



COURT OF CRIMINAL APPEAL

HON. MADAM JUSTICE NATASHA GALEA SCIBERRAS B.A., LL.D

Appeal Number: 122/2023

The Police

VS

Milomir JOVICEVIC

Today, 26th June 2024

The Court,

Having seen the following:

A. THE CHARGES

1. This is an appeal from a judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 14th March 2023 against Milomir JOVICEVIC, born on 30th August 1983, residing at 8, Athena's Place, Triq San Anton Abbati, Mosta, holder of Maltese residence permit number 178806(A) and charged with having:

On 4th January 2022 and previous dates as director of Milmar Construction Ltd (C94812) worked as self-employed and as Director of the said company without registering as either Director nor self-employed, as well

as for employing Sokol Pula, Florian Saraci, Luan Sadiku and Erjon Luli, who are not citizens of Malta, other than such persons were in possession of a single permit or employment licence (Chapter 594, Art. 36, 37, 43).

B. THE APPEALED JUDGMENT

2. That, by means of a judgement delivered on 14th March 2023, the Court of Magistrates (Malta) as a Court of Criminal Judicature, having seen Chapter 594 Articles 36, 37 and 43, and Chapter 9 Articles 17 and 31, found the accused (today, the appellant) Milomir JOVICEVIC guilty as charged in terms of law and condemned him to the punishment of a fine (multa) of three thousand euro (€3000).

C. THE APPEAL

3. That, the appellant JOVICEVIC appealed from this judgment and requested this Court to “*cancel and revoke the same judgment where the appellant was found guilty of the charges and to instead go on to acquit the appellant of all charges and punishment*”.

D. THE PARTIES’ SUBMISSIONS

4. The parties made oral submissions regarding the appeal before this Court, as differently presided, during the hearing held on 1st August 2023. During the hearing held before this Court, as presided, on 8th January 2024, the parties declared that they were resting on the oral submissions made before this Court, as differently presided.

E. THE CONSIDERATIONS OF THIS COURT

5. From the records of the proceedings, it transpires that on 4th January 2022, the Occupational Health and Safety Authority conducted an inspection on a construction site situated at 26/28, Triq l-Indipendenza, Għargħur, where

there were four workers, namely, Sokol Pula (bearing passport BJ 9577925), Florian Sarachi (bearing passport BC 6712278), Luan Sadiku (without any documents available) and Ejon Luli (without any documents available), who identified their employer as Milomir Jovicevic, the appellant, and called him on site. As soon as he arrived on site, Jovicevic provided Clinton Cachia, the Authority's representative, with his identity card number and informed him that he was the director of Milmar Construction Ltd (C 94812), at which point he was informed that a Stop Order had been issued on the works. Subsequently, on 10th January 2022, the appellant was summoned to the Authority's offices, and after he was cautioned to remain silent and was given the right of legal assistance, which right he refused, he confirmed that the four workers which had been found on site, were his employees. In the meantime, the Occupational Health and Safety Authority liaised with Jobsplus, and it transpired that the said workers were not registered as being in the employment of the said company. Furthermore, from online searches carried out with the Malta Business Registry, it also resulted that appellant was registered as one of the directors of Milmar Construction Ltd.¹ As to the appellant, he was not registered as self-employed or as a director of the said company, and he eventually registered his employment as manager of the said company.²

6. The appellant was subsequently charged as aforementioned and on 14th March 2023, he was found guilty by the Court of Magistrates (Malta) as a Court of Criminal Judicature of the said charges.
7. That most of appellant's grievances may be summarised in one main grievance to the effect that the Prosecution has failed to adduce sufficient evidence to prove the charges proffered against him. The appellant states that the documentation exhibited by Dr. Claudette Fenech on behalf of the Malta Business Registry, does not prove that at the time of the alleged offences, namely on 4th January 2022 and the preceding days, the company Milmar Construction Ltd existed and that the accused was a director thereof, since the said witness merely exhibited information pertaining to the date when she actually testified. The appellant further states that documents exhibited by Bernard Zarb on behalf of Jobsplus

¹ *Vide* testimony of Clinton Cachia, a fol. 56 *et seq* of the records.

² *Vide* also the testimony of Bernard Zarb, a fol. 43 *et seq* of the records.

