 Sect. I p 1036 and others);

c) When the confession is recorded in writing at the time it is made, the writing must be presented and only if it is proven that the writing has been destroyed or lost, oral evidence is made, in order to prove the substance of that confession. However, even where there is a written confession, nothing prevents any other oral confession that was made before or after being taken as evidence (Article 659);

d) That then as was retained by the same Criminal Court in its Judgment "**Republic of Malta vs. Salvatore Bugeja**" [3.12.2004], it is accepted that every statement of the accused made before, during or after the incriminated act can be brought as evidence against him and that the confession that was made voluntarily can be taken as evidence of his fault.

e) It is often said that the confession of the accused is the ultimate proof because as it was said a free and voluntary confession of guilt by a prisoner, whether under examination before magistrates or otherwise, if it is direct and positive, and is duly made and satisfactorily proven, is sufficient to warrant a conviction without any corroborative evidence;

f) It is often said that Admissions or confessions to persons other than magistrates, if in writing, are proved as any other written instrument. If made by parol, they are proved by parol evidence of some person who heard them. What a prisoner has been overheard to say to another, or to himself, is equally admissible; though it is evidence to be acted upon with much caution, as being liable to be unintentionally misinterpreted by the witnesses;

That reference is also made to the judgment delivered by the Criminal Court in the names of **Il-Pulizija vs De Cesare**,"[31] in which the Court held:

> *....Illi fil-kamp penali dejjem ġie ritenut li l-konfessjoni – popolarment magħrufa bħala l-istqarrija ta' l-imputat jew l-akkużat – hija l-prova reġina li tista' tressaq il-prosekuzzjoni biex tipprova l-ħtija tal-persuna akkużata, dment li din tkun saret volontarjament u ma ġietx imġiegħla, jew meħuda b'theddid, jew b'biża', jew b'wegħdiet jew twebbil ta' vantaġġi (Artikolu 658 tal-Kodiċi Kriminali).*
>
> *Illi ukoll jirriżulta illi l-appellanti ingħata l-jedd jikseb parir legali qabel ma irrilaxxja dina l-istqarrija liema jedd huwa irrinunzja għalih b'mod volontarju u ghalhekk għadda sabiex jagħmel id-dikjarazzjoni inkriminanti tiegħu.*
>
> *Illi tali dikjarazzjoni hija għalhekk waħda sufficjenti għalbiex il-Qorti tasal għal sejbien ta' ħtija u dan sakemm ma hemmx xi prova illi tali dikjarazzjoni tista' tkun waħda ivvizzjata, liema allegazzjoni ma*

[31] Decided on the 22nd September 2016

jidhirx illi tressqet f'dan il-każ, tant illi mil-verbal tas-seduta tas-16 ta' Diċembru 2013, jirriżulta illi d-difiża eżentat lill-Prosekuzzjoni milli tressaq il-prova dwar il-volontarjetà ta' l-istqarrija rilaxxjata mill-appellanti.

Illi allura l-Ewwel Qorti ma kellha bżonn l-ebda prova oħra sabiex tikkorobora dak iddikjarat mill-appellanti, w dan kif sottomess minnu fl-aggravvju minnu interpost u ċioè l-prova permezz tax-xhieda tat-terza persuna lil lilha huwa forna d-droga w l-analizi ta' l-istess droga, iktar w iktar meta imbaghad fix-xhieda moghtija minnu fil-Qorti l-appellanti jidher illi jonqos milli isemmi dan il-fatt minnu iddikjarat fl-istqarrija tiegħu w jagħti xi spjegazzjoni valida dwar dak li kien ġie mistqarr minnu jew inkella li iressaq provi biex jikkontrobatti w ixejjen dina l-prova tal-Prosekuzzjoni...."

That in the judgement delivered by the Criminal Court in the names of *Il-Pulizija vs De Cesare,"* the Court held that in the criminal field it has always been held that the confession - popularly known as the statement of the defendant or the accused - is the queen of all evidence that the prosecution can bring to prove the guilt of the accused person, as long as this was done voluntarily and was not forced, or taken with threats, or with fear, or with promises or promises of advantages (Article 658 of the Criminal Code);

That it also results that the appellant was given the right to obtain legal advice before he released the statement which right he voluntarily waived and therefore proceeded to make his incriminating statement;

That such a statement is therefore sufficient for the Court to arrive at a finding of guilt and this unless there is some proof that such a statement may be tainted, which allegation does not seem to have been brought forward in this case, so much so that from the minutes of the hearing of 16 December 2013, it appears that the defence exempted the Prosecution from presenting the evidence regarding the voluntariness of the statement released by the appellants;

That then the First Court did not need any other evidence to corroborate what was stated by the appellant, and this as submitted by him in the appeal he interposed and that is the evidence through the testimony of the third person to whom he provided the drugs and the analyzes of the same drug, even more so when in the testimony given by him in the Court the appellant appears to fail to mention this fact which he stated in his statement and gives any valid explanation about what had been confessed by him or else that he submits evidence to counteract and undermine the evidence of the Prosecution;

That for example, Article 2730 of the Italian Civil Code states that:[32]

> *"La confessione è la dichiarazione che una parte(1) fa della verità di fatti(2) ad essa sfavorevoli e favorevoli all'altra parte.*
>
> *La confessione è giudiziale(3) o stragiudiziale(4) [2733, 2735; 228 c.p.c.];"*

[32] Italian Royal Decree 16th March, 1942, n. 262 - Sources → Civil Code → SIXTH BOOK - On the protection of rights → Title II - On evidence → Chapter V - On confession;

That in other words, Article 2730 of the Italian Civil Code states that:

> *"The confession is the declaration that one party(1) makes of the truth of facts(2) unfavorable to it and favorable to the other party.*
>
> *The confession is judicial(3) or extrajudicial(4) [2733, 2735; 228 c.p.c.];"*

That the Notes to **Article 2730** of the Italian Civil Code are as follows:

> (1) The confession, which as a rule can only be made personally by the party, is a mere declaration of knowledge, not a negotiating act: consequently, the declarant need not want the effects, but the awareness and the will are sufficient to admit as true a fact unfavorable to oneself and favorable to the other party *(ANIMUS CONFITENDI);*
>
> (2) The principle *IURA NOVIT CURIA, FACTA SUNT PROBANDA* is observed, by virtue of which it is up to the judge to indicate the rule to be applied and the correct legal classification suitable for the case in question, thus resulting in the possible objects of confession only of the facts, not the legal standards or qualifications;
>
> (3) The confession can be made during the proceedings (and is then defined as judicial) spontaneously, or more often through a formal interrogation, to which the judge proceeds at the request of the other party, asking the interrogated subject the questions prepared by this last (see Article 228 i.c.p.c.). In the context of the interrogation, the party must answer in person, according to what is prescribed by the Article 231, paragraph 1 of the Italian

Code of Civil Procedure; however, if it has been explicitly excluded that the formal interrogation can be made by the defender, in his capacity as technical procedural representative of the conflicting subject, the legislator has granted a limited legitimacy to provide answers to the substantial representative of the same, pursuant to Article 2731 of the Italian Civil Code. This legitimation initially aroused numerous perplexities, since the confession, not being a declaration of will, but of science, could not be made through a representative instrument; nonetheless, this possibility is now unanimously accepted, given the effects indirectly analogous to those of the negotiation, produced by the confessional declaration as legal proof;

(4) The provision specifies that the confession, by the party or by whoever represents it in substance, can also be obtained out-of-court, both orally and in writing, and assumes the same probative value as that made judicially. Even the extrajudicial confession made by a third party or contained in a testamentary disposition can have probative value; however it is evaluated at the discretion of the judge (see Article 2735 of the Italian Civil Code);

That the *RATIO LEGIS* of Article 2730 of the Italian Civil Code are that the provision in question provides for the use of a test of absolute reliability, which consists of a scientific statement, therefore non-negotiation, through which the party affirms the truth of facts unfavorable to itself and favorable to the other party;

That the confession can be made during the trial (see Article 2733 of the Italian Civil Code), spontaneously (see Article 229 of the Italian Code of Civil Procedure) or on

the initiative of the opposing party (see Article 228 of the Italian Code of Civil Procedure), or outside of this (see Article 2735 of the Italian Civil Code), but in any case it has the value of legal proof, therefore it will bind not only the party (see Article 2732 of the Italian Civil Code) but also the judge, who will therefore consider the truthfulness of the facts admitted to be demonstrated, drawing the relative consequences when deciding the case;

That if, on the other hand, the dispute concerns unavailable rights (if, for example, it concerns questions of status), the judge has inquisitive powers **to search for the truth and can at his discretion examine any confession provided, which therefore has no legal value;**

That in this matter, apart from the Latin phrase ***CONFESSIO EST REGINA PROBATIONUM*** (in English: *Confession is the queen of evidence")* other legal maxims include:

A. *CONFESSIO DIVIDI NON DEBET* which means that *"A confession must not be separated;"*

B. *CONFESSIO FACTA IN IUDICIO NON POTEST RETRACTARI* which means that *A confession made in court cannot be retracted;"*

C. *CONFESSIO FACTA IN JUDICIO OMNI PROBATIONE MAJOR EST* which means that *"A confession made in court is of greater effect than any proof;"* Jenk. Cent. 102.

D. *CONFESSUS IN JUDICIO PRO JUDICATO HABETUR ET QUODAMMODO SUA SENTENTIA DAMNATUR* which means that *"A person who has confessed in court is deemed to have had judgment passed upon him, and, in a manner, is condemned by his own sentence;"* 11 Co. 30. See Dig. 42. 2. 1.

E. *CONFESSIO IN FAVOREM CONFITENTIS DEBET INTERPRETARI* which means that *the confession must be interpreted in favor of the confessor;"*

F. *CONFESSIO IN UNO IUDICIO FACTA IN ALIO NOCET* which means that *a confession made in one judgment is harmful in another;"*

G. *CONFESSIO IUDICIALIS PRO PLENA PROBATIONE HABETUR* which means that *A judicial confession is considered full proof;"*

H. *CONFESSIO IURIS ERRANTIS NON PRAEIUDICAT* which means that *Confession of the wrongful right does not prejudice;"*

I. *CONFESSIO OMNEM PRAESUMPTIONEM EXCLUDIT* which means that *Confession excludes all presumption;"*

J. *CONFESSIO SINE CAUSA DEBENDI NIHIL PROBAT* which means that *Confession without reason proves nothing;"*

K. *CONFESSIO VERO PER METUM VEL PER FRAUDEM EXTORTA NON VALET* which means that *But a confession made by fear or fraud is not valid;"*

L. *CONFESSOS IN IURE PRO IUDICATIS HABERI PLACET* which means that *Confessions should be regarded as judged in law;"*

M. *CONFESSUS PRO IUDICATO EST* which means that *He was admitted as judged;"*

N. *CUM CONFITENTE SPONTE MITIUS EST AGENDUM* which means that *"One making a voluntary confession is to be dealt with more mercifully;"* Bart. Max. 68; 4 Inst. 66; Branch, Princ;

O. *CONFESSIO SOLI CONFITENTI NOCET* which means that "*Confession harms only the one who confesses;"*

P. *CONFESSUS PRO INDICATO HABETUR, QUI QUODAMMODO SUA SENTENTIA DAMNATUR* which means that "*The defendant, who in a certain way has been condemned for his decision, is considered to have already been judged;"*

Q. *CONTRA SE PRONUNTIATIO* which means that *"What a party says against itself;"*

R. *HABEMUS CONFITENTEM REUM* which means that *"We have a confessed offender;"*

S. *PROBATIO PROBATISSIMA* which means that "*Confession par excellence;"*

That the Explanation of Article 2730 of the Italian Civil Code are:

1. Confession and testimony: Common features and differential features:

That as mentioned (see Article 2721 of the Italian Civil Code), a broad concept of testimony, now penetrated into the doctrine; the confession can be included in it;

But it is naturally necessary to bear in mind the markedly distinctive characteristics of confession from testimony in the technical sense;

a) Testimony is always judicial; confession can also be extrajudicial;

b) The testimony in the technical sense is the work of a third party; the confession is a partisan statement;

c) The testimony has the effect of representing certain facts to the judge as the object of his free appreciation; the confession is to provide him with legal and therefore absolute proof of the truth of a fact;

d) The testimony does not produce effects to the detriment of the declarant; the confession has the specific character of establishing one or more facts to the detriment of the confiente;

That it is debated in doctrine whether the confession always represents a declaration of science or whether it can constitute a declaration of will; i.e.: in the sense that through the confession of a non-existent fact a right can be established in favor of the other party;

2. Differences from admission and adherence to the claim:

That the differential characteristics arise from the definition of the confession given by the law:

a) From admission. According to Carnelutti, the distinction would be in this: that the admission would concern a fact already affirmed by the other party. But the most important difference consists in this: the admission concerns a

fact which by itself does not produce effects unfavorable to the declarant and favorable to the other party, so that it may, in the concurrence of other circumstances, neither admitted nor confessed, lead to a result procedurally useful to the other party. For example, Titius admits to having met Caius; but he does not confess to having received a loan of 1,000 euros from him on that occasion;

b) From the acceptance of the claim: since this certainly implies the acceptance of the request, while the confession does not exclude that the effect of it is neutralized by the effect of an exception; e.g.: the debt is confessed, but the statute of limitations is validly affirmed;

CONFESSUS PRO INDICATO HABETUR, QUI QUODAMMODO SUA SENTENTIA DAMNATUR:

That without prejudice to the above, some academics have concluded that all confessions should be accompanied stronger corroborative evidence;

That for example English law, like American law, requires a finding of voluntariness before admission of a confession;

That the prosecution has the burden of proof to show that the confession was voluntarily made;[33 + 34]

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[33] Dr. Boaz Sangero, *"Miranda is Not Enough: A new Justification for Demanding Strong Corroboration to a Confession,"* Cardozo Law Review, Vol. 28 No. 6 (May 2007).

