



**In The Criminal Court of Appeal**

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

**Appeal Number: 12/2024/1**

**The Police**

**Vs**

**Sunil Gurung**

**Today, 10<sup>th</sup> July 2024**

The Court.

Having seen the charges brought against **Sunil Gurung**, holder of Identity Card Number 329175A, who was charged before the Court of Magistrates (Gozo) as a Court of Criminal Judicature (hereinafter referred to as the Court of Magistrates) that, on 19 September 2023, at about 17:30 hours, whilst in Rabat Road, Marsalforn, limits of Zebbug, Gozo ;

1. Drove motorcycle make KYMCO with registration number CED 213 without a driving licence and this in violation of Art 15(1)(a) of Chapter 65 and Article 5 of SL 65.18 of the Laws of Malta.
2. Drove motor cycle make KYMCO with registration number CED 213 without being covered by an insurance policy regarding the risks for third parties and this in violation of Art 3(1) of Chapter 104 of the Laws of Malta.

Having seen the Judgement of the Court of Magistrates (Gozo) dated the 15th February, 2024, wherein the appellate was acquitted from the charges brought against him given that the prosecution did not prove that the appellate had been in Malta for over one year and also did not provide *prima facie* evidence that the appellate was not covered under an insurance policy whilst driving the said motorcycle.

Having seen the application of appeal of the Attorney General, presented in the registry of this Court on the 22nd February, 2024, wherein he humbly asked this Honorable Court to;

- Cancel, revoke and annul the appellate judgment, and thus declare Sunil Gurung guilty of the charges brought against him and impose an adequate punishment according to law.

The appellant Attorney General felt aggrieved by the aforementioned judgment delivered by the Court of Magistrates for the following reasons:

That, with all due respect, the appellant disagrees with the judgment of the Court of Magistrates because it made an incorrect assessment of the facts of the case and the evidence brought by the parties and, subsequently, acquitted the appellate from all charges brought against him on the ground that the facts did not contain the elements of the offences he was charged with.

The appellant argues that from the evidence brought by the prosecution before the Court of Magistrates, essentially, the testimonies of PS 1040 John Grima and PC 1151 by means of affidavits, the *viva voce* testimonies of Saviour Farrugia (a Transport Malta Official) and the appellate himself, the residence permit and driving licence of the appellate, and a screenshot confirming that the appellate had no Maltese driving licence, the appellate could have been found guilty of the charges brought against him.

The First Charge - the appellate drove a KYMCO motor cycle bearing registration number CED 213 without a driving licence

The appellant deems it best to commence by considering the articles that are relevant to the offence contained in the first charge, namely, Article 15(1)(a) of Traffic Regulation Ordinance, Chapter 65 of the Laws of Malta, and Regulation 5 of Motor Vehicles (Driving Licences) Regulations, Subsidiary Legislation 65.18 of the Laws of Malta.

Article 15(1)(a) of Chapter 65 of the Laws of Malta states as follows:

*15. (1) Any person who –*

*(a) drives a motor vehicle or other vehicle without a licence or an unlicensed motor vehicle or other vehicle, or in a reckless, negligent or dangerous manner, provided that no licence shall be required in relation to a bicycle; ...*

*shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) not exceeding one thousand and two hundred euro (€1,200) or to imprisonment not exceeding one year.*

Regulation 5 of Subsidiary Legislation 65.18 of the Laws of Malta provides as follows:

*5. The holder of a driving licence issued by the competent authority in a third country may drive in Malta, for a period not exceeding twelve months from the date of his last entry into Malta, any class or description of vehicle covered by the driving licence issued to him by the competent authority in that third country: ...*

The appellant argues that from the aforementioned evidence tendered by the prosecution, the Court of Magistrates should have concluded that all the elements of the offence subsist. First of all, PS 1040 and PC 1151 testified through their affidavits that they caught the appellante red-handed driving the motor cycle bearing registration number CED 213. Therefore, there is no doubt that the appellante was in fact driving such a motor cycle. Secondly, the prosecution exhibited the appellee's driving licence issued by a competent authority in a third country, Nepal. Thirdly, Saviour Farrugia testified and confirmed that the appellee did not have a valid Maltese driving licence and also exhibited a screenshot of the search which he had carried out to substantiate his confirmation.