Corporation, merely proves that the appellant was employed with Milmar Construction Ltd. with effect from 22nd March 2022 and thus, not that he had any connection with the said company at the time of the offence, or that at the time of the offence, he was an official of the said company, capable of employing or otherwise third parties, for and on behalf of the company. Furthermore, states the appellant, it was also necessary for the Prosecution to prove that the four labourers whom the appellant was meant to have employed, did not have the relevant authorisation to work, namely that they were not citizens of Malta, and that they did not have a single permit or an employment licence. Indeed, states the appellant, these four workers were not summoned to testify before the first Court as to their relation with the appellant, and thus, the Prosecution did not produce the best possible evidence. No evidence was forthcoming as regards their employment status or their capacity to work legally or otherwise in Malta, at the time of the offence.

8. The appellant is further aggrieved by the fact that although he was duly cautioned by Clinton Cachia before releasing his statement at the OHSa offices, nonetheless he had already released incriminating statements whilst onsite without having been duly cautioned in terms of law. According to appellant, once he had already committed himself to a statement, no amount of *ex post facto* cautioning would have enabled him to retract what he had already stated. Thus, the Court should not have taken into consideration any statements made by appellant after being duly cautioned, once such statements were merely a repetition of his statements prior to cautioning.
9. The appellant has been charged with having, in his capacity as director of the company Milmar Construction Ltd, breached the provisions of Articles 36, 37 and 43 of Chapter 594 of the Laws of Malta, which state as follows:

36. Any employer who employs another person whole-time, part-time or otherwise under a definite or indefinite contract or on probation shall notify Jobsplus of such employment by any means which may be established by Jobsplus from time to time.

37. Any person, hereinafter referred to as "a self-employed person", who takes up a gainful occupation whole-time, part-time

or otherwise, other than in a contract of employment with an employer, shall notify Jobsplus of such occupation by any means established by Jobsplus from time to time.

43. Any employer who employs any person who is not a citizen of Malta, other than such person as may be in possession of a single permit or employment licence, shall be guilty of an offence.

10. That from a reading of Article 36 of Chapter 594 of the Laws of Malta, it is understood that in order that appellant JOVICEVIC may be found guilty as aforesaid, it is necessary for the Prosecution to prove beyond reasonable doubt that on 4th January 2022, the company Milmar Construction Ltd failed to give notice to Jobsplus Corporation of his employment as a director of the said company. The Prosecution has charged appellant in his capacity as director of the company Milmar Construction Ltd and it is therefore being alleged that he is vicariously liable for the breaches of law committed by the company. As has been held, appellant laments that no proof was brought to the effect that the company Milmar Construction Ltd existed at the time of the commission of the alleged offences and no evidence was adduced to show that he was at the time, director of the company. The appellant further argues that the documentation produced by Jobsplus representative Bernard Zarb only proves that he was employed with Milmar Construction Ltd., and had a connection with the said company, with effect from 22nd March 2022.
11. Appellant is right in so far as he contends that the documents produced by Dr. Claudette Fenech, on behalf of the Malta Business Registry, before the first Court, do not indicate that he was a director of the company Milmar Construction Ltd on 4th January 2022. Her testimony before the first Court was not transcribed, so that her testimony, as well as the testimonies of the other witnesses heard before the first Court, Bernard Zarb in representation of Jobsplus and Clinton Cachia on behalf of the Occupational Health and Safety Authority, were heard again before this Court, as differently presided. During this testimony, however, Dr. Claudette Fenech could not remember the date of issue of the documents, which she had exhibited before the first Court. The said documents solely indicate that appellant Milomir JOVICEVIC was a director, shareholder, legal and judicial representative and secretary of the said company. Yet,