[34] Gordon Van Kessel, *"The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches,"* 38 Hastings L.J. 1 (1986)

That the magistrate or judge must decide on the issue at the *VOIR DIRE* hearing, which is outside of the presence of the jury;

That for example, in the UK, Confessions are governed by Article 76(2) of the *Police and Criminal Evidence Act (PACE)"* of 1984 which states that:

> *If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused, it is represented to the court that the confession was or may have been obtained*
>
> *(a) By oppression of the person who made it; or*
>
> *(b) In consequences of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequences thereof;"*
>
> *The court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid;"*[35] **[13]**

35

http://www.statutelaw.gov.uk/content.aspx?LegType=All+Primary&PageNumber=1&NavFrom=2&parentActiveTextDocId=1871659&ActiveTextDocId=1871659&filesize=9089

> That Article 82(1) of PACE defines *confession"* as *any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise;"*[36]

That there are two main rationales to exclude confessions:

A. Oppressive police methods; and

B. Reliability;

That if the judge admits the confession, defense counsel still has the right to argue oppression or unreliable evidence at trial. It will then be up to the jury to decide the weight that should be given to the confession. In making such a decision, the jury must act compatibly with the right to a fair trial and the right against self-incrimination;

That for example, in Australia, the standard became clearer with the cases of *R. v. Swaffield"* and *Pavic v. R.;"*[37]

That in those cases, the Australian High Court outlined the following confessions test:

1) Was it voluntary? If so,

36

http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&PageNumber=0&NavFrom=0&parentActiveTextDocId=1871554&ActiveTextDocId=1871668&filesize=13420

[37] http://www.icclr.law.ubc.ca/Publications/Reports/ES%20PAPER%20CONFESSIONS%20REVISED.pdf

2) If is reliable? If so,

3) Should be it be excluded in the exercise of discretion?[38]

That this confessions standard emphasizes reliability more than previous tests;

That the court also includes examination of public policy issues, in addition to issues revolving around trial fairness and unduly prejudicial evidence;[39]

That the Dictionary to the *Evidence Act* defines the terms *"admission," "previous representation"* and *"representation"* (Dictionary, Pt 1) and the expression *"a representation is contained in a document is taken to have been made by a person"* (Dictionary, Pt 2 cl 6);

That in other words, admission is an answer to a question and the question to which it is given are relevant if the answer is an admission of guilt or of a fact relevant to the proof of guilt, or if it is capable of being regarded as such an admission; if the answer does not unequivocally amount to an admission but is capable of being regarded as such, and subject to the exercise of the judge's discretion, it is a question for the jury whether it is an admission, but the jury must be clearly and fully

[38] http://www.icclr.law.ubc.ca/Publications/Reports/ES%20PAPER%20CONFESSIONS%20REVISED.pdf. See also *"R. v. Swaffield,"* http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1998/1.html?query=title(R%20%20and%20%20Swaffield)

[39] http://www.icclr.law.ubc.ca/Publications/Reports/ES%20PAPER%20CONFESSIONS%20REVISED.pdf

directed that it is a question for them as to whether the answer does or does not amount to a relevant admission:[40]

That if the answer is a denial, if it is not capable of being regarded as an admission, and if its tender is objected to, it is irrelevant and it must be rejected;[41]

That if, however, the denial becomes relevant for another purpose, and such a denial is capable of affecting, directly or indirectly a fact in issue, it is becomes relevant and admissible;

That the previous representation constituting the admission must be adverse to the interests of the party against whom the evidence is tendered in the outcome of the proceeding (Dictionary definition, par (b));

That at common law, conduct by a party such as lies, flight, the discouragement of witnesses from speaking to police and the destruction of relevant evidence, where it could amount to consciousness of guilt, is admissible to prove that guilt;[42]

That after Edwards v The Queen**,** confessions has now been applied under the **Evidence Act** to include denials to questions where the denials are expressed in the form of exculpatory statements that are shown to be lies — thereby becoming

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[40] *R v Plevac* (1995) 84 A Crim R 570 at 579–580; *R v JGW* [1999] NSWCCA 116 at [37]–[41]. If the answer is a denial, if it is not capable of being regarded as an admission, and if its tender is objected to, it is irrelevant and it must be rejected: *Graham v The Queen* (1998) 195 CLR 606 at [1], [2], [40], [45];

[41] *Graham v The Queen* (1998) 195 CLR 606 at [1], [2], [40], [45];

[42] ***Edwards v The Queen* (1993) 178 CLR 193.**

admissions, even though the adverse nature of the exculpatory denial may depend on subsequent conduct by the party;[43]

That for this reason, the Appellant *Parte Civile* cannot understand why the Honourable Court of Magistrates (Gozo) as a Court of Criminal Judicature {Magistrate Dr. Leonard Caruana LL.D., M.A. (Fin. Serv)} had decided:

> *"….Therefore, on the basis of the above, the Court, after having seen Article 85 and 339(1)(e) of the Criminal Code, Chapter 9 of the Laws of Malta, finds Anukam Gift and Carmel Cordina not guilty of the charges brought against them…."*

and totally ignored the **Affidavit of PS 2100 Lorraine Grech Mifsud** which states that:

> *On the 29/08/2022, Michael Angelo Zammit reported again at Victoria Police Station were he stated that the day before, that is on the 28/08/2022, at about 18.00 hrs, he went to his abome mentioned property were he found door leading to yard locked by a gangetta . Same stated that when he saw this, he spoke to the tenant about it were she told him the words:*
>
> *....You are crazy, the owner told me to do so, I don t care about the police, I will get my friends to hit you...."*

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[43] ***R v Esposito*** **(1998) 45 NSWLR 442 at 458–9;** ***Adam v R*** **(1999) 106 A Crim R 510 at [34]–[66]. (*Adam v R* is not the decision leading to the appeal in *Adam v The Queen* (2001) 207 CLR 96.);**

I, the undersigned call on site African Gift Shop, No: 6, Triq Taħt Putirjal, Victoria were I spoke with Anukam Gift, ID: 74581 M, b/o 01/01/1985 at the Ivory Coast, Res: Regina Court, Flat 1, Triq l-Ewropa, Rabat....were she stated that she had locked the yard door as instructed by the owner. I inspected this yard, were it was confirmed that this door was locked from the yard side, in a way that there was no access from dwelling No. 5 towards the yard. Anukam Gift stated that it was true that she called Michaelangelo 'crazy' but stated that she had never threatened him in any way, however, she added that this incident was not on the 28/08/2022 but the Sunday before.

I also spoke with Carmel Cordina were he stated that although he is the owner of the mentioned yard he never instructed Anukam to lock the door...."

That in other words and as already stated above, PS 2100 Lorraine Grech Mifsud confirmed that:

a) *....Anukam Gift....stated that she had locked the yard door as instructed by the owner...."* i.e.: the Defendant Carmel Cordina;

b) She, PS 2100 Lorraine Grech Mifsud had personally *....inspected this yard, were it was confirmed that this door was locked from the yard side, in a way that there was no access from dwelling No. 5 towards the yard...."*

c) *....Anukam Gift stated that it was true that she called Michaelangelo crazy ...."*

That as a result, and for these reasons, once Anukam Gift had admitted to the Police to have uttered insults and threats not otherwise provided for in the Criminal Code against the Appellant *Parte Civile,* and as ....*stated that she had locked the yard door as instructed by the owner*...." i.e.: the Defendant Carmel Cordina, the Appellant *Parte Civile* cannot understand why the Honourable Court of Magistrates (Gozo) as a Court of Criminal Judicature {Magistrate Dr. Leonard Caruana LL.D., M.A. (Fin. Serv)} had not based its judgement on the Latin Maxim *CONFESSIO EST REGINA PROBATIONUM* (in English: *Confession is the queen of evidence")* once it became evident that Anukam Gift gave her confession freely and openly and that the use of forced confession had not been made in this case;

That as stated above, *CONFESSIO SOLI CONFITENTI NOCET* which means that "*Confession harms only the one who confesses*";

That for this basic reason, and as already stated above, the Appellant *Parte Civile* Michael Angelo sive Michael Zammit holder of Identity Card No: 31156 G was aggrieved by this Judgment and is therefore interposing this humble Appeal against this same Judgement handed down during the Sitting of the 4th May 2023, by the Honourable Court of Magistrates (Gozo) as a Court of Criminal Judicature {Magistrate Dr. Leonard Caruana LL.D., M.A. (Fin. Serv)};

That the grounds of the Appeal are clear, manifest and as already stated above;

The Defendents Carmel Cordina and Anukam Gift and the basic Legal Principles *NE OCCASIO SIT MAIORIS TUMULTUS* u r-*RAGION FATTASI* - The arbitrary exercise of

a right of his own - The boundary between the reason made and private violence - the analysis of the decision:

That the basic Legal Principle *NE OCCASIO SIT MAIORIS TUMULTUS* means that "*So that it does not constitute an occasion for greater disorder;*"

That *RAGION FATTASI* is the awareness and the will to force someone, through violence or threat, to do, tolerate or omit something with the awareness of the illegitimacy of this constraint, is considered to represent the differential element of private violence with respect to the crime of exercise arbitrary of one's own reasons, which presupposes, instead, the awareness of doing something that is right in substance although unjust in form;

That as already stated above, the Appellant *Parte Civile* is also aware of the fact that the Defendent Carmel Cordina knows that the source of ownership of 6 Main Gate Street, Rabat, Gozo is the Public Deed done before Notary Public Francesco Refalo dated the fifth (5) day of May of the year 1938;

That the Appellant *Parte Civile* is also aware of the fact that the Defendant Carmel Cordina knows that at Fol 319 of the said Public Deed dated the fifth (5) day of May of the year 1938 clearly states that:

> *"….and Maria widow of Giovanni Azzopardi in the name as above do hereby sell, convey and transfer (?)…the said Giuseppe Hili as above who accepts by way and title of purchase three small houses (mezzanini) situate at Victoria Gozo Strada Porta Reale marked with the numbers six, seven and eight fore and exempt from any payment…."*

That already stated above, the Appellant *Parte Civile* is also aware of the fact that the Defendant Carmel Cordina knows that he does not even enjoy the ownership of the airspace 6 Main Gate Street, Rabat, Gozo;

That as a matter of fact, the Defendant Carmel Cordina knows that one finds clearly written at Fol 323 of the said Public Deed dated the fifth (5) day of May of the year 1938 that:

> *"….The contracting parties have agreed upon:*
>
> ***III.*** *That the said purchaser Hili as above shall be entitled and shall have the right of access from the dwelling house situated at Victoria Gozo Strada Porta Reale marked number Seven lying close and adjacent and contiguous to the above named tenements (mezzanine) as above sold, on account that he may repair the roofs of the said premise when occasion shall arise of selling right such roofs;*
>
> ***IV.*** *That the said purchaser Hili as above shall enjoy fully the right of building and exerting additional and supplementary accommodations on the roofs of the said mezzanini...."*

That in other words, the Defendant Carmel Cordina knows that he has no rights over 5 Main Gate Street, Rabat, Gozo;

That as already stated above, the Appellant *Parte Civile* is also aware of the fact that the Defendant Carmel Cordina knows that according to the *"Denunzja ta' Proprjetà Taxxabbli"* of the Late Rev Emmanuel Hili who died on the 1st January 1982,

presented to the Death and Donation Duty Department on the 12th March 1982 Number G107/82 clearly states that:

> *"….Post żgħir, No 6 Main Gate Street, Victoria Għawdex, jikkonsisti f'kamra isfel u oħra fuq. Dan il-post hu mikri u ma hemm l-ebda tama li r-residenti joħorġu minnu…."*

That in other words, the Appellant *Parte Civile* is also aware of the fact that up till 1982, the Defendant Carmel Cordina knows that 6 Main Gate Street, Rabat, Gozo still had its own yard:

That the Appellant *Parte Civile* is also aware of the fact that amongst other things, the Defendant Carmel Cordina knows that the source of ownership of 5 Main Gate Street, Rabat, Gozo is the Public Deed done before Notary Public Maurice Gambin dated the seventh (7) day of October of the year 1972;

That the parties to that deed were Frank Gulia et (Sellers) and Enrico Zammit (the buyer) who is also the father the Appellant *Parte Civile;*

That the Appellant *Parte Civile* is also aware of the fact that amongst other things, the Defendant Carmel Cordina knows that there are a number of Addendums to the said Public Deed done before Notary Public Maurice Gambin dated the seventh (7) day of October of the year 1972;

That the Appellant *Parte Civile* is also aware of the fact that the Defendant Carmel Cordina knows that Addendum No 9 clearly states:

> *"….(9) ADDE: "consisting of a terrano, a basement and with its own yard…."*

That the Appellant *Parte Civile* is also aware of the fact that the Defendant Carmel Cordina knows that the Appellant *Parte Civile* is a vulunarable person and had been hospitilized and house bound from early January 2022 to practically end of June and early July 2022;

That as already stated, *RAGION FATTASI* is the awareness and the will to force someone, through violence or threat, to do, tolerate or omit something with the awareness of the illegitimacy of this constraint, is considered to represent the differential element of private violence with respect to the crime of exercise arbitrary of one's own reasons, which presupposes, instead, the awareness of doing something that is right in substance although unjust in form;

That therefore and always without prejudice to whatever had already been stated above, the Appellant *Parte Civile* cannot understand why the Honourable Court of Magistrates (Gozo) as a Court of Criminal Judicature {Magistrate Dr. Leonard Caruana LL.D., M.A. (Fin. Serv)} had decided:

> *"….Therefore, on the basis of the above, the Court, after having seen Article 85 and 339(1)(e) of the Criminal Code, Chapter 9 of the Laws of*

Malta, finds Anukam Gift and Carmel Cordina not guilty of the charges brought against them…."

and totally ignored the **Affidavit of PS 2100 Lorraine Grech Mifsud** which states that:

On the 29/08/2022, Michael Angelo Zammit reported again at Victoria Police Station were he stated that the day before, that is on the 28/08/2022, at about 18.00 hrs, he went to his abome mentioned property were he found door leading to yard locked by a gangetta . Same stated that when he saw this, he spoke to the tenant about it were she told him the words:

....You are crazy, the owner told me to do so, I don t care about the police, I will get my friends to hit you...."

I, the undersigned call on site 'African Gift Shop', No: 6, Triq Taħt Putirjal, Victoria were I spoke with Anukam Gift, ID: 74581 M, b/o 01/01/1985 at the Ivory Coast, Res: Regina Court, Flat 1, Triq l-Ewropa, Rabat....were she stated that she had locked the yard door as instructed by the owner. I inspected this yard, were it was confirmed that this door was locked from the yard side, in a way that there was no access from dwelling No. 5 towards the yard. Anukam Gift stated that it was true that she called Michaelangelo crazy but stated that she had never threatened him in any way, however, she added that this incident was not on the 28/08/2022 but the Sunday before.

I also spoke with Carmel Cordina were he stated that although he is the owner of the mentioned yard he never instructed Anukam to lock the door...."

That in other words and as already stated above, PS 2100 Lorraine Grech Mifsud confirmed that:

a) *....Anukam Gift....stated that she had locked the yard door as instructed by the owner...."* i.e.: the Defendant Carmel Cordina;

b) She, PS 2100 Lorraine Grech Mifsud had personally *....inspected this yard, were it was confirmed that this door was locked from the yard side, in a way that there was no access from dwelling No. 5 towards the yard...."*

c) *....Anukam Gift stated that it was true that she called Michaelangelo crazy ...."*

That as a result, and for these reasons, once Anukam Gift had admitted to the Police to have uttered insults and threats not otherwise provided for in the Criminal Code against the Appellant *Parte Civile,* and as *....stated that she had locked the yard door as instructed by the owner...."* i.e.: the Defendent Carmel Cordina, the Appellant *Parte Civile* cannot understand why the Honourable Court of Magistrates (Gozo) as a Court of Criminal Judicature {Magistrate Dr. Leonard Caruana LL.D., M.A. (Fin. Serv)} had not based its judgement on the basic Legal Principle *RAGION FATTASI - The arbitrary exercise of a right of his own* once it became evident that Anukam Gift gave her confession freely and openly and that the use of forced confession had not been made in this case;

That in this background it is to be remembered that the crime of *RAGION FATTASI,* it is capable of acting even with permanent effects, it is an instantaneous one;

That as a result, the fact that Anukam Gift had admitted to the Police to have uttered insults and threats not otherwise provided for in the Criminal Code against the Appellant *Parte Civile,* and as *....stated that she had locked the yard door as instructed by the owner....*" i.e.: the Defandent Carmel Cordina, the Appellant *Parte Civile* cannot understand why the Honourable Court of Magistrates (Gozo) as a Court of Criminal Judicature did not find both Anukam Gift and the other Defendent Carmel Cordina guilty as charged;

That whatever they did, their acts were instantaneous capable of having permanent effects;

The fact that Anukam Gift had *....stated that she had locked the yard door as instructed by the owner....*" i.e.: the Defendant Carmel Cordina, once she locked the door of the yard, the crime of *RAGION FATTASI* had been committed;

That it is irrelevant to state that the offence was not committed due to the fact that later on the yard door was eventually unlocked;

That the crime was consumed and crystallized at the moment the positive spoliative action of an active subject of the crime took place; i.e.: once Anukam Gift had admitted to the Police to have uttered insults and threats not otherwise provided for in the Criminal Code against the Appellant *Parte Civile,* and as *....stated that she had locked the yard door as instructed by the owner....*" i.e.: the Defendant Carmel Cordina;

That with respect to the crime of <u>*RAGION FATTASI*</u>, Vincenzo Manzini stated that:[44]

> *"....E' in ogni caso reato istantaneo, e non permanente, ancorche' possa avere effetti permanenti. Ne' importa che la violenza, specialmente quella sulle cose, possa continuarsi ininterrottamente per un certo tempo….<u>perche' il reato si consuma nell'istante in cui l'agente si e' fatto ragione da se' medesimo con l'uso della violenza</u>, <u>per il quale uso e' sufficiente il fatto violento iniziale</u>...."*

That in other words, with respect to the crime of <u>*RAGION FATTASI*</u>, Vincenzo Manzini stated that it is in any case an instantaneous crime, and not a permanent one, even though it may have permanent effects;

That nor does it matter that the violence, especially that against things, can continue uninterruptedly for a certain period of time, because the crime is committed the instant in which the agent has righted himself with the use of violence, for which use the initial violent fact is sufficient;

That for example, the Case *The Police v. Paul Cilia,"*[45] was about the changing of locks in two places;

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[44] Vincenzo Manzini, *Trattato di Diritto Penale Italiano*, Vol. V, Torino 1950, p. 996.

[45] Decided by the Court of Criminal Appeal on October 7, 2015 per Mr. Justice DAVID SCICLUNA LL.D., MAG. JUR. (EUR.LAW) - App. Nru. 339/13 DS

That the Court of Appeal explained in the light of what Manzini claims that even though the crime had permanent effects, it should still be considered an instantaneous crime;

That one can see that this is the position taken even by the Italian Court of Cassation:

> *"….Il reato di esercizio arbitrario delle proprie ragione, sia con violenza sulle cose che con violenza alle persone, si consuma nel momento in cui la violenza o la minaccia sono esplicate, senza che rilevi il conseguimento in concreto del fine perseguito...."*

That in other words, the Italian Court of Cassation stated that the crime of the arbitrary exercise of one's reason, i.e.: the crime of *RAGION FATTASI*, both with violence against things and with violence against people, is committed when the violence or threat is carried out, without the actual achievement of the aim being relevant;

That for example, Article 392 of the Italian Penal Code states that:[46]

> *"Chiunque, al fine di esercitare un preteso diritto(1), potendo ricorrere al giudice(2), si fa arbitrariamente ragione da sé medesimo, mediante violenza sulle cose, è punito, a querela della persona offesa [120; c.p.p. 336, 340], con la multa fino a euro 516.*

[46] Royal Decree October 19, 1930, n. 1398 [Updated 03/31/2023] Arbitrary exercise of one's reasons with violence on things - Sources → Criminal Code → SECOND BOOK - Of crimes in particular → Title III - Of crimes against the administration of justice → Chapter III - Of the arbitrary protection of private reasons

Agli effetti della legge penale, si ha violenza sulle cose allorché la cosa viene danneggiata o trasformata, o ne è mutata la destinazione(3).

Si ha altresì, violenza sulle cose allorché un programma informatico viene alterato, modificato o cancellato in tutto o in parte ovvero viene impedito o turbato il funzionamento di un sistema informatico o telematico(4).”

That in other words, **Article 392** of the Italian Penal Code states that:

“Whoever, in order to exercise an alleged right(1), being able to appeal to the judge(2), arbitrarily reasons himself, through violence against things, is punished, upon complaint by the offended person [120; c.p.p. 336, 340], with a fine of up to 516 euros;

For the purposes of the penal law, there is violence against things when the thing is damaged or transformed, or its destination is changed(3);

There is also violence against things when a computer program is altered, modified or canceled in whole or in part or the functioning of a computer or telematic system is prevented or disturbed(4);”

That the Notes to Article 392 of the Italian Penal Code are:

(1) The existence of an alleged right of the agent is required as a prerequisite; i.e.: a right that need not necessarily already exist, but at least putative, or reasonably effective;

(2) The possibility of recourse to the judge is one of the preconditions for this offense and must exist both in material and juridical terms, or the subject must be in the possibility of recourse to the judicial authority and the claimed right must be capable of effective judicial realization;

(3) Violence against things also occurs when there is a change of destination, or when the usability of the thing itself is prevented, altered or modified. According to the prevailing orientation, this change must be evaluated not in relation to its natural destination, but in relation to the destination received by the entitled party;

(4) This paragraph was added by l. 23 December 1993, no. 547;

That the *RATIO LEGIS* behind Article 392 of the Italian Penal Code is that the majority of the doctrines believes that the *RATIO* of this provision is found in the protection of the so-called judicial monopoly of the resolution of disputes between private individuals, and therefore of the social peace that would be compromised if room were left for private justice;

That however, Article 392 of the Italian Penal Code also highlights the private interest, considered by some authors as the only interest subject to protection;

Explanation of Article 392 of the Italian Penal Code:

That through the punishability of the c.d. for this reason, the Legislator intended to protect the process of the Institution in the generally understood sense,

guaranteeing the primacy of Judicial Intervention, without leaving any space in the form of violent private self-defense;

That the crime has a multi-offensive nature, given that the legal asset protected is, in addition to the public interest in guaranteeing the trial, and also guaranteeing the private interest;

That in fact, jurisprudence even recognizes the mere possession of the property subject to violence as a person offended by the crime, and not just the owner of the property;