Moreover, for the sake of clarity, the appellant is not making any reference to the appellante's declaration to PS 1040 during the roadcheck. However, the appellant does make reference to the appellante's *viva voce* testimony before the Court of Magistrates given on the 15th February 2024, specifically, that part which is found on page 11 of the acts of the proceedings, wherein there is stated as follows:

*Inspector Josef Gauci: When you were stopped by the police, how long have you been in Malta and Gozo?*

*The witness: Sorry?*

*Dr Kevin Mompalao: When you were stopped by the police, how long had you been in Gozo or Malta? You know?*

*The witness: One year, Sir, one year plus.<sup>1</sup>*

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<sup>1</sup> Emphasis of the appellant.

Thus, the appellant contends that the appellee himself had admitted in Court that he had been in Malta for more than a year. This renders his Nepal driving licence invalid for driving in Malta and, hence, he was driving the motorcycle without a valid driving licence.

Yet, the Court ignored the appellee's aforementioned declaration and acquitted the appellee from the first charge on the ground of lack of evidence. However, contrary to what the Court of Magistrates held, the appellant asserts that, as explained above, as a result of the aforementioned evidence brought before that Court, the prosecution had managed to prove the offence contemplated in the first charge, that is, that the appellee was driving a KYMCO motor cycle bearing registration number CED 213 without a valid driving licence in violation of Article 15(1) of Traffic Regulation Ordinance, Chapter 65 of the Laws of Malta, and Regulation 5 of Motor Vehicles (Driving Licences) Regulations, Subsidiary Legislation 65.18 of the Laws of Malta.

The Second Charge – the appellee drove a KYMCO motor cycle bearing registration number CED 213 without being covered by an insurance policy regarding the risks for third parties

The appellant again claims that it is best to initiate by analysing the relevant articles of the law, namely, Articles 3(1) and 3(1A) of the Motor Vehicles Insurance (Third-Party Risks) Ordinance, Chapter 104 of the Laws of Malta, which Articles provide as follows:

1. (1) *Subject to the provisions of this Ordinance, it shall not be lawful for any person to use or to cause or permit any other person to use a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be,*

*such a policy of insurance in respect of third-party risks as complies with the requirements of this Ordinance.*

*(1A) It shall be presumed that there was not a policy of insurance in force in terms of sub article (1), unless the person charged with an offence under sub article (1) shall show the contrary through the production of a certificate of insurance issued under article 4(4).*

Our Courts had various opportunities to discuss and delve into the interpretation of the aforementioned Articles and the relevant offences. In this regard, the appellant makes reference to the judgment Il-Pulizija vs Claydon Mifsud, decided by this Honourable Court on 26<sup>th</sup> September, 2023, wherein the Court made a detailed and comprehensive analysis of these Articles and, for the sake of completeness and for clarity of the appellant's argument, it is being reproduced hereunder:

16. Jibda biex jingħad li kif irrimarkat il-Qorti tal-Maġistrati (Malta),<sup>2</sup> jirriżulta kif qabel is-sena elfejn u ħamsa, il-Qrati kienu konsistenti f'interpretazzjoni testwali tal-Artikolu 3(1) u 3(1A) tal-Kapitolu 104 tal-Liġijiet ta' Malta fis-sens li l-preżunzjoni (iuris tantum) tkun tiskatta kull meta jiġi ippruvat li vettura nstaqet fit-toroq mingħajr polza tal-assigurazzjoni għar-riskji ta' terzi persuni. Din il-pożizzjoni ġurisprudenzjali nbidlet fis-sena elfejn u ħamsa b'riżultat tad-deċiżjoni tal-Qorti tal-Appell Kriminali fil-kawża fl-ismijiet **Il-Pulizija vs. Angelo Scuderi** li nġhatat nhar it-3 ta' Novembru 2005 liema insenjament ġie wkoll abbraccjat f'deċiżjonijiet illi segwew fosthom, fil-kawża **Il-Pulizija vs. Stefan Apap**<sup>3</sup> u **Il-Pulizija vs. Charles Galea**.<sup>4</sup>

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<sup>2</sup> Foljo 5 tas-sentenza.

