



## **Court of Criminal Appeal**

**Onor. Judge Consuelo Scerri Herrera, LL.D., Dip Matr., (Can)**

**Appeal Number: 131/2023**

**The Police**

**Vs**

**Anukam Gift**

**Today 13th June 2024**

The Court,

Having seen the charges brought against the appealed, Anukam Gift, born the 1st of January of the year 1985 residing at 6, Triq Putirjal, Rabat, Gozo, holder of identity card 74581A, was accused before the Court of Magistrates (Gozo) as Court of Criminal Judicature that on the 5th January of the year 202 at the premises numbered 6, Triq il-Mina Principali, Rabat Gozo she;

1. Failed to keep any food away from contamination which is likely to make such food unfit for consumption by any person, damaging for Health or contaminated in such way that it would not be reasonable to expect such food to be consumed in such state. LN 264/2022 Part IX Reg 4;
2. Used premises for food related business which was not Registered with the 'Kummissjoni ghas-Sigurta' fl-Ikel' LN 180/2001 Reg 3(1);
3. Intentionally disturbed or caused an obstacle to an authorised official in the performance of his duties according to the Food Safety Act. Ch.449 art 32(1).

Having seen the judgement of the Courts of Magistrates (Gozo) dated 8th February, 2024, the Court found Anukam Gift not guilty of the charges brought against her and is acquitting her from all guilt and punishment.

Having seen the application of the appealed Anukat Gift where they are asking that this Honourable Court **reforms** the judgment proffered against the accused in these proceedings by:

- Revoking the part where Anukam Gift was found not guilty of the First and Second Charges, respectively being that she:
  1. Failed to keep any food away from contamination which is likely to make such food unfit for consumption by any person, damaging for health or contaminated in such way that it would not be reasonable to expect such food to be consumed in such state. LN 264/2022 Part IX Reg 4- and
  2. Used a premises for food related business which was not Registered with the 'Kummissjoni għas-Sigurta fl-Ikel'. LN 180/2001 Reg 3(1) and instead to find her guilty of these First and Second Charges;

And by;

Confirming the part where Anukam Gift is found not guilty of the third charge wherein she was accused of intentionally disturbing or causing an obstacle to an authorised official in the performance of his duties according to the Food Safety Act.Ch.449 art 32(1);

And by consequentially inflicting a punishment in terms of the Law

### **REASONS FOR AND GROUNDS FOR APPEAL**

Whereas, the appellat Attorney General was aggrieved by the fact that, in the humblest opinion, the first Honourable Court made an incomplete evaluation of the evidence presented; (apprezzament ta' provi)

Whereas, the grievances, which are clear and manifest, pertain to the first and second charges;

i) In regard to the first charge (relating to the contamination of food), the First Court opined that:

*"The Prosecution did not provide any evidence to show that the food was not protected against contamination or that there was any risk of contamination. Although the Environmental Inspectors stated that the accused did not comply with an alleged letter sent to her, this same letter was not presented by the witness and therefore the Court does not know whether the contents of this letter concerned any possible risk of contamination of the food"*

To this reasoning, the appellant cannot but humbly observe that the first Court relied heavily on the mentioned letter to ascertain whether there was contamination or not. To this end the appellant submits that there were other pieces of evidence which should have led, beyond reasonable doubt, to a very different conclusion, yet the first Court did not delve into their appreciation.