That conversely, the active subject of the crime is, in addition to the holder of the alleged right, also the one who legitimately exercises this right on behalf of the owner and the *NEGOTIORUM GESTOR*;[47]

[47] *NEGOTIORUM GESTIO* (Latin for *"management of business")* is a form of spontaneous voluntary agency in which an intervenor or intermeddler, the gestor, acts on behalf and for the benefit of a principal *(DOMINUS NEGOTII)*, but without the latter's prior consent;

That the gestor is only entitled to reimbursement for expenses and not to remuneration, the underlying principle being that *NEGOTIORUM GESTIO* is intended as an act of generosity and friendship and not to allow the gestor to profit from his intermeddling; That this form of intervention is classified as a quasi-contract and found in civil-law jurisdictions and in mixed systems (e.g.: Maltese, Louisiana, Scots, South African, and Philippine laws);

That for example, while you are traveling abroad, a typhoon hits your home town and the roof of your house is in danger; To avoid the catastrophic situation, your neighbor does something urgently necessary;

That you are the *'principal'* and your neighbor here is the *'GESTOR*,' the act of which saved your house is the *NEGOTIORUM GESTIO;* That it originated as a Roman legal institution in which an individual acted on behalf of another, without his asking and without remuneration;

That it was considered a part of *OFFICIUM* (duty), for instance, to defend a friend's or neighbor's interests while the friend or neighbor was away (See for example: J.A. Crook, *Law and Life of Rome* (Ithaca, New York: Cornell University Press), 236–37); That the principal, or *DOMINUS NEGOTII* (or rarely *DOMINUS NEGOTIORUM DOMINUS REI GESTAE)*, is bound to indemnify the *GESTOR* for the expenses and liabilities incurred;

That of fundamental importance is the analysis each time of the subjective element;

That in fact, for the offense to be configurable, it is not at all necessary that the right which is the object of the unlawful claim actually exists, it being sufficient that the offender acts in the reasonable conviction of defending his right;

That as far as the possibility of appealing to the judge is concerned, the thesis of the c.d. concrete actionability, or the concrete possibility, offered by the law, to appeal to the judge;

That a negative example is the exclusion from the list of enforceable rights of the natural bond, since it does not have an action;

That if the principal fails to do so, there is unjust enrichment, and the manager then has a claim to bring an action for restitution; That in Napoleonic civilian jurisdictions, including Louisiana, the action takes the form of the *ACTIO DE IN REM VERSO;*

That in South Africa, on the other hand, multiple restitutionary actions lie for *NEGOTIORUM GESTIO*, namely:

I. *CONDICTIO INDEBITI;*

II. *CONDICTIO CAUSA DATA CAUSA NON SECUTA;*

III. *CONDICTIO OB TURPEM VEL INIUSTAM CAUSAM;*

IV. *CONDICTIO SINE CAUSA SPECIALIS*

NEGOTIORUM GESTIO is not recognized at common law, despite certain English salvage cases, as well as some cases in equity where trustees were on occasion remunerated for services voluntarily rendered {See for example: Jeroen Kortmann, *Altruism in Private Law: Liability for Nonfeasance and Negotiorum Gestio* (Oxford: Oxford UP, 2005).};

That nevertheless, the concept is known in English legal theory as *"necessary intervention;"*

That coming now to the limits within which the claim can be considered arbitrary, violence is lawful only when it is intended to maintain possession, or to recover possession immediately after the counting;

That as far as the subjective element is concerned, the specific fraud must be added to the generic fraud, consisting in the direction of the conduct for the implementation of the claimed right with the conviction of the reasonableness of the claim;

That in the Criminal Cassation, Section II, Sentence n. 46288 of the 3rd November 2016, the Court stated that:

> *"….Il reato di esercizio arbitrario delle proprie ragioni, sia con violenza sulle cose che sulle persone, rientra, diversamente da quello di estorsione, tra i cosiddetti reati propri esclusivi o di mano propria, perciò configurabili solo se la condotta tipica è posta in essere da colui che ha la titolarità del preteso diritto. Ne deriva che, in caso di concorso di persone nel reato, solo ove la condotta tipica di violenza o minaccia sia posta in essere dal titolare del preteso diritto è configurabile il concorso di un terzo estraneo nell'esercizio arbitrario delle proprie ragioni (per agevolazione, o anche morale), mentre, qualora la condotta sia realizzata da un terzo che agisca su mandato del creditore, essa può assumere rilievo soltanto ai sensi dell' art. 629 cod. pen….Il delitto di esercizio arbitrario delle proprie ragioni con violenza alla persona e quello di estorsione, pur caratterizzati da una materialità non esattamente sovrapponibile, si distinguono in relazione all'elemento*

psicologico del reato in quanto nel primo, l'agente persegue il conseguimento di un profitto nella convinzione non meramente astratta ed arbitraria, ma ragionevole, anche se infondata, di esercitare un suo diritto, ovvero di soddisfare personalmente una pretesa che potrebbe formare oggetto di azione giudiziaria; nel secondo, invece, l'agente persegue il conseguimento di un profitto nella consapevolezza della sua ingiustizia. (In motivazione la Corte ha precisato che l'elevata intensità o gravità della violenza o della minaccia di per sé non legittima la qualificazione del fatto ex art. 629 cod. pen. - potendo l'esercizio arbitrario delle proprie ragioni essere aggravato, come l'estorsione, dall'uso di armi - ma può costituire indice sintomatico del dolo di estorsione)….In tema di esercizio arbitrario delle proprie ragioni, ai fini della configurabilità del reato, occorre che l'autore agisca nella ragionevole opinione della legittimità della sua pretesa, ovvero ad autotutela di un suo diritto suscettibile di costituire oggetto di una contestazione giudiziale, anche se detto diritto non sia realmente esistente; tale pretesa, inoltre, deve corrispondere perfettamente all'oggetto della tutela apprestata in concreto dall'ordinamento giuridico, e non mirare ad ottenere un qualsiasi "quid pluris", atteso che ciò che caratterizza il reato in questione è la sostituzione, operata dall'agente, dello strumento di tutela pubblico con quello privato (Cassazione penale, Sez. II, sentenza n. 46288 del 3 novembre 2016)…."

That in other words, in the Criminal Cassation, Section II, Sentence n. 46288 of the 3rd November 2016, the Court stated that differently from extortion, the crime of arbitrarily exercising one's rights, both with violence against things and people, falls within the so-called exclusive or own-handed crimes, therefore configurable only if the typical conduct is carried out by the person who has the right to claim;

That it follows that, in the event of concurrence of persons in the crime, only where the typical conduct of violence or threat is put in place by the holder of the alleged right can the concurrence of an unrelated third party in the arbitrary exercise of one's reasons (for facilitation, or even moral), while, if the conduct is carried out by a third party acting on behalf of the creditor, it can only assume significance pursuant to Article 629 of the Italian Penal Code;

That the crime of arbitrarily exercising one's rights with violence against the person and that of extortion, although characterized by a materiality that is not exactly superimposable, are distinguished in relation to the psychological element of the crime since:

I. In the first, the agent pursues the achievement of a profit in the conviction that is not merely abstract and arbitrary, but reasonable, even if unfounded, of exercising one's right, or of personally satisfying a claim that could be the subject of legal action;

II. In the second, however, the agent pursues the achievement of a profit in the awareness of his injustice;

That in the reasoning, the Court specified that the high intensity or seriousness of the violence or threat in itself does not legitimize the classification of the fact pursuant to Article 629 of the Italian Penal Code - the arbitrary exercise of one's reasons being able to be aggravated, such as the extortion, from the use of weapons - but it can be a symptomatic indication of the intent of extortion;

That in terms of the arbitrary exercise of one's own reasons, for the purposes of the configurability of the crime, the perpetrator must act in the reasonable opinion of the legitimacy of his claim, or in self-defense of his right which may be the subject of a judicial dispute, even if said law does not really exist; moreover, this claim must correspond perfectly to the object of the protection actually provided by the legal system, and not aim at obtaining any *QUID PLURIS,* given that what characterizes the crime in question is the substitution, made by the agent between the public instrument of protection and the private one;

That without prejudice to the above and always in line with Vincenzo Manzini arguments with respect to the crime of *RAGION FATTASI*, the same arguments were upheld in the case *The Police v. Godfrey Cash;"*[48]

That even in this case the Court of Criminal Appeal decided that sometimes the crime of *RAGION FATTASI* is classifies as an instantaneous one, so there should not be any doubt that it was incumbent on the Prosecution that prove that that action

[48] Decided on the 12th March, 2019, per Madam Justice Dr. Consuelo Scerri Herrera LL.D - Appell Nru: 419/2014

attributable to the appellant actually took place on the specific day postulated in the citation;

That this proof, however, does not it does not appear anywhere from the procedural acts;

That in this particular Case, i.e.: *The Police v. Godfrey Cash,"* all the Prosecution had to do in order to remedy this deficiency was which qualifies the date with the words *and/or in the days and in the weeks before this date;"*

That as already indicated, *RAGION FATTASI* means *"The exercise of a pretended right;"*

That **Article 85(1) of Chapter 9** of the Laws of Malta states that:[49]

> *"Whosoever, without intent to steal or to cause any wrongful damage, but only in the exercise of a pretended right, shall, of his own authority, compel another person to pay a debt, or to fulfil any obligation whatsoever, or shall disturb the possession of anything enjoyed by another person, or demolish buildings, or divert or take possession of any water-course, or in any other manner unlawfully interfere with the property of another person, shall, on conviction, be liable to imprisonment for a term from one to three months:*

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49 Arbitrary exercise of pretended rights - *Amended by: XVI. 2006.2.*

Provided that the court may, at its discretion, in lieu of the above punishment, award a fine (multa);"

That **Article 85(2) of Chapter 9** of the Laws of Malta states that:

> *"The provisions of article 377(5) shall apply in the case of any conviction under sub article (1) and when the conduct of the offender has resulted in a person being despoiled the Court shall apply the provisions of that sub article in order to ensure that the person despoiled is fully revested in the position before he was despoiled;*

That the legal source on which this crime is based is Article 168 of the *"Codice per lo Regno delle Due Sicilie;"*[50]

That this Article actually prescribed the crime as *"vie di fatto"* and as follows:

> *"Chiunque senza oggetto di furto o di recar danno per ingiuria, ma solamente per l'esercizio di un preteso diritto, obblighi altri al pagamento di un debito, o alla soddisfazione di un'obbligazione qualunque, o disturbi un'altrui possesso, demolisca fabbricati, devii acque e simili, e' punito col primo al secondo grado di prigionia, salve le pene maggiori nel case di un reato per se stesso maggiore;"*

[50] Napoli, Presso Angelo Trapani, 1819, fol 73: *"De' reati contra l'amministr. pubblica, Sezione III, Dell'uso privato de' mezzi della pubblicà autorità;"*

That in other words, **Article 168** of the "*Codice per lo Regno delle Due Sicilie*" states that:[51]

> *Anyone without the object of theft or injury through injury, but only for the exercise of a claimed right, other obligations to pay a debt, or the satisfaction of any obligation whatsoever, or disturbances someone else s possession, demolish buildings, divert water and the like, is punished with first to second degree of imprisonment, except for greater penalties in the case of a greater crime in itself;"*

That it is clear that Article 85 of the Criminal Code is practically identical to what was in force in the "*Codice per lo Regno delle Due Sicilie;*"

That this means that for the purpose of interpreting this crime, this Court can make reference to not only Maltese jurisprudence but also the one that affects this Article in the deceased Code of the Kingdom of the Two Sicilies and other foreign Codes that were in accordance with this text of Bourbon Laws;

That in the Case of ***Il-Pulizija vs. Eileen Said,"*** the Court of Criminal Appeal stated that:[52]

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[51] *"Kull min mingħajr l-oġġett ta' serq jew korriment permezz ta' korriment, iżda biss għall-eżerċizzju ta' dritt mitlub, obbligi oħra ta' ħlas dejn, jew is-sodisfazzjon ta' xi obbligu ikun xi jkun, jew tfixkil pussess ta' xi ħadd ieħor, jitwaqqa' bini, jiddevja l-ilma w affarijiet simili, huwa kkastigat bl-ewwel sat-tieni grad ta' priġunerija, ħlief għal pieni akbar fil-każ ta' kriminalità akbar fiha nnifisha;"*