<sup>3</sup> Deciża mill-Qorti tal-Appell Kriminali nhar is-26 ta' April 20[0]7.

<sup>4</sup> Deciża mill-Qorti tal-Appell Kriminali nhar is-7 ta' Mejju 2007.

17. L-insenjament **Scuderi** jiddistingwi bejn dawk il-każijiet fejn għandha tiskatta l-preżunzjoni ikkontemplata fl-Artikolu 3(1A) tal-Kapitolu 104 tal-Liġijiet ta' Malta u dawk il-każijiet fejn ma jkunx jagħmel sens li dan iseħh. Gie rilevat li fl-ewwel lok ikun jiskatta l-mekkanizmu ta' inverzjoni tal-oneru tal-prova fuq l-imputat ai termini tal-Artikolu 3(1A) tal-Kapitolu 104 meta jiġi ippruvat li l-vettura kienet qiegħda tinstaq minn persuna li ma kellhiex ukoll licenzja valida tas-sewqan fit-triq. Fejn imbagħad il-vettura tkun qiegħda tiġi misjuqa minn persuna li tkun fil-pussess ta' licenzja valida tas-sewqan u l-awtoritajiet ikunu jistgħu jaslu għall-identifikazzjoni tal-kumpanija assikuratriċi u daqstant ieħor il-prosekuzzjoni tkun tista' tingunġi sabiex tiddeponi persuna li tikkonferma l-hruġ ta' dik il-polza, ma jkunx jagħmel sens li tiskatta il-preżunzjoni illi mhemmx polza tal-assigurazzjoni.

18. Fl-appell kriminali **Apap** intqal:

Illi għar-rigward tat-tieni imputazzjoni ta' sewqan bla kopertura ta' polza ta' assikurazzjoni kontra r-riskji ta' terzi din il-Qorti tagħmel riferenza għas-sentenza ta' din il-Qorti:

**"Il-Pulizija vs. Angelo Scuderi"** [3.11.2005], fejn il-fattispeċji kienu li Scuderi, fiz-zmien imsemmi fl-akkuza, ma kellux licenzja tas-sewqan pero' kien irrizulta li l-vettura li kien qed isuq kienet koperta b'polza ta' assikurazzjoni.

F' dik il-kawza l-appellant kien silet b'success argument mill-artikolu 10(1) tal-Kap.104 li jgħid testwalment hekk :-

*"Jekk, wara li jkun inhareg certifikat ta' sigurta' taht is-subartikolu (4) ta' l-artikolu 4 ta' din l-Ordinanza lill-persuna li tkun hadet il-polza, tigi*

*moghtija sentenza kontra persuna assicurata bil-polza, dwar responsabbilta' li ghandha tkun koperta minn polza taht is-subartikolu (1) tal-artikolu 4 ta' din l-Ordinanza (meta hija responsabbilta' koperta bil-kondizzjonijiet tal-polza), f' dan il-kaz, ghad li l-assikuratur awtorizzat ikun jista' jannulla jew ihassar, jew ikun annulla jew hassar il-polza, huwa ghandu, bla hsara tad-dispozizzjonijiet ta' dan l-artikolu, ihallas lil-persuni li favur taghhom tkun inghatat is-sentenza, kull somma ta' flus li ghandha tithallas bis-sahha ta' dik is-sentenza dwar ir-responsabbilta' fuq imsemmija ...." (sottolinear ta' din il-Qorti).*

Is-subartikoli (2) u (3) umbaghad jelenkaw serje ta' eccezzjonijiet fejn l-assikuratur awtorizzat ikun ezenti minn tali obbligu ta' hlas.