The premises consisted of the lower floor (the grocery) and the upper floors (where Anukam Gift resided with her child/ren), as also illustrated by the pictures submitted by the witness on pages 15 to 27 of the acts of the proceedings. Given that there was no permit, as also confirmed by the Health Inspector Noel Portelli under oath in his testimony, there was no separation between the first floor containing the food for sale, and the upper floor (connected by stairs) where the accused was residing;

Thus the grocery and residence quarters in the same premises weren't divided;

Therefore, it is clear that the prosecution had shown, through the testimony of the Health Inspectors, that since there was no permit de jure nor separation of the grocery from residence area de facto (vide pg16), the food was not protected from cross contamination, and nor had there been steps taken to ensure that at least such risk would be eliminated;

In addition, from page 26 of the acts of the proceedings, this argument is enforced even further when observing that packets of water to be sold to customers of the grocery were held adjacent to garbage;

ii) In regard to the second charge (relating to the failure to operate with a permit), the First Court opined that:

*"From the evidence of the prosecution, it clearly results that the accused was operating a food premises without having the required registration. The prosecution, however, did not prove that the establishment was being operated for three consecutive weeks or more. Although the Environmental Inspector Noel Portelli testified that he sent her a letter with some irregularities, it was not proven that this letter was sent three weeks, or more, prior to the physical inspection on the 4th and 5th of January 2023"*

To this reasoning, the appellant cannot but humbly observe that the first Court relied once again on the mentioned letter which illustrated the irregularities in question to ascertain the timeframe required by the article the accused was charged with. To this end the appellant submits that there were other pieces of evidence which should have led to guilt, beyond reasonable doubt;

The wording of the relevant article (Regulation 3(1) of the registration of Food Premises Regulations (S.L.449.28)) states that;

*'No Person may use any premises as a food premises for the purposes of a food **business for three or more days, whether consecutive or not, in any period of three consecutive weeks unless such premises are registered with the Food Safety Commission'***

Thus, irrelevant of the letter sent by the Health Authorities, what the prosecution was required to prove was that there had been an operation of a food business without proper registration for three or more days in any period of three consecutive weeks;

To this end the prosecution proved this through the testimony of the owner of the premises, Carmel Cordina (page 28 of the Acts), who under oath stated that he identified the accused in the Hall, he rented out the premises to her, and that she used the premises as a shop. When asked when the rent had started, he explained that it was "One and a half years ago";

Therefore, the afore-mentioned witness clearly testified that the accused had been using the premises as food business for two or more days well over the span of three consecutive weeks.

The appellant humbly submits that the heart of the matter when proving the timeframe should have been this testimony, rather than the afore-mentioned letter which couldn't properly illustrate the breach of the regulation.

It's without a doubt that such testimony was crucial evidence for the prosecution to prove its case, yet the First Honorable Court did not consider such in its judgement, nor were there reasons given as to why such details in testimony were disregarded.

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

The Court having heard the oral submissions made by the parties;

Having seen the acts of the case;

**Considers further;**

The grievance raised by the Attorney General consists in the fact that the Court of Magistrates was, with regards to the first and second charge, incorrect in its evaluation of the evidence produced before it.

This Court is a court of revision for the judgment of the Court of Magistrates and, therefore, does not disturb the appreciation of the evidence made by the First Court when that Court has been legally and reasonably correct in its assessment. As held in the judgment delivered by this Court, differently presided, in the case of **The Police vs. Julian Genovese**<sup>1</sup>:

*“hu principju ormaj stabilit fil-gurisprudenza ta 'din il-Qorti (kemm fil-kaz ta 'appelli minn sentenzi tal-Qorti tal-Magistrati kif ukoll filkaz ta 'appelli minn verdetti w sentenzi tal-Qorti Kriminali) li din il-Qorti **ma tiddisturbax l-apprezzament dwar il-provi maghmul mill-Ewwel Qorti jekk tasal ghall-konkluzzjoni li dik il-Qorti setghet ragonevolment u legalment tasal ghall-konkluzzjoni li waslet ghaliha.** Fi kliem iehor, din il-Qorti ma tirrimpjazzax id-diskrezzjoni fl-apprezzament tal-provi ezercitata mill-Ewwel Qorti, **izda taghmel apprezzament approfondit tal-istess biex tara jekk dik l-Ewwel Qorti kienetx ragjonevoli fil-konkluzzjoni***

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<sup>1</sup> Deciz mill-Qorti tal-Appell Kriminali nhar it-31 ta' Lulju, 2008