[52] Decided on the 19th June, 2002 per Mr. Justice DOTTOR JOSEPH G. GALEA DEBONO B.A. , LL.D. - Reference: APPELL NRU. 37/2002 JGD

"….Illi l-appellanti instabet ħatja tar-reat ta' "RAGION FATTASI" jew dak li jissejjah "the exercise of a pretended right". Illi din l-azzjoni bażata fuq l-Artikolu 85 tal-Kap.9 tal-Liġijiet ta' Malta hija speċi ta' żona griġja bejn il-kamp ċivili w dak kriminali, tant li Sir Andrew Jameson meta kien qed jiġi abbozzat il-Kodiċi Penali Malti kien osserva fir-Rapport tiegħu fir-rigward li:-

"....It is doubtful whether acts of this kind would not be better left to the operation of the ordinary civil remedies by way of interdict of or claim for damages...." (Ara Prof. Sir Anthony Mamo - Notes on Criminal Law" (Parti Speciali) Vol. II) [53]

Illi l-elementi tar-reat in diżamina ġew maġisterjalment miġbura fid-definizzjoni analitika mogħtija mill-Imħallef W. Harding fis-sentenza ta' din il-Qorti fil-kawża "Il-Pulizija vs. Giuseppe Bonavia et." (App. Krim. 14.10.1944 , Vol.XXXII - IV, p.768) u dawn jinkludu:-

a) Att estern li jimpedixxi persuna oħra minn dritt li hija tgawdi, w li jkun sar bid-dissens espliċitu jew impliċitu ta' dik il-persuna;

b) L-imputat irid jemmen li qed jaġixxi bi dritt;

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[53] *"...That the appellant was found guilty of the crime of 'RAGION FATTASI' or what is called "the exercise of a pretended right." That this action based on Article 85 of Chapter 9 of the Laws of Malta is a sort of gray area between the civil and criminal fields, so much so that Sir Andrew Jameson when the Code was being drafted Penali Malta had observed in its Report that:*

> *"....It is doubtful whether acts of this kind would not be better left to the operation of the ordinary civil remedies by way of interdict of or claim for damages...." (Ara Prof. Sir Anthony Mamo - Notes on Criminal Law" (Parti Speciali) Vol. II)*

c) Ix-xjenza tal-imputat li qed jieħu b'idejħ dak li suppost jieħu tramite l-proċess legali;

d) Li l-att ma jinkwadrax ruħu f'reat aktar gravi;

Illi kif dejjem ġie ritenut element importanti kostituttiv ta' dar-reat hu dak intenzjonali fis-sens li l-aġir ta' dak li jkun irid ikun magħmul bil-ħsieb li hu qed jeżerċita dritt li jaħseb li għandu għad-distinzjoni mir-reati ta' serq jew danni volontarji fuq proprjetà ta' ħaddiehor per eżempju;

Għalhekk hemm bżonn li ssir indaġni fuq il-movent li jkun wassal lill-persuna li kkommettiet dar-reat biex tagħmel dak li għamlet. L-element materjali inveċe jikkonsisti filli wieħed jippriva persuna oħra minn xi dritt fuq ħaġa li għandu d-dgawdija tagħha;

Ir-reat ma jissussistix meta l-att materjali jikkonsisti fir-retenzjoni ta' pussess li dak li jkun ġja ikollu;

Hemm bżonn li jkun hemm att pożittiv li jippriva lit-terz, jew ifixklu fil-pussess tal-ħaġa għax kif jgħid il-CARRARA (Prog. Parte Speciale Vol.5 para. 2850:-[54]

[54] *That the elements of the crime in question have been magisterially collected in the analytical definition given by Judge W. Harding in the judgment of this Court in the case "The Police vs. Giuseppe Bonavia et al." (App. Krim. 14.10.1944, Vol.XXXII - IV, p.768) and these include:-*

> *a) An external act that prevents another person from a right that he enjoys, that has been done with the explicit or implicit dissent of that person;*

"....L'atto esterno deve privare altro contro sua voglia di un bene che gode. Chi e' nell'attuale godimento di un bene e continua a goderne a dispetto di chi non voglia; non delinque perche' la legge protegge lo "stato quo" , il quale non puo' variarsi tranne per consenso degli interessati o per decreto della autorita' giudiziale...."[55]

Issa fil-każ in eżami, ma hemmx dubju li Raymond Said kellu id-dritt li jgawdi il-flat de quo larba kienet għadha ma saritx separazzjoni bejnu w bejn martu li tassenjalha dan il-post bi proprjetà jew użu esklussiv. Lanqas ma kien hemm xi digriet tas-Sekond'Awla jew tal-Prim'Awla tal-Qorti Ċivili li jallontanah mill-post de quo "PENDENTE LITE;"

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b) The defendant must believe that he is acting rightly;

c) The science of the accused who is taking with his hands what he is supposed to take through the legal process;

d) That the act does not frame itself in a more serious crime;

That as it has always been held that an important constitutive element of the crime is the intentional one in the sense that the behavior of the one who wants to be done with the thought that he is exercising a right that he thinks he has for the distinction from the crimes of ' theft or voluntary damages on another's property for example;
Therefore it is necessary to investigate the motive that led the person who committed the crime to do what he did. The material element instead consists in depriving another person of any right over something that he has the enjoyment of; The crime does not arise when the material act consists in the retention of possession that the one already has;

There needs to be a positive act that deprives the third party, or interferes in the possession of the thing because as CARRARA says (Prog. Parte Speciale Vol.5 para. 2850:-

[55] *"....The external act must deprive another against its will of a good that it enjoys. Who is in the current enjoyment of a good and continues to enjoy it in spite of those who don't want to; he does not commit a crime because the law protects the "state quo", which cannot be changed except by consent of the interested parties or by decree of the judicial authority...."*

Illi anki jekk hu intima lill-martu w l-Avukat tagħha li ser imur jgħix band' oħra w ċioè fil-villa f'Tal-Ibraġġ, dan ma setax jiġi interpretat li hu kien irrinunzja għall-aċċess b'tal-flat ta' Birkirkara;

Umbagħad anki jekk martu setgħet kienet IN BUONE FEDE meta ħasbet li dan telaq mil-flat mingħajr intenzjoni li jiġi lura, w għalhekk ħasset li setgħet tibdel is-serratura għax forsi ħasbet li żewgħa ma kienx ser isib oġġezzjoni għal dan, meta effettivament żewgħa mar id-dar u wera bl-aktar mod ċar li ried jidħol f'daru, hi ma setgħetx baqgħet IN BUONA FEDE w hemm żgur li fehmet li bil-fatt li qed tostakolah milli jidħol, kienet qed tfixklu fit-tgawdija tal-istess dar u meta ippersistiet bl-aġir tagħha li tilqgħu w ma ħallihx jidħol anki f'okkażjonijiet sussegwenti, anki jekk ġenwinament ħasbet li kellha dritt tagħmel dan - dritt li fil-fatt ma kellhiex, hija kienet qed tikkommetti ir-reat dedott kontra tagħha w kienet taf li dan kienet qed tagħmlu bid-dissens ta' żewgħa;

Ta' min isemmi ukoll iċ-ċirkostanza li meta qabel dan l-incident żewgħa kien bidel is-serratura tal-villa, hija kienet ħadet passi kontra tiegħu w għalhekk kienet taf li tali aġir hu passibbli għall-proċeduri fil-Qrati kriminali w ergo il-BUONA FEDE tagħha ma setgħetx kienet radikata fil-fond, għax dak li hi rat illegali fl-aġir ta' żewgħa - tant li istituiet passi kontra tiegħu, missu nebbaħa ugwalment li dak li kienet qed tagħmel hi kien ugwalment illegali;

Fuq dan umbagħad ma setax jibqala' ebda dubju meta żewgħa mar id-dar u baqa' jinsisti li kellu dritt li jidħol;

Għalhekk fil-fehma ta' din il-Qorti jikkonkorru l-elementi kollha tar-reat dedott kontra l-appellanti kemm dawn materjali kif ukoll l-element morali;

Illi dwar il-piena, ma jidhirx li hemm lok li din tiġi varjata għax la hija barra mill-parametri legali w lanqas hija sproporzjonata fiċ-ċirkostanzi w għalhekk din il-Qorti ma tħossx li għandha b'xi mod tiddisturba id-diskrezzjoni tal-ewwel Qorti;

Għal dawn il-motivi l-appell qed jiġi miċħud u s-sentenza appellatta konfermata fl-intier tagħha.…"[56]

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[56] *Now in the case under examination, there is no doubt that Raymond Said had the right to enjoy the flat de quo once a separation had not yet been made between him and his wife who assigns this place to her with ownership or exclusive use. Nor was there any decree of the Second Chamber or of the First Chamber of the Civil Court to remove him from the post de quo "PENDENTE LITE;"*

That even if he intimated to his wife and her lawyer that he was going to live elsewhere in the villa in Tal-Ibraġ, this could not be interpreted as meaning that he had renounced access to the flat of Birkirkara;

And then even if his wife could have been IN BUONE FEDE when she thought that he left the flat with no intention of coming back, she therefore felt that she could change the lock because perhaps she thought that her husband would not find an objection to this, when in fact her husband went home and showed in the clearest way that he wanted to enter his house, she could not stay IN BUONA FEDE and there she must have understood that by the fact that she was preventing him from entering, she was hindering the enjoyment of the same house and when she persisted with her behavior of welcoming him and not letting him in even on subsequent occasions, even if she genuinely thought she had a right to do so - a right she actually did not have, she was committing the crime inferred against her and she knew that this she was doing it with the dissent of her husband;

It is also worth mentioning the circumstance that when before this incident her husband had changed the lock of the villa, she had taken steps against him and therefore she knew that such behavior is passable for the proceedings in the Criminal Courts and ergo - Her GOOD FAITH could not have been deeply rooted, because what she saw as illegal in her husband's behavior - so much so that she instituted steps against him, she should have equally warned herself that what she was doing was equally illegal;

That from a reading of the cases that deal with this subject, Maltese Courts have taken the interpretation of this Article in both ways in accordance with what was stated by the Authors of the Bourbon Code, as also interpreted this Article in the wider scope of teaching of Carrara, who was commenting on the Penal Code of the Kingdom of Italy (or the Zanardelli Code);

That this turns out to have happened because although in these Laws there is no identity of the locution of the crime, there remained too great a similarity between them in relation to the main elements of the crime de quo;

That the text of the **Zanardelli Code** relative to the crime of *RAGION FATTASI* reads:

> ***Articolo 286. Chiunque con violenze verso le persone, ed al solo oggetto di esercitare un preteso diritto, taluno a pagare un debito, o ad eseguire un' obbligazione qualunque, o, turba l'altrui possesso, demolisce fabbricati, devia abbatte alberi, siepi vive o ripari stabili sara, punito:***

On this then she could no longer have any doubts when he went home and kept insisting that he had a right to enter;

Therefore, in the view of this Court, all the elements of the crime inferred against the appellants are concurring, both the material and the moral element;

That regarding the punishment, it does not seem that there is room for it to be varied because it is neither outside the legal parameters nor is it disproportionate in the circumstances and therefore this Court does not feel that it should in any way disturb the discretion of the first Court;

For these reasons the appeal is being rejected and the appealed judgment confirmed in its entirety...."