in his testimony before this Court, as differently presided, Bernard Zarb on behalf of Jobsplus testifies that he had conducted verifications with the Malta Business Registry, to which he had online access, in January 2022, and had found that appellant was indeed a director of the said company. Before the first Court, he exhibited Doc. BZ 3, an extract from the Malta Business Registry online database showing details of the company Milmar Construction Ltd. (C 94812), which results to having been printed on 25th October 2022, and is identical in its content, to the document exhibited by Dr. Claudette Fenech. Clinton Cachia, on behalf of the Occupational Health and Safety Authority also testifies before this Court, as differently presided, that he had confirmed with the Malta Business Registry online database that the appellant was one of the two directors of the said company and that he had conducted such verification between the date of the onsite inspection and the subsequent meeting with the appellant on 10th January 2022. The documents exhibited by the said witness, obtained as stated from the Malta Business Registry online database, also indicate that the said company was registered on 6th February 2020. Indeed, the Court notes that a ‘Stop Order’ was issued by OHSA in respect of the said works on 4th January 2022, which Order was addressed to the appellant and to Dijana Jovicevic as directors of the said company. As regards this document, Clinton Cachia states that *“This is a copy of the stop order I issued on the same day of the inspection and of course I had confirmed online that Milomir Jovicevic and Ms Diana Jovicevic were Directors of Miramar [recte: Milmar] Construction Limited”*.³ Furthermore, setting aside the declarations made on site by the appellant, as lacking in probative value, once it results that these were made by the said appellant without him having been duly cautioned in terms of law, and without being given his right to legal assistance, the Court notes that after having been given his rights – which appellant does not contest – on 10th January 2022, it results from the testimony of Clinton Cachia that the said appellant was spoken to about the works being carried out on the said site, in his capacity as director of the said company.⁴ Furthermore, when appellant was spoken to by Clinton Cachia on 10th January 2022 at the OHSA offices in relation to the works that were being carried out on the said site, at no time did appellant contest that he was the director of Milmar

³ A fol. 61 of the records.

⁴ *Vide* a fol. 58 and 59 of the records of the proceedings.

Construction Ltd⁵, but being asked about the works and specifically, about the four workers that were on site, he confirmed that these were his employees.

12. As to the grievance that this statement by appellant cannot be deemed admissible once it was made following an earlier statement which he released without having been given his rights at law, the Court does not agree with appellant. Once he was cautioned and given his rights in terms of law, appellant could have exercised his right to remain silent, he could have obtained legal assistance, and he could have also retracted his previous statement. After he was duly cautioned and given his right to legal assistance, the appellant did not merely repeat that which he had stated previously, as he states in his appeal application, but he also went on to confirm that the workers on site were indeed in his employment. Indeed, there is no evidence that the declarations made by the appellant at the Occupational Health and Safety Authority's offices were not made voluntarily, or were extorted with promises of favours or threats or intimidation. The said declarations were made by the appellant voluntarily. Therefore, the rule contained in Article 658 of the Criminal Code invariably applies.
13. It follows that this Court cannot agree with appellant JOVICEVIC when he argues that no proof was brought as to the company's active status at the time of the commission of the alleged offences, or as to his involvement as a director of the said company at the time. The Court further notes that the document exhibited by Bernard Zarb on behalf of Jobsplus, Dok. BZ 2, indicating that the appellant was registered as a full-time employee of Milmar Construction Ltd as from 20th March 2022 was given a context by the said witness⁶, who testified that at the time, Jobsplus had contacted the appellant, requesting him to regularise his position with the Corporation, as he was neither registered as self-employed nor as employed with the said company, and that he had subsequently registered as manager of the said company. Taken within this context, and contrary to that stated by appellant, therefore, this document does not prove that

⁵ *Vide* a fol. 58 and 59 of the records of the proceedings.

⁶ A fol. 12 of the records.

until 20th March 2022, he had no connection with the said company. As stated, other evidence produced proves otherwise.

14. The Court further notes that the declaration made by appellant regarding the workers on site, is also corroborated by the fact that during the inspection, the workers identified the appellant as their employer and furthermore, Cachia noted that the appellant was indeed called on site by the said workers. Although appellant states that the said workers were not brought to testify before the first Court, jurisprudence is clear with regards to the admissibility of *hearsay evidence*. Not every declaration made by a third party, who is not produced as a witness, may be considered to be *a priori* inadmissible as *hearsay evidence*, but the probative value of that declaration by the said third party depends on the use to which it is put as evidence. This means that whilst the declarations of the said workers on site to Clint Cachia, may not serve as evidence of the fact that JOVICEVIC was indeed their employer, or in other words of the veracity of the content of the said declarations, they are proof of the fact that such declarations were made in that context of time and place, and taken together with other evidence, including the declaration made by appellant himself, they serve to prove that appellant was indeed their employer. In this regard, reference is made to the judgement delivered by the Court of Criminal Appeal (Superior Jurisdiction) in the names **Ir-Repubblika ta' Malta vs Angelus Vella** of 30th July 2015, where it was held as follows:

Ilu ben stabbilit minn din il-Qorti, kif anki rilevat mill-ewwel Qorti fis-sentenza tagħha, li mhux kull relazzjoni ta' x'qal ħaddieħor tikkostitwixxi *hearsay evidence* iżda jekk dak rapportat hux *hearsay evidence* jew le jiddependi mill-użu li wieħed jippretendi li jsir minn dak rakkontat. Jekk dak rakkontat jiġi preżentat bħala prova tal-kontenut tiegħu allura dak ikun *hearsay evidence* u bħala tali inammissibbli iżda jekk dak rakkontat jiġi preżentat mhux bħala prova tal-kontenut tiegħu iżda bħala prova li dak li ntqal verament intqal fiċ-ċirkostanzi ta' data, post u ħin li fihom intqal allura dan ma jkunx *hearsay evidence* u huwa ammissibbli għal ċerti għanijiet legali legittimi bħal sabiex tiġi kontrollata x-xiehda diretta tax-xhud li l-kliem tiegħu ikun qiegħed jiġi rapportat jew, fiċ-ċirkostanzi idoneji, anki sabiex tiġi korroborata xiehda diretta oħra.

15. Having therefore established that it is proven beyond reasonable doubt, not merely that the company Milmar Construction Ltd existed at the time in issue, but also that appellant was the director thereof, by application of Article 13 of the Interpretation Act, Chapter 249 of the Laws of Malta, there operates an inversion of the burden of proof onto appellant to show that the alleged offences were committed without his knowledge and that he exercised all due diligence to prevent the commission thereof. Indeed Article 13 of Chapter 249 of the Laws of Malta reads as follows:

Where any offence under or against any provision contained in any Act, whether passed before or after this Act, is committed by a body or other association of persons, be it corporate or unincorporate, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such body or association, or was purporting to act in any such capacity, shall be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence. [emphasis of this Court]

16. As already stated, from the evidence tendered by Bernard Zarb, on behalf of Jobsplus, and particularly with regards to Dok. BZ 2, it results that appellant was registered as a full-time employee of Milmar Construction Ltd as from 20th March 2022⁷. Before such time, however, there was no record of appellant as having been registered as an employee of the said company or as director thereof. Zarb testified that at the time Jobsplus had contacted appellant requesting him to regularise his position with the Corporation, and that he subsequently registered as manager of the company. It therefore follows that the Prosecution successfully proved, beyond any reasonable doubt, that the company Milmar Construction Ltd acted in breach of Article 36 of Chapter 594 of the Laws of Malta in failing to register appellant's employment as its director. On his part, appellant, as director thereof, did not bring any evidence to prove that he was unaware of the illegal wrongdoing of the company and that he had exercised the required diligence to prevent the commission of the offence. In this regard, this Court refers to the judgement delivered by this Court, as differently presided, on 1st September 2020, in the names **Il-Pulizija**

⁷ A fol. 12 of the records.

vs Anthony Ellul, where the Court explored the concept of vicarious liability (albeit in relation to breaches committed by a company against Chapter 372 of the Laws of Malta) and the defence afforded by law to the director of the company in breach of law:

Nonostante l-fatt li l-appellant ried jirrizenja, huwa bhala direttur kellu jassigura li sakemm jibqa' direttur, il-formoli tat-taxxi qeghdin jigu intavolati u l-hlasijiet qeghdin isiru. Wiehed ma jistax ikun direttur u fl-istess hin jiehu pozizzjoni passiva f'dak li jirrigwarda l-obbligi fiskali.