**taghha.** *Jekk izda din il-Qorti tasal ghallkonkluzzjoni li l-Ewwel Qorti fuq il-provi li kellha quddiemha, ma setghetx ragjonevolment tasal ghall-konkluzzjoni li waslet ghalha, allura din tkun raguni valida, jekk mhux addirittura mpellenti, sabiex din il-Qorti tiddisturba dik id-diskrezzjoni w konkluzzjoni (ara f'dan is-sens "inter alia" l-Appelli Kriminali: **Il-Pulizija vs. Raymond Psaila et.**<sup>2</sup>, **Ir-Repubblika ta 'Malta vs. George Azzopardi**<sup>3</sup>; **Il-Pulizija vs. Carmel sive Chalmer Pace**<sup>4</sup>; **l-Pulizija vs. Anthony Zammit**<sup>5</sup> u ohrajn.)<sup>6</sup>*

In this regard, this Court refers to what was stated by **Lord Chief Justice Widgery** in the case of **R. v. Cooper** (in connection with section 2 (1) (a) of the English Criminal Appeal Act, 1968).

*“assuming that there was no specific error in the conduct of the trial, an appeal court will be very reluctant to interfere with the jury’s verdict (in this case with the conclusions of the learned Magistrate) , because the jury will have had the advantage of seeing and hearing the witnesses, whereas the appeal court normally determines the appeal on the basis of*

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<sup>2</sup> Deciz mill-Qorti tal-Appell Kriminali nhar it-12 ta 'Mejju, 1994.

<sup>3</sup> Deciz mill-Qorti tal-Appell Kriminali nhar l-14 ta 'Frar, 1989.

<sup>4</sup> Deciz mill-Qorti tal-Appell Kriminali nhar il-31 ta 'Mejju, 1991.

<sup>5</sup> Deciz mill-Qorti tal-Appell Kriminali nhar il-31 ta 'Mejju, 1991.

<sup>6</sup> Ara wkoll, l-Appelli Kriminali Superjuri: Ir-Repubblika ta' Malta vs Domenic Briffa, 16 ta' Ottubru 2003; Ir-Repubblika ta' Malta vs Godfrey Lopez u r-Repubblika ta' Malta v. Eleno sive Lino Bezzina 24 ta' April 2003, Ir-Repubblika ta' Malta vs Lawrence Ascjak sive Axiak 23 ta' Jannar 2003, Ir-Repubblika ta' Malta vs Mustafa Ali Larbed; Ir-Repubblika ta' Malta vs Thomas sive Tommy Baldacchino, 7 ta' Marzu 2000, Ir-Repubblika ta' Malta vs Ivan Gatt, 1 ta' Diċembru 1994; u l-Appelli Kriminali Inferjuri: Il-Pulizija vs Andrew George Stone, 12 ta' Mejju 2004, Il-Pulizija vs Anthony Bartolo, 6 ta' Mejju 2004; Il-Pulizija vs Maurice Saliba, 30 ta' April 2004; Il-Pulizija vs Saviour Cutajar, 30 ta' Marzu 2004; Il-Pulizija vs Seifeddine Mohamed Marshan et, 21 ta' Ottubru 1996; Il-Pulizija vs Simon Paris, 15 ta' Lulju 1996;

*papers alone . However, should the overall feel of the case – including the apparent weakness of the prosecution evidence as revealed from the transcript of the proceedings – leave the court with a lurking doubt as to whether an injustice may have been done, then, very exceptionally, a conviction will be quashed.”<sup>7</sup>*

If the conclusion reached by the Court of Magistrates was safe and satisfactory, this Court cannot simply change its judgment unless there is a valid reason. The appellant may disagree with the conclusions of the First Court; however, this is not sufficient for this Court to alter the judgment of the Court of Magistrates.