1. Colla relegazione estensibile ad anni dieci, se, la violenza sara, stata fatta con armi ed'accompagnata da percossa o ferita;

2. Col carcere non minore di tre mesi, se si sara fatto uso d armi, ma senza percosse ne ferite ovvero se siano intervenute percosse o ferite, ma senz armi;

3. Col carcere estensibile a tre mesi, se la violenza sara seguita senza percossa o ferita e senza armi;

Alla pena del carcere sara aggiunta una multa estensibile sino al doppio del danno recato;

Sono salve in tutti i casi le maggiori pene pei reati per se stessi piu gravi;"[57]

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[57] Article 286 of the Zanardelli Code states that:

"Whoever with violence against people, and for the sole object of exercising an alleged right, someone to pay a debt, or to perform any obligation whatsoever, or, disturbs the possession of others, demolishes buildings, deviates, cuts down trees, live hedges or stable shelters will be punished:

1. With confinement extendable to ten years, if the violence will have been done with weapons and accompanied by a blow or wound;

2. With imprisonment of not less than three months, if weapons have been used, but without beatings or wounds or if beatings or wounds have occurred, but without weapons;

3. With imprisonment extendable to three months, if the violence is followed without beatings or wounds and without weapons;

A fine extendable up to double the damage caused will be added to the prison sentence; In all cases, the greater penalties for crimes that are more serious in themselves are valid;"

Kull min bi vjolenza fuq in-nies, u għall-unika għan li jeżerċita allegat dritt, xi ħadd biex iħallas dejn, jew biex jaqdi xi obbligu, jew, ifixkel il-pussess ta' ħaddiehor, iwaqqa' bini', jiddevja, jaqta' siġar, sisien tal-ħaxix ħajjin jew xelters stabbli jiġu kkastigati:

287. Se la demolizione di fabbricati, o la deviazione d'acque, o l'abbattimento di alberi, siepi vive o ripari stabili, fu bensi commessa allo scopo di esercitare un preteso diritto, ma non v'ebbe violenza verso le persone, il colpevole sara punito con una multa non maggiore del doppio del danno recato;"[58]

That this crime finds its place under Capo 3 which deals with crimes that constitute disobedience and other deficiencies towards public authority;

That the Carrara means this crime in this way:[59]

"La ragion fattasi (1) e' il delitto di chiunque – credendo di avere un diritto sopra altro individuo lo esercita malgrado la opposizione vera o

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1. B detenut li tista' tiġi estiż għal għaxar snin, jekk il-vjolenza tkun saret bl-armi w akkumpanjata minn daqqa jew ferita;

2. B piena ta' priġunerija ta' mhux inqas minn tliet xhur, jekk ikunu ntużaw l-armi, iżda mingħajr swat jew feriti jew jekk ikunu seħħew swat jew feriti, iżda mingħajr armi;

3. Bi priġunerija estiża għal tliet xhur, jekk il-vjolenza tiġi segwita mingħajr swat jew feriti w mingħajr armi;

Multa li tista' tiġi estiża sad-doppju tal-ħsara kkawżata se tiżdied mas-sentenza mas-sentenza ta' ħabs;

Fil-każijiet kollha, l-pieni akbar għal reati li huma aktar serji fihom infushom huma validi;"

[58] Article 287 of the Zanardelli Code states that:

"If the demolition of buildings, or the diversion of water, or the felling of trees, hedges or permanent shelters was indeed committed for the purpose of exercising a claimed right, but there was no violence against people, the culprit will be punished with a fine not exceeding double the damage caused;"

"Jekk it-twaqqigħ ta' bini, jew id-devjazzjoni ta' l-ilma, jew it-twaqqigħ ta' siġar, sisien tal-ħaxix jew xelters permanenti twettqu tabilħaqq bil-għan li jiġi eżerċitat dritt mitlub, iżda ma kienx hemm vjolenza kontra n-nies, il-ħati jiġi kkastigat b'multa. li ma jaqbiżx id-doppju tal-ħsara kkawżata;"

[59] *"Esposizioni dei Delitti in specie – parte speciale del Programma del corso di diritto criminale,"* Volum 5, Lucca, 1868, page 486, paragraph 2849; and Page 487, paragraph 2850

presunta di questo, pel fine di sostituire la sua forza privata all'autorita' pubblica, senza per altro eccedere in violazioni speciali di altri diritti;"[60]

That although the offense in the Zanardelli Code is not identical to that found in the Maltese Criminal Code and that of the Regno delle Due Sicilie, in particular as it stresses another element, namely violence against a person, the other elements, the formal *in primis* remains the same;

That in the Maltese and the Bourbon legal context it is not necessary that the action be executed by means of violence, but the gist of the same crime, both under the Zanardelli and Bourbon Codes, remains based on the elements that, in the Maltese legal context, have been elaborated by the Maltese Courts both in judgements such as the one given by Mr. Justice William Harding in the case *"Il-Pulizija vs. Giuseppe Bonavia et"* (App.Krim. 14.10.1944, Vol.XXXII - IV, p.768) as well as in more recent judgements like the one given by Mr. Justice Lawrence Quintano in the case **"Il-Pulizija vs. Anthony Zahra,"** on the 20th June, 2014 which reflect these elements according to Carrara in that they were deemed to include :-

a) An external act that prevents another person from a right that he enjoys, and that has been done with the explicit or implicit dissent of that person;

b) The defendant must believe that he is acting rightly;

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[60] *"The reason made (1) is the crime of anyone - believing he has a right over another individual, he exercises it despite the real or presumed opposition of this, for the purpose of substituting his private strength for public authority, without however exceed in special violations of other rights;"*

c) The science of the defendant who is taking into his own hands what he is supposed to take through the legal process;

d) That the act does not frame itself in a more serious crime;

That although this exposition of the elements of the crime of *RAGION FATTASI* respects what was stated by Carrara on the Italian Penal Code as shown further above, the Maltese Courts have also embraced the interpretation of other authors, specifically those who comment on the crime of *RAGION FATTASI* that was found under the Bourbon Code;

That the Maltese Courts continued to elaborate how the specific facts in the specific cases should be interpreted so that the crime of *RAGION FATTASI* can be considered integrated;

That in order to integrate the crime of *RAGION FATTASI* it is not enough that a person is disturbed in the possession of a property or a right - whatever that possession or right is - as long as it is proven that there is that possession or right or some form of it;

That in Malta, even detention by a spouse of a house on a *mera tolleranza* and that has been disturbed by the action of changing the lock of the front door on the day when the Court decreed the annulment of the marriage between the spouses, was held to integrate the crime of *RAGION FATTASI* and this since there was the *STATUS QUO* that came abusively and arbitrarily changed by the unilateral action of an active subject instead of resorting to judicial authorization;

That in the Case, ***Il-Pulizija vs. Joseph Bongailas,"*** Court of Criminal Appeal, where it was said that:[61]

> *....Mela dan l-Artikolu 85 tal-Kodici Kriminali, bl-ewwel rekwiżit tiegħu, kjarament iqis bħal aġir kriminali kull att ta' xi ħadd li jfixkel lil xi ħaddiehor fil-pussess ta' xi ħaġa li qed igawdi. L-imsemmi artikolu, għalhekk, jittutela l-pussess tal-ħaġa w mhux neċessarjament ukoll il-propjetà tagħha. Il-kelma pussess, għalhekk, tinkludi l-użu jew dgawdija ta' dik il-ħaġa…."*

That in other words, in the Case, ***Il-Pulizija vs. Joseph Bongailas,"*** Court of Criminal Appeal, stated that Article 85 of the Maltese Criminal Code, with its first requirement, clearly considers as a criminal act any act of someone who disturbs someone else in the possession of something they are enjoying;

That for the said article, therefore, the possession of the thing is guaranteed and not necessarily also its property;

That the word possession, therefore, includes the use or enjoyment of that thing possessed;

That the active subject came that *"….si e' fatto arbitariamente ragione…."*[62] and not simply *"….si e' fatto ragione da sè…."*[63]

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[61] Decided on the 22th October 2001;

[62] *"....he was arbitrarily right…."*

[63] *"....he made himself right…."*

That according to the judgment of the *Cassazione Penale, Sez. VI, sent. 11118 tat-22/11/1985 Mioli*, it was decided that the crime of *RAGION FATTASI* is not intended to punish *"….chi si fa ragione da se' ma chi si fa arbitrariamente ragione…."*[64] in a way that disturbs the *STATUS QUO* prevailing at the moment when the criminal act was committed;

That according to the Carmignani, who commented on the Law in Tuscany before the unification of Italy, the disturbance of possession must not be a merely constructive one but there must be *"actual"* possession and that it is the action of the third party that leads to the disturbance of that *STATUS QUO;*

That according to the **"Elementi di Diritto Criminale, Giovanni Carmignani, Traduzione italiana sulla quinta**" edizione di Pisa del Profs. Caruana Dingli, Milano, 1863, fol 318 states that:

> *879 - Si hanno esempi di questo delitto:*
>
> *1. Se un creditore riscuote con violenza dal suo debitore la somma dovutagli;*
>
> *2. Se una cosa mobile od immobile creduta propria vien tolta violentemente a chi ne e' in attuale possesso;*

[64] *"….who makes themselves right but whoever makes themselves right arbitrarily…."*

Here the Court of Cassation found that the crime of *RAGION FATTASI* had not been integrated in the case where the owner of a building changed the lock of an access door to offices and thus closed the access to the tenants of the same offices and who had been needlessly cautioned from disbursing the rented places respectively the activity for which they were hired and which they were later warned not to carry out;

3. Se un colono, finita la locazione, ricusa di lasciare il fondo...."

That in other words, according to the "**Elementi di Diritto Criminale, Giovanni Carmignani, Traduzione italiana sulla quinta**" edizione di Pisa del Profs. Caruana Dingli, Milano, 1863, fol 318 states that:

879 - There are examples of this crime:

1. If a creditor violently collects from his debtor the sum owed to him;

2. If a movable or immovable thing believed to be one's own is violently taken away from whoever is in current possession of it;

3. If a settler, having finished the tenancy, refuses to leave the land…."

That as a result, the Appallant humbly asks this Honourable Court to also inquire what was the *STATUS QUO* was in a period relevant to this case and if then the possession advertised by the civil party was an actual one in the sense described above;

That according to Francesco Saverio Arabia,[65] the action of *RAGION FATTASI* is not intended to sanction a disturbance of possession *per se* but to penalize the use of means competent to the public authority by replacing them with the action unilateral da part of the private:

[65] *"I Principi del Diritto Penale applicati al Codice delle Due Sicilie,"* Francesco Saverio Arabia, Vol 3, Napoli 1858, Parte III, Art. 164 a 173, page 45.

"….Il che da una parte dimosta che il reato non ista' nella turbativa del possesso, ma nell'uso de' mezzi dell'autorità pubblica. Ma perchè intervenga l'autorità pubblica a porre in atto l'esercizio dell'altrui diritto, sono fuor di dubbio necessariamente due cose:

a) Che il diritto sia reale,

b) Che ne sia controverso l'esercizio...."

That in other words, according to Francesco Saverio Arabia, the action of *RAGION FATTASI* is on the one hand, this demonstrates that the crime does not lie in the disturbance of possession, but in the use of the means of public authority. But for public authority to intervene to implement the exercise of the rights of others, there are necessarily two things without a doubt:

a) That the law is real; and

b) That its exercise is controversial;

That Arabia was concentrating on the Bourbon Law of the *vie di fatto* - identical to the Maltese one in materia - and which must be interpreted also against the background of those elements that the Maltese Courts emphasized over the years - and which as has been shown were based on the very similar crime of *RAGION FATTASI* in the Zanardelli Code;

That it is clear, even from the jurisprudence on the Italian Penal Code, that the legal object protected by the crime of *RAGION FATTASI* is still debated and divided the jurists in their opinions;

That the current traditional maintains that this crime is based on the violation of the jurisdictional monopoly made by the unilateral action of an active subject since this, instead - as he is obliged to do – resorts to the jurisdiction of the authority of the Courts, he chooses to act of his own free will to take the right he claims to have without having to go to a competent Judicial Authority;

That there is then the current of the other thought that concentrates more on the aspect that the offense in the crime of *RAGION FATTASI* is the *STATUS QUO* of the possession of the rights; the *STATUS QUO* intended as the state of fact where a person is exercising a right over object even if it is holder *APPARENTIA IURIS,* and where then the action perturbative of the active subject disturbs this *STATUS QUO* of possession even based on *APPARENTIA IURIS;*[66]

[66] The *APPARENTIA IURIS* is a fundamental principle of the legal system aimed at protecting good faith;

That the term appearance in law identifies a case in which a given situation does not correspond to legal reality, however, in the face of certain assumptions, it can produce the same legal effects;

That the legislator has deemed certain situations worthy of protection in which the appearance of law made legal reality indistinguishable, being able to generate false and innocent representations of reality in the third party;
That the institution of appearance is composed of an objective and a subjective element. The first element requires the existence of an effective similarity and relevance to a real and probable situation; this can happen, for example, when a person erroneously believes he is the owner of a right or when he pretends to be someone else or induces a third party to believe what he is not, or is unaware without fault of the existence of a cause for extinction of the right;

That the subjective element consists of the third party's good faith and the need for him to have ascertained the real situation with the required average diligence according to custom and/or to have been misled through excusable and innocent ignorance;