Illi din il-Qorti kienet allura ddecidiet li minn din id-dicitura ta' dan l-artikolu kif emendat, jidher li una volta li jkun hemm polza ta' assikurazzjoni li tkopri l-vettura in kwistjoni, jekk ikun hemm xi responsabbilta' ghal dejn civili, din tigi rizarcita mill-assikurazzjoni, sakemm ma jirrikorru xi wahda jew aktar mic-cirkostanzi elenkati fissubartikolu (2) u (3), anki meta l-assikuratur ikollu dritt jannulla jew ihassar il-polza, ghaliex, per ezempju, d-driver ma jkollux licenzja. Imma hija l-prosekuzzjoni li trid tipprova li ma jkunx hemm din il-kopertura minnhabba xi cirkostanza indikata fis-subartikolu (2) (3), u sakemm din il-prova ma ssirx minnha, tibqa' l-prezunzjoni li hemm il-kopertura tal-polza kontra r-risjki ta' terzi persuni kif tipprovdi l-ligi fis-subartikolu (1) fuq citat.



Jidher li dan il-kaz bhala fattispecji hu simili hafna ghal dak ta' Scuderi, fejn ukoll irrizulta li l-appellant kien qed isuq vettura li kienet assikurata pero' hu ma kellux licenzja.

Ikkonsidrat;

Illi huwa minnu li bejn l-interpretazzjoni li tat din il-Qorti lill-artikolu 10 (1)(2) u (3) fil-kaz ta' Scuderi fuq citat u l-artikolu 3 (1A) tal-Kap.104 jista' jkun hemm certa kontradizzjoni apparenti.

Din pero' fil-fehma tal-Qorti hija biss apparenti w tista' tigi rikonciljata. Di fatti fejn ikun jidher *prima facie* ghall-prosekuzzjoni minn verifiki preliminari mal-Awtorita' Dwar it-Trasport li l-vettura involuta fil-kaz tkun licenzjata biex tkun fit-triq u allura, bis-sistema amministrattiv prevalenti llum, necessarjament koperta b' polza ta' assikurazzjoni, kif inhu l-kaz prezenti u kif kien dak ta' Scuderi, jibqa' dejjem jinkombi fuq il-prosekuzzjoni li, jekk trid, tipprova li l-kaz tad-driver li ma jkunx licenzjat ma jkunx kopert skond il-polza vigenti kopert bl-istess polza.

Invece fejn dan ma jkunx il-kaz u anki l-karozza ma tkunx licenzjata ghat-triq u allura possibilment u x' aktarx ukoll ma tkunx koperta b' polza, tiskatta il-prezunzjoni kontenuta fl-artikolu 3 (1A) tal-Kap. 104 li titfa' l-oneru li jkun hemm polza ta' assikurazzjoni mahruga taht l-art. 4(4) tal-Ordinanza fuq il-persuna akkuzata.

Fl-ewwel kaz, la darba l-vettura tkun licenzjata, l-Awtorita' Dwar it-Trasport tkun taf ma min hi assikurata l-vettura w din hija facilment identifikabbli ghall-prosekuzzjoni w tkun tista' tigi ngunta biex tiddeponi dwar il-kontenut tal-polza w xi ezenzjonijiet jew limitazzjonijiet li tista' tikkontjeni fit-termini tal-art. 10 tal-Kap.104, billi okkorrendo anki tesibixxi kopja tal-istess polza. F' kazi bhal dawn ikun

assurd li għalkemm jirrizulta car li hemm polza, tiskatta l-prezunzjoni li ma hemmx polza kontenuta fl-art.3 (1A).