Even if this Court reviews the evidence presented before the Court of Magistrates, its role remains that of reviewing the decision given by the Court of Magistrates. In the ordinary course of its functions, it does not act as a court of retrial and does not rehear the case and decide it a new. The decision of whether the defendant is guilty or not is made by the Court of Magistrates, which has the duty to analyze all the evidence and legal arguments and reach its conclusions. This holds unless there are exceptional reasons within the parameters provided by Article 428(3)(5) of the Criminal Code that would allow this Court to decide on the merits of the case, as in the present case.

**Considers that;**

Health Inspector **Aldo Portelli**<sup>8</sup> testified on the 4th of May 2023 that on the 5th of January 2023 he had accompanied his colleague Noel Portelli to deliver the emergency control order for the closure of the premises six (6) Main Gate Street Victoria, Gozo. The accused did not accept to sign the order.

Health Inspector **Noel Portelli**<sup>9</sup> testified on the 4th of May 2023 that the accused operated a grocery shop at Main Gate Street Victoria, Gozo. Identifying the accused present in Court, the witness explained that the accused’s shop was not registered with Food Safety Commission,

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<sup>7</sup> Ara wkoll Blackstone’s Criminal Practice (1991), p. 1392.

<sup>8</sup> fol. 6

<sup>9</sup> fol. 9

and hence she had no operations permit. According to the witness the shop was also used as the accused's residence where she lived with her three children on the first floor. He presented photos of the premises which he took himself.<sup>10</sup> He further stated that a notice<sup>11</sup> was issued on the 4th of January 2023 following complaints made to the Environmental Health Inspectorate's office in Malta. He also stated that the accused refused to sign the enforcement notice. The witness stated that he carried out an inspection both on the 4th and 5th of January 2023. Upon cross-examination tendered on the 16th of November 2023, Portelli confirmed that the accused had an application with the Directorate to operate a grocery shop. He had inspected the premises, and she had to make some works within the timeframe prescribed in the letter he had sent on behalf of the Environmental Health Directorate.<sup>12</sup> The works consisted in separating the dwelling area from the grocery shop. Following the inspection made in the beginning of January 2023, he did not carry out further inspections. He was aware that a Planning Authority permit for change of use was issued, but the Environmental Health Directorate permit had not been issued, as every food outlet or catering establishment had to first be registered with the Food Safety Commission after the carrying out of the structural alterations.

Mr **Carmel Cordina**<sup>13</sup> testified on the 4th of May 2023 that he rented the premises at six (6) Main Gate Street Victoria, Gozo to the accused, whom he also identified in Court, in December 2022.

### **Further considers;**

It is the duty of the prosecution to prove every element of the crime and this beyond reasonable doubt. The Court here makes reference to the address made by the learned judge in the trial by Jury in the names **Repubblika ta 'Malta vs Martin Dimech**<sup>14</sup> wherein he held that

*"Il-principju principali li johrog mill-prezunjoni tal-innocenza huwa li la darba l-akkuzat huwa prezunt innocenti, l-akkuzat ma huwa obbligat jipprova xejn*

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<sup>10</sup> Document NP2 fol.15-27

<sup>11</sup> Document NP1 fol.14

<sup>12</sup> fol. 34

<sup>13</sup> fol.28

<sup>14</sup> Application number 37/1996 Page2 u 3 of the transcripts of the address of the Judge



....Dan ma jfissirx li jekk l-akkuzat jaghzel li jipprova xi haga, certi regoli ta' kif ghandhom isiru l-provi ma japplikawx anke ghallakkuzat. Ma jfissirx hekk imma jfisser biss li l-akkuzat mhux obligat li jipprova xejn u jfisser li lpiz tal-prova, jigifieri l-obbligu biex tipprova l-akkuza, jew f'dan il-kaz, l-akkuzi kontra l-akkuzat, bl-elementi kollha taghhom, bl-elementi kollha ta' kull akkuza, qieghed, mill-bidu sa l ahhar, fuq il-prosekuzzjoni .... U l-akkuzat ma ghandu ebda obbligu li jipprova xejn”7.