That the legal system contemplates various institutes in which the notion of appearance of law appears, let's see some of them; That for example, Article 534 of the Italian Civil Code protects third parties who contract with the heir apparent, if they prove that they have contracted in good faith. This is the case, for example, of the heir who transfers to the third party a share of an asset exceeding the portion due to him;

That furthermore, according to Carrara *QUI CONTINUAT NON ATTENTAT*[67] and this it makes sense in the logic of Carrara and the crime itself because according to how says the same author in paragraph 2851 of the Opera quoted above:

> *"….L'atto esterno deve privare altro contro sua voglia di un bene che gode. Chi e' nell'attuale godimento di un bene e continua a goderne a dispetto di chi non voglia non delinque; perche' la legge protegge lo stato quo, il quale non puo' variarsi tranne per consenso degl'interessati, o per decreto dell'autorita' giudiciale...."*[68]

That this is also reflected in more recent Italian jurisprudence whence it follows that:

That Article 1153 of the Italian Civil Code deals instead with the case of *NON-DOMINO* purchase, i.e: the transfer of movable property from the one who does not own it. Here good faith is even presumed and it is up to whoever claims the asset to provide proof of bad faith; That Article 1189 of the Italian Civil Code regulates the case of payment to the apparent creditor (or apparent representative); this release releases the debtor in good faith, provided that he provides proof not only that he trusted without his fault in the apparent situation but, also, that his erroneous belief was determined by at least negligent behavior of the creditor;

That Article 1396 of the Italian Civil Code establishes the survival of the acts performed by the attorney after changes or revocation of the power of attorney have occurred, without these having been brought to the attention of third parties by suitable means. Similarly, Article 1415 of the Italian Civil Code protects and maintains effective contracts entered into by third parties in good faith with the apparent holders of a right, because of the effect of simulation. Whoever intends to oppose the simulation is required to prove the bad faith of the assignee;

[67] That the Latin brocardo, *QUI CONTINUAT NON ATTENTAT* means that whoever, having initiated offenses against another person, in turn returns the offenses, is not punishable.

See *"Programma,"* Vol. 5, page 488;

[68] *"....The external act must deprive another against its will of a good that it enjoys. Who is in the current enjoyment of a good and continues to enjoy it in spite of those who don't want to do not commit a crime; because the law protects the STATUS QUO, which cannot be changed except by consent of the interested parties, or by decree of the judicial authority...."*

....Si e' conseguentemente precisato che ... autore del delitto puo' essere soltanto chi non si trova nel possesso della cosa, poiche solo in tal caso si puo' verificare quella turbativa nel godimento di fatto che costituisce uno degli elementi essenziali del reato (tra le piu' recenti, Cass. VI 13.11.81, Papa, G PEN 1982, II, 648; Cass. VI 7.5.85, Spallina', CP 1986, 1766; Cass. VI 26.3.85 Pirola, CP1986, 1935). In effetti, sopratutto dalla circostanza che il diritto deve essere si ricava come gli elementi sopra indicati descrivano innanzitutto come presupposto del reato l'esistenza di un conflitto di pretese, ovvero il requisito della contenziosita' del diritto...."[69]

That even under the Bourbon Code it was important to be notified this controversy or contentiousness of rights;

That according to **Arabia**, this results when there are the following:

"….Ma che s'intende per dritto posto in controversia? Ogni dritto il cui esercizio e' chiaramente e solennemente controvertito, sia con un fatto giudiziale, sia con un fatto materiale, che l'altro avea dritto almeno apparente di fare. Si supponga p.e. che Tizio abbia conceduto a Caio la

[69] Codice Penale, Tullio Padovani, op. cit. a fol 2611 taħt il-vuċi *"soggetto attivo;"*

"....It has consequently been specified that….the perpetrator of the crime can only be someone who is not in possession of the thing, since only in this case can that disturbance in the de facto enjoyment which constitutes one of the elements essential elements of the crime (among the most recent, Cass. VI 11.13.81, Papa, G PEN 1982, II, 648; Cass. VI 05.07.85, Spallina', CP 1986, 1766; Cass. VI 03.26.85 Pirola, CP1986, 1935). In fact, above all from the fact that the right must be, it can be deduced that the elements indicated above first of all describe the existence of a conflict of claims, or the requirement of the contentiousness of the law, as a prerequisite for the crime...."

facoltà di passare pel suo fondo per certo tempo e con certe condizioni. Se essi venissero in controversia sull'esercizio di questa facoltà, e Caio citasse Tizio innanzi al magistrato per farsi conservare nel diritto di passaggio, Tizio incorrerebbe nell'art. 168 se facesse qualche opera per cui il passaggio fosse turbato. Abbia o non abbia diritto, viola la legge facendo ciò si spetta all'autorita' pubblica già invocata. Per lo contrario, se prima che Caio adisca il magistrato, Tizio pone una siepe o un cancello o altro segno visibile, che chiaramente pone in controversia la facolta' di Caio, questi incorre nell'art. 168, se invece di adire il magistrato, rompa la siepe o il cancello e passi, abbia o non abbia diritto. Nel che notisi che il porre il cancello che fece Tizio può essere ingusto, e quindi una turbativa del possesso di Caio, ma egli non può essere astretto che con la sole azione civile, perchè quando pose il dette cancello, non dovè distruggere alcun segno visibile del possesso di Caio, onde è presunta buona fede, non essendovi stata controversia di cui vi siano segni tali, che tolgano ogni dubbio sulla volontà dell' altro di contraddirgli il possesso, onde si debba aver ricorso all'autorità. Gli elementi dunque del reato dell'art. 168 sono:

a) Uno de' datti materiali in esso descritti, e tassativamente nominati, cioè costringere a pagare un debito, turbare il possesso ec.

b) Che cià sia fatto per l'esercizio di un dritto messo in controversia e così che sia richiesta l'opera dell'autorità pubblica a deciderla, poco importando se questo dritto sia o non sia reale; solo che sia chiaramente controvertito...."[70]

That this jurisprudence is reflected in the Maltese jurisprudence, which as has been shown, it considers the elements of *RAGION FATTASI* as being the following:

a) An external act that prevents another person from a right that he enjoys and that has been done with the explicit or implicit dissent of that person;

b) The accused must believe that he is acting rightly;

c) The science of the defendant who is taking with his own hands what he is supposed to take through the legal process;

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[70] *"....But what is meant by a straight place in dispute? Any right whose exercise is clearly and solemnly contested, both with a judicial fact and with a material fact, which the other had at least an apparent right to do. Assuming e.g. that Titius has granted Caius the right to pass through his land for a certain time and with certain conditions. If they were in dispute over the exercise of this faculty, and Caio summoned Tizio before the magistrate to be preserved in the right of passage, Tizio would incur in the art. 168 if he did any work for which the passage was disturbed. Whether or not he has the right, he violates the law by doing so; it is up to the already invoked public authority. On the contrary, if before Caius appeals to the magistrate, Tizio places a hedge or a gate or other visible sign, which clearly puts Caius's faculty in dispute, he incurs in the Article 168, if instead of appealing to the magistrate, he breaks the hedge or the gate and passes, whether he has the right or not. In which it should be noted that the placing of the gate that Tizio made may be unfair, and therefore a disturbance of the possession of Caius, but he can only be forced with civil action alone, because when he placed the said gate, he did not have to destroy any visible sign of Caius's possession, hence good faith is presumed, since there has been no dispute of which there are signs such as to remove any doubt on the other's will to contradict his possession, so one must have recourse to authority. The elements therefore of the crime of Article 168 are:*

a) One of the material acts described therein, and exhaustively named; i.e.: forcing to pay a debt, disturbing possession, etc.
b) That this is done for the exercise of a right put into dispute and so that the work of the public authority is required to decide it, it matters little whether this right is or is not real; only that it is clearly contradicted...."

d) That the act does not frame him in a more serious crime; Moreover, the crime is not justified when the material act consists in the retention of possession that has been given had;[71]

That as a result, the fact that a person has a title on the property does not does not preclude it from being passable for the crime of *RAGION FATTASI* in congruous cases;

That the crime can also exist in case the affected person from the action of the active subject only the simple possession had power or detention of the property in question or even when it simply has the right to enjoy or use the property in question and, due to the action of the active subject, she will not be able to continue with this use or enjoyment of the same object;

That indeed, in the cause in the names "***Il-Pulizija vs. Joseph Bongailas,"***[72] the Court of Appeal considered the following:

> *"….L-Artikolu 85 tal-Kodiċi Kriminali li jittratta dwar ir-RAGION FATTASI, bl-ewwel rekwiżit tiegħu, kjarament iqis bħala aġir kriminali kull att ta' xi ħadd li jfixkel lil xi ħaddiehor fil-pussess ta' xi ħaġa li qed igawdi. L-imsemmi artikolu, għalhekk, jittutela l-pussess tal-ħaġa w*

[71] See *Il-Pulizija vs. Anthony Zahra* decided by the Court of Criminal Appeal presided over by the Judge Lawrence Quintano and dated 20 June 2014. See also among others *Il-Pulizija vs. Mario Bezzina*, decided by the Court of Criminal Appeal presided over by Judge David Scicluna and dated 26 May 2004, *Il-Pulizija vs. Michael Lungaro*, decided by the Court of Criminal Appeal presided over by judge Joseph Galea Debono and dated 15 May 2003 and *Il-Pulizija vs. Eileen Said* decided by the Court of Appeal Criminal presided over by Judge Joseph Galea Debono and dated June 19, 2002.

[72] Decided on the 22th October 2001 by the Court of Criminal Appeal (Inferior Jurisdiction), per Mr. Justice Patrick Vella

mhux neċessarjament ukoll il-propjetà tagħha. Il-kelma pussess, għalhekk, tinkludi l-użu jew dgawdija ta' dik il-ħaġa....Li hu importanti, ai fini ta' l-Artikolu 85 tal-Kap. 9, dejjem riferibbilment għall-ewwel element kostituttiv tiegħu huwa jekk effettivament sa dik in-nhar li sar dan l-allegat att ta' spoll mill-appellant, kellhomx il-kwerelanti l-pussess, ossija l-użu u/jew id-dgawdija tal-fond in kwistjoni...."

That in other words, in "***Il-Pulizija vs. Joseph Bongailas***," the Court of Appeal considered that Article 85 of the Criminal Code which deals with the *RAGION FATTASI,* with its first requirement, clearly considers as a criminal act any act of someone who disturbs someone else in possession of something that is enjoys;

That the said article, therefore, guarantees the possession of the thing and not necessarily also its property;

That the word possession, therefore, includes the use or enjoyment of that thing;

That what is important, for the purposes of Article 85 of the Chapter 9, always referrable to its first constitutive element is whether effectively until that day when this alleged act of spoliation was done by the appellant, did the complainants have the possession; i.e.: the use and/or the enjoyment of the fund in question;

That also in the Appeal "***Il-Pulizija vs. John Vassallo,"***[73] the Court of Criminal Appeal considered that:

[73] Decided on the 22nd March 1991, Court of Criminal Appeal, presided over by Mr Justice Godwin Muscat Azzopardi;

....Taħt l-Artikolu 85 tal-Kodici Kriminali ma hemm ebda bżonn illi jiġi ppruvat xi element ta' pussess aktar sostanzjali minn hekk. Id-diċitura ta' l-artikolu hija ċara w il-leġislatur ċertament ried illi jiġi evitat kull tfixkil, hu ta' liema natura hu, anki fis-sempliċi pussess. Tali pussess jinkludi wkoll kif ġie ripetutament deċiż minn din il-Qorti, anke s-sempliċi drittijiet normalment kompetenti lill-persuni konċernati...."

That in other words, in "***Il-Pulizija vs. John Vassallo***," the Court of Appeal considered that under Article 85 of the Criminal Code there is no need to prove any element of possession more substantial than that;

That the wording of the Article is clear and the legislator certainly wanted to avoid any disturbance, whatever its nature, even in simple possession;

That such possession also includes, as has been repeatedly decided by the Maltese Courts, even the simple rights normally competent to the persons concerned;

That according to another sentence given by the Court of Criminal Appeals in the names "***Il-Pulizija vs. John Dimech***," the Court stated that:[74]

"....id-dispożizzjoni tal-liġi li tikkontempla r-reat ta' RAGGION FATTASI hija ntiża biex il-privat li jippretendi xi drittijiet ma jissostitwix l-azzjoni tiegħu għal dak tat-tribunal meta jista' jirrikorri

[74] Decided on the 24th June 1961 by the Court of Criminal Appeal, presided over by Mr Justice William Harding;

lejhom. Hi ġusta jew le l-pretensjoni tiegħu, hu ma jistax minn rajh jeżerċita dawk id-drittijiet li hu jippretendi li għandu...."