Fit-tieni kaz, fejn zgur mhux possibbli għall-prosekuzzjoni li tindovna jekk ikunx hemm assikurazzjoni u, jekk ikun hemm, liema tkun id-ditta assikuratrici, ovvjament mhux mistenni mill-Prosekuzzjoni li tingungi lir-rapprezentanti tal-assikurazzjonijiet kollha tal-pajjiz biex tagħmel il-prova li fuq dik il-vettura ma jkunx hemm polza. Għalhekk jagħmel hafna sens li hawn tiskatta l-prezunzjoni kontenuta fl-art. 3 (1A) bl-inversjoni tal-oneru tal-prova kontra l-persuna akkuzata bir-reat ta' sewqan minghajr kopertura ta' polza t' assikurazzjoni kontra r-riskji ta' terzi.

19. Din il-pożizzjoni ma baqgħetx tiġi abbraccjata mill-Qrati Maltin li rrevertew għall-interpretazzjoni originali tal-Artikolu 3(1) u tal-prezunzjoni kkontemplata fl-Artikolu 3(1A) tal-Kapitolu 104 tal-Liġijiet ta' Malta bħala li tiskatta kull meta 'min jiġi akkuzat b'reat taht is-subartikolu (1) ma jgibx prova kuntrarja billi juri certifikat tal-assigurazzjoni mahruġ taht l-Artikolu 4(4) tal-Kap. 104'. F'dan is-sens inqatgħu l-appelli kriminali fl-ismijiet **Il-Pulizija vs. Joseph Gatt**<sup>5</sup> li giet iċċitata f'diversi sentenzi oħra fosthom fl-appelli kriminali bl-ismijiet **Il-Pulizija vs. Alan Spiteri**<sup>6</sup> u **Il-Pulizija vs. Shawn Fenech**<sup>7</sup> u fejn gie ritenut is-segwenti:

*Issa, traccjat l-insenjament tal-Qrati tul iz-zmienijiet, jidher illi sas-sena 2005, l-Qrati tagħna dejjem fehemu dak li fis-semplicita' tiegħu jipprovi l-artikolu 3 tal-Kap 104, igifieri li hadd ma jista' jsuq vettura bil-mutur*

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<sup>5</sup> Deciża nhar it-18 ta' Jannar 2016 mill-Qorti tal-Appell Kriminali.

<sup>6</sup> Deciża nhar it-30 ta' Settembru 2020 mill-Qorti tal-Appell Kriminali.

<sup>7</sup> Deciża nhar it-3 ta' Mejju 2019 mill-Qort tal-Appell Kriminali.

*jekk ma jkunx debitament assikurat biex jagħmel dan. Dik is-sentenza izda tippertja fuq id-doveri tal-kumpaniji tal-assikurazzjoni u bid-dovut rigward, l-obbligi u l-kundizzjonijiet li l-kumpaniji tal-assikurazzjoni jassumu mal-Awtoritajiet kompriz ir-Regolatur, sabiex tinhargilhom u jzommu fis-sehh il-licenzji tagħhom bhala assikurazzjoni kompriz l-obbligi tagħhom li jieħdu sehem f'pool bhala insurers concerned, ma jistghax jitqies li jeżonera lil kull sewwieq mill-obbligi tiegħu taht il-Kapitolu 104. Tant hu hekk illi, għad li s-sentenza fl-ismijiet Scuderi kien font ta' referenza għal diversi kawzi anke jekk mhix dejjem segwita, l-Qorti tal-Appell kellha ripensament u fissentenza tagħha Il-Pulizija vs Andre Apap tal-4 ta' Frar, 2011 rriteniet illi ma taqbilx mad-distinzjonijiet li saru minn din il-Qorti diversament preseduta fis-sentenzi tagħha Il-Pulizija vs Angelo Scuderi (3.11.2005), Il-Pulizija vs Stefan Apap (26.4.2007) u Il-Pulizija vs Charles Galea (7.5.2007) u oħrajn "dwar meta tiskatta l-prezunzjoni prevista fis-subartikolu 3(1A) tal-Kap 104. Is-subartikolu 3(1A) tal-Kap 104 huwa car u inekwivoku fil-portata tiegħu.<sup>8</sup>*

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<sup>8</sup> Fil-każ fl-ismijiet **Il-Pulizija vs Joseph Gatt**, din l-Onorabbli Qorti ma rat ebda raġuni għaliex kellha tagħti xi interpretazzjoni differenti għall-Artikoli 3(1) u 3(1A) tal-Kapitolu 104 tal-Liġijiet ta' Malta u għalhekk qieset illi l-appellant ma kienx debitament assigurat.