17. Also in the judgement of this Court, as differently presided, of 20th December 2022, in the names **Il-Pulizija vs Mandy Mallia**, the Court referred to another judgement of the said Court in the names **Il-Pulizija vs Clint Debono** of 29th April 2022, where it was held as follows:

Illi fis-sentenza moghtija fl-ismijiet **Il-Pulizija vs Jesmond Sant** din il-Qorti kif diversament ippresjeduta rriteniet is-segwenti:

‘Meta xi haga ssir jew tonqos milli ssir minn persuna li tkun qed tagixxi ghan-nom ta' persuna registrata ghall-finijiet tat-Taxxa fuq il-Valur Mizjud, ghandu jitqies bhallikieku dik il-haga tkun saret jew naqset milli ssir sew minn dik il-persuna l-ohra kif ukoll mill-persuna registrata. Il-persuna registrata, pero', tista tezimi ruha minn din ir-responsabilita' vikarja jekk tipprowa, imqar fuq bazi ta' probabilita' jew (a) li ma kienetx taf u li ma setghetx b'diligenza ragonevoli tkun taf b'dak l-eghmil jew nuqqas jew (b) li tkun ghamlet kull ma setghet taghmel biex izzomm milli jsir dak l-eghmil jew nuqqas. Mela l-persuna registrata trid tkun hi li tipprowa dawn ic-cirkostanzi w dana almenu fuq bazi ta' probabbilita' - li hu l-kriterju tal-grad tal-prova impost fuq l-akkuzat fil-kamp penali, fejn hu tenut li jipprova xi haga.’

18. It follows that the Court of Magistrates (Malta) could have reasonably and legally found guilt in appellant with regards to the offence under Article 36 of Chapter 594 of the Laws of Malta. The same may not be held, however, in relation to the offence under Article 37 of Chapter 594 of the Laws of Malta, insofar as appellant was in the employment of the company as its director, at the time of the commission of the offence. It thus follows that appellant cannot be referred to as a ‘self-employed

person’, in terms of Article 37 of Chapter 594 of the Laws of Malta, apart from the fact that no proof thereof has been adduced by the Prosecution.

19. With reference to the second limb of the charges as proffered against appellant in his capacity as director of Milmar Construction Ltd, the Prosecution charged appellant with having breached Article 43 of Chapter 594 of the Laws of Malta, with reference to the four workers found on site. For appellant JOVICEVIC to be found guilty as aforesaid, it is necessary for the Prosecution to prove beyond reasonable doubt that on 4th January 2022, the four individuals who were found on the relevant construction site at Gharghur, were not citizens of Malta, and were employed by the company Milmar Construction Ltd., without holding the relevant permits or employment licenses.
20. Thus, Article 43 of Chapter 594 makes it clear that in order for a non-citizen of Malta to be considered to be legally employed, any such person must be in possession of a single permit or employment licence. This Court notes that it can be deduced from the passport number provided by only two of the four workers, namely, Sokol Pula and Florian Sarachi, that they were not of Maltese nationality or citizenship. As to the remaining two workers, however, no such evidence was brought. The only reference to the nationality of these workers is made in correspondence sent by David Saliba of OHSa to Bernard Zarb, where the former indicates to the latter that “*All we know is that they are from Albania if this helps*”⁸, which certainly does not constitute proof in terms of law. It is definitely not up to the Court to deduce the nationality of the said workers. In this respect, the Court also notes that Bernard Zarb testified that from a search carried out on the Jobsplus database, it transpired that none of the said workers were registered as employees of the company on 4th January 2022. Yet, this does not translate into sufficient evidence to adduce that the said workers were not in possession of a single permit or employment licence. No evidence was brought forward by Identita` or the Employment Licensing Unit, for instance, to prove that the said workers did not hold a single permit or an employment license, and thus, the Prosecution failed to produce evidence to the degree required by law in this regard. In view of these considerations, the Court finds that appellant’s grievance

⁸ A fol. 6 of the records.

regarding the finding of guilt in respect of this charge, is justified and is therefore being upheld.

DECIDE

For these reasons, this Court is partially upholding the appeal of Milomir JOVICEVIC by confirming that part of the appealed judgement in so far as appellant was found guilty of the offence under Article 36 of Chapter 594 of the Laws of Malta, whilst it revokes that part of the judgement whereby said appellant was found guilty of the offences under Articles 37 and 43 of the said Chapter 594 of the Laws of Malta, and therefore acquits him thereof. Consequently, the Court also revokes that part of the judgement whereby appellant was condemned to the punishment of a fine (multa) of three thousand euro (€3,000) and condemns him instead to a fine (multa) of one thousand and five hundred euro (€1,500).

Natasha Galea Sciberras
Judge