That in other words, in *"**Il-Pulizija vs. John Dimech**,"* the Court of Appeal considered that the provision of the law that contemplates the crime of *RAGGION FATTASI* is intended so that the private person who claims some rights does not substitute his action for that of the tribunal when he can resort to them;

That whether his claim is fair or not, he cannot voluntarily exercise those rights that he claims to have;

That therefore and always without prejudice to whatever had already been stated above, the Appellant *Parte Civile* cannot understand why the Honourable Court of Magistrates (Gozo) as a Court of Criminal Judicature {Magistrate Dr. Leonard Caruana LL.D., M.A. (Fin. Serv)} had decided:

"….Therefore, on the basis of the above, the Court, after having seen Article 85 and 339(1)(e) of the Criminal Code, Chapter 9 of the Laws of Malta, finds Anukam Gift and Carmel Cordina not guilty of the charges brought against them…."

and totally ignored the Affidavit of PS 2100 Lorraine Grech Mifsud which states that:

On the 29/08/2022, Michael Angelo Zammit reported again at Victoria Police Station were he stated that the day before, that is on the 28/08/2022, at about 18.00 hrs, he went to his abome mentioned property

were he found door leading to yard locked by a gangetta. Same stated that when he saw this, he spoke to the tenant about it were she told him the words:

....You are crazy, the owner told me to do so, I don t care about the police, I will get my friends to hit you...."

I, the undersigned call on site African Gift Shop , No: 6, Triq Taħt Putirjal, Victoria were I spoke with Anukam Gift, ID: 74581 M, b/o 01/01/1985 at the Ivory Coast, Res: Regina Court, Flat 1, Triq l-Ewropa, Rabat....were she stated that she had locked the yard door as instructed by the owner. I inspected this yard, were it was confirmed that this door was locked from the yard side, in a way that there was no access from dwelling No. 5 towards the yard. Anukam Gift stated that it was true that she called Michaelangelo 'crazy' but stated that she had never threatened him in any way, however, she added that this incident was not on the 28/08/2022 but the Sunday before.

I also spoke with Carmel Cordina were he stated that although he is the owner of the mentioned yard he never instructed Anukam to lock the door...."

That in other words and as already stated above, PS 2100 Lorraine Grech Mifsud confirmed that**:**

a) *....Anukam Gift....stated that she had locked the yard door as instructed by the owner...."* i.e.: the Defendant Carmel Cordina;

b) She, PS 2100 Lorraine Grech Mifsud had personally *....inspected this yard, were it was confirmed that this door was locked from the yard side, in a way that there was no access from dwelling No. 5 towards the yard...."*

c) *....Anukam Gift stated that it was true that she called Michaelangelo crazy ...."*

That as a result, and for these reasons, once Anukam Gift:

a) Had admitted to the Police to have uttered insults and threats not otherwise provided for in the Criminal Code against the Appellant *Parte Civile,* and

b) To have *....stated that she had locked the yard door as instructed by the owner...."* i.e.: the Defendant Carmel Cordina;

the Appellant *Parte Civile* cannot understand why the Honourable Court of Magistrates (Gozo) as a Court of Criminal had not based its judgement on the above basic Legal Principles; i.e.: on:

i. *CONFESSIO EST REGINA PROBATIONUM – Admission is the queen of all evidence;"* and

ii. *RAGION FATTASI - The arbitrary exercise of a right of his own;*

once it became evident that Anukam Gift gave her confession freely and openly and that the use of forced confession had not been made in this case;

That in this background, the Appellant *Parte Civile* cannot understand also why the Honourable Court of Magistrates (Gozo) as a Court of Criminal Judicature **had**

failed to consider that in the crime of *RAGION FATTASI,* one is capable of acting even with permanent effects, and above all that it is an instantaneous one.

The Court having heard the oral submissions made by the parties with regard to the submissions made by the defence that the appeal of the parte civile cannot be entertained by this Court as he has no right to appeal but it is the office of the Attorney General who has the right to appeal since this is an offence that can be prosecuted ex ufficio;

Having seen the acts of the proceedings;

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

Considers further;

The Criminal Code Chapter 9 of the Laws of Malta, clearly states who can appeal from the judgments of the Court of Magistrates as a Court of Criminal Judicature: the party convicted as in Art.413(1)(a) and in the cases expressly mentioned in Art.413(1)(b) "*the Attorney General, and, in the cases mentioned in article 373, by the complainant*" and the Attorney General in all the other instances mentioned in Art. 413(1)(c). Hence, this necessarily means that the complainant can appeal in cases where the prosecution is led by him as the offended party, besides, of course, that, as in the case of the Attorney General, his right of appeal must be rooted in any of the cases contemplated in Art. 413 (1)(b).

As repeatedly held by the Court, even as differently presided, this complainant's right of appeal is limited only where the offences are:

(i) of the original competence of the Court of Magistrates as a Court of Criminal Judicature as provided for in article 370(1) of the Criminal Code together with article 371;

(ii) prosecutable only with the complaint of the offended party;

(iii) that the prosecution is conducted by the complaint as provided in article 374.

For this purpose this Court makes a reference to previous judgments given, as early as l944 in '**Il-Pulizija vs Francesco Said**' (Criminal Court, 15/4/1944, Vol. XXXII.IV.727), and followed by other judgments given, namely '**Il-Pulizija vs Eric Pace Bonello**' (Criminal Appeal 17/10/1988), 'Il-**Pulizija vs Joseph Formosa**' (Criminal Appeal 17/10/1988), '**Il-Pulizija vs Dr. Edwin Bonello**' (Criminal Appeal 3/3/1989), '**Il-Pulizija vs Connie Farrugia u Raymond Bajada**' (Criminal Appeal 17/10/1990), '**Il-Pulizija vs Carmelo sive Lino Grima**' (Criminal Appeal 17/10/1990), '**Il-Pulizija vs Joseph Bugeja**' (Criminal Appeal 25/01/2008), '**Il-Pulizija vs Jacqueline Leonard**' (Criminal Appeal 21/01/2011), '**Il-Pulizija [Spettur Edmond Cuschieri] vs Jimmy Bonnici Giuseppe Bonnici**' (Criminal Appeal 17/10/2013), '**Il-Pulizija vs Darren Grima**' (Criminal Appeal 28/02/2015);

As was held in **Il-Pulizija vs Alfred Vella**[75] **the *parte civile* may appeal only** where:-

> *"(a) ir-reat ikun ta' kompetenza originali tal-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali, jigifieri jkun jinkwadra f dak li jipprovdi l-Artikolu 370(1) tal-Kodici Kriminali moqri flimkien ma' l-Artikolu 371; (b) l-azzjoni kriminali fir-rigward ta' dak ir-reat ma tkunx tista' titmexxa hlief bil-kwerela tal-offiz; u (c) il-prosekuzzjoni titmexxa mill-offiz kif provvdut fl-Artikolu 374 tal-Kodici Kriminali b mod li s-sentenza tinghata fil-konfront tal-kwerelant (l-offiz) u tal-kwerelat (l-*

[75] Decided by the Court of Criminal Appeal on 24 February 2000

imputat) (u ghalhekk mill-occhio tas-sentenza ikun jidher li l-partijiet fil-kawza huma l-kwerelant u l-imputat, u mhux il-Pulizija u l-imputat)"

The charges brought against the defendants are (i) the arbitrary exercise of a pretended right - *ragion fattasi* (art. 85), and (ii) contraventions against the person for utterance of insults or threats not otherwise provided for in this Code (art.339 (1)(e)). The offence of *ragion fattasi*- is of original competence of the Court of Magistrates as a Court of Criminal Judicature, but it is not a crime that the action in relation to it requires the complaint of the injured party. Art.339 (2) of Chapter 9 of the Laws of Malta provides that the offences contemplated in art.339 (1)(e) require the complaint of the injured party for proceedings to ensue.

As the Court stated in **Il-Pulizija vs Alfred Vella**[76]:

"Ir-reat ta' ragion fattasi hu prosegwibbli ex officio[1] mill-Pulizija Ezekuttiva u dan peress li ma huwiex meqjus bhala delitt kontra l-propjeta` privata izda delitt kontra l-amministrazzjoni tal-gustizzja u amministrazzjonijiet pubblici ohra. Huwa veru li bhala fatt il-Pulizija rarament jipprocedu taht l-Artikolu 85 tal-Kodici Kriminali jekk ma jkunux gew infurmati bl-allegat delitt bil-kwerela tal-parti leza; f dan il-kaz il-kwerela sservi ta' semplici notitia criminis, cioe` il-mezz li bih il-Pulizija jsiru jafu bid-delitt, minghajr, pero`, ma dik il-kwerela tkun b xi mod essenzjali ghat-tmexxija ta' l-azzjoni. Inoltre fil-kaz in dizamina il-prosekuzzjoni tmexxiet mill-Pulizija Ezekuttiva u mhux mill-kwerelant jew parti leza, tant li s-sentenza inghatat fil-konfront tal-Pulizija u tal-imputat Vella; il-kwerelant jew parti leza semplicement ikkostitwixxa ruhhu bhala parti civili fil-kawza fit-termini tas-subartikolu (3) tal-Artikolu 410 tal-Kodici Kriminali. Il-fatt, pero`, li l-parti leza tkun ghamlet uzu minn din id-disposizzjoni ma jfissirx li ghandha dritt ta' appell: dana d-dritt ta' appell hu regolat,

[76] Decided by the Court of Criminal Appeal on 24 February 2000

fil-Kodici Kriminali, unikament b dak li jipprovdi l-Artikolu 413(1)(b). Konsegwentement f dan il-kaz ma hux moghti dritt ta' appell lill-kwerelant jew parti leza."

In the case **Il-Pulizija (Spettur Horace J. Anastasi) vs Philippa Farrugia**[77], the Court held that:-

"(d) fil-kaz odjern hu evidenti mill-atti - kemm mic-citazzjoni li mhix tahrika ta' kawza privata izda tahrika ta' kawza tal-pulizija - kif ukoll mill-verbali u mill-istess sentenza, li l-prosekuzzjoni tmexxiet mill-Pulizija Ezekuttiva u li ghalhekk il-parttijiet fil-kawza kienu il-Pulizija u l-gudikabbli, li eventwalment giet liberata;

(e) jekk dan sarx bi zball jew ghax il-Pulizija Ezekuttiva ghamlet uzu mill-proviso tal-artikolu 373 hu, f' dana l-istadju, irrilevanti. L-appellanti Stella Micallef forsi setghet tqajjem dan il-punt quddiem il-Qorti Inferjuri u titlob li tmexxi hi l-prosekuzzjoni b'mod li testrometti lill-Pulizija Ezekutiva. Pero' f' dana l-istadju, cioe' fl-istadju tal-appell, hemm sentenza moghtija f' kawza tal-Pulizija u fejn il-partijiet huwa il-Pulizija u Philippa Farrugia. Ghalhekk f' dan il-kaz, stante li Philippa Farrugia giet liberata, jekk hemm dritt ta' appell dan kien jispetta biss lill-Avukat Generali;"

Furthermore, these judgments emphasise that simply choosing to be recognised as a *parte civile* in the proceedings against the defendants does not automatically confer the right to file an appeal. Consequently, the only individuals entitled to appeal the judgment rendered by the Court of Magistrates as a Court of Criminal Judicature against Anukam Gift and Carmel Cordina were Anukam Gift and Carmel Cordina themselves, and the Attorney General.

[77] Decided by the Court of Criminal Appeal on 6 December 1995

For these reasons the Court upholds the preliminary defence raised for the nullity of the appeal, declares the same application null and void and refrains from taking further cognisance thereof.

(ft) Consuelo Scerri Herrera
Judge

(ft) Mary Jane Attard
Deputy Registrar

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For the Registrar