Section 4 of the Subsidiary Legislation 449.31 Hygiene of Food Regulations stipulates that:

*All food which is handled, stored, packaged, displayed and transported shall be protected against any contamination **likely to render** the food unfit for human consumption, injurious to health or contaminated in such a way that it would be **unreasonable to expect**.* (Emphasis added by the Court)

This Court recognises that in these cases, under Chapter 449 of the Laws of Malta, it must look into whether the accused exercised adequate diligence, known as 'due diligence' and 'reasonable precautions'. The principle of strict liability goes back to this law's infancy. As expounded by this Court diversely presided in **Police vs James Barbara**<sup>15</sup>:

*Professor Leonard Leigh has described how the courts of the 1870s held that no mens rea was required to convict persons of selling adulterated food as unadulterated contrary to section 2(2) of the Food and Drugs Act 1872.*

*A mens rea required, he says, 'would have rendered the provision ineffectual' and the principles of both strict and vicarious liability developed because without them enforcement would be difficult, if not impossible: 'If the master were permitted to escape because the fault was that*

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<sup>15</sup> Decided by the Court of Criminal Appeal on the 17th of January, 2013

*of his servant, an easy excuse would have been created, and the master would not have been under the powerful incentive of liability to ensure enforcement of the legislation within the enterprise.’*

Hence, in its assessment of whether the accused exercised 'due diligence' and 'reasonable precautions', the Court must be convinced by the evidence produced before it.

Furthermore section 3 (1) of the Subsidiary Legislation 449.28 Registration of Food Premises Regulations stipulates that:

*No person may use any premises as a food premises for the purposes of a food business for three or more days, whether consecutive or not, in any period of three consecutive weeks unless such premises are registered with the Food Safety Commission.*

In this case, for this Court to find the accused guilty, the Prosecution had to prove beyond any reasonable doubt that she failed to comply with the requirements of the law. The First Court was correct in observing that no evidence was produced to the effect that the food was not protected against contamination or that there was even the risk thereof. The Emergency Control Order (*vide* Document NP1 fol.14) issued in terms of Chapter 449 is devoid of mentioning why the premises cannot be used as a food premises. Nor does it contain any information as to how the food was not protected against contamination or the risk thereof. No evidence to the effect was also tendered by the witnesses produced by the Prosecution.

Notwithstanding that the Prosecution did successfully prove that the premises was not registered with the Food Safety Commission and hence had no operation permit, as stated by the First Court, it however, failed to bring any evidence in support of the fact that the premises was being used for food business for three or more days, whether consecutive or not, in any period of three consecutive weeks. In his testimony Health Inspector Noel Portelli did mention that a letter was sent by the Directorate following an inspection prescribing a timeframe for the necessary alteration works to be carried out, said letter was never presented in the acts of the

proceedings, no mention of the date thereof was made, nor is it possible to determine whether this was sent three weeks or more prior to the inspection merits of case.

The standard of proof required in criminal cases for a finding of guilt demands that the Court decide based on the evidence present in the records: *quod non est in actis, non est in mundo*. The standard of probability does not apply to this case; **proof beyond any reasonable doubt** was required.

**Article 32 (1) of Chapter 449** of the Laws of Malta Food Safety Act states that:

*(1) A person who –*

- (a) intentionally obstructs or causes the obstruction of any person acting in the performance of his duties under this Act; or*
- (b) without reasonable cause, fails to give any person acting in the performance of his duties under this Act, such assistance or information which he is required to give by or under this Act, shall be guilty of an offence against this article*

The First Court was also correct in noting the lack of evidence presenting in substantiating this charge. The accused's lack of signing the Emergency Control Order cannot be construed as an intentional obstruction or failure to provide assistance or information as required by the law.

## **Decide**

Therefore, the Court dismisses the grievances of the appellant, and confirms the judgment given by the Court of Magistrates in its totality.

Dr Consuelo Scerri Herrera

Hon Madame Justice