20. Inoltre, fl-appell kriminali Il-Pulizija vs. Andre Apap deciż l-4 ta' Frar 2011 gie rilevat illi:

*Is-subartikolu 3(1A) tal-Kap 104 hu ċar u inekwivoku fil-portata tiegħu: il-preżunzjoni in kwistjoni tiskatta kull meta "...min jiġi akkużat b'reat taht is-subartikolu (1) ma jgibx prova kuntrarja billi juri certifikat tal-assigurazzjoni maħruġ taht l-artikolu 4(4)" tal-Kap. 104. Din id-dispozizzjoni ma thalli lok għall-ebda interpretazzjoni. Qatt ma kien hemm xi htiega li jsir xi sforz biex id-dispozizzjoni tal-artikolu 3(1A) tal-Kap 104 tiġi rikonċiljata permezz ta' proċess ta' interpretazzjoni mad-dispozizzjoni tal-artikolu 10(1) tal-istess Kap għaliex iz-żewġ dispozizzjonijet jirregolaw sitwazzjonijet diversi. L-artikolu 3(1A) tal-Kap 104 jirregola x'jiġri fi proċeduri kriminali għal reat taht l-artikolu 3(1) tal-Kap 104 mentri l-artikolu 10(1) tal-istess Kap jirregola ir-rizarċiment mill-assikurazzjoni għal xi responsabbilta' għal dejn ċivili li għandha tkun koperta minn polza ta' assikurazzjoni. B'dak kollu li hemm fl-artikolu 10(1) tal-Kap 104 il-pożizzjoni li hemm fl-artikolu 3(1A) tal-istess Kap tibqa' mhux mittiefsa u ċioe' li fi proċeduri kriminali għal reat taht l-artikolu 3(1) tal-Kap 104 kemm-il darba l-akkużat ma jgibx prova*

*kuntrarja billi juri ċertifikat tal-assigurazzjoni maħruġ taħt l-artikolu 4(4) jiġi preżunt li ma kienx hemm polza tal-assigurazzjoni*.<sup>9</sup>

21. Issa, l-Artikolu 3(1) tal-Kapitolu 104 tal-Liġijiet ta' Malta jaqra bil-mod segwenti:

*3.(1) Bla ħsara tad-disposizzjonijiet ta' din l-Ordinanza, hadd ma jista' juża jew iġiegħel jew iħalli lil persuna oħra tuża vettura bil-mutur fit-toroq kemm-il darba, għall-użu tal-vettura minnu jew minn dik il-persuna l-oħra, skont il-każ, ma tkunx isseħħ polza ta' assicurazzjoni dwar ir-riskji ta' terzi persuni, skont id-disposizzjonijiet ta' din l-Ordinanza.*

*(1A) Ikun preżunt li ma kienx hemm polza tal-assigurazzjoni fis-seħħ skont is-subartikolu (1), kemm-il darba min jiġi akkużat b'reat taħt is-subartikolu (1) ma jgħibx prova kuntrarja billi juri ċertifikat tal-assigurazzjoni maħruġ taħt l-artikolu 4(4).*

22. Illi bil-kliem tal-Artikolu 3(1) tal-Kapitolu 104 tal-Liġijiet ta' Malta il-Legislatur għamar li l-ebda vettura ma tinstaq fit-toroq mingħajr ma tkun inħarġet fir-rigward ta' **dik il-vettura**, polza tal-assigurazzjoni sabiex terzi

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<sup>9</sup> Emphasis of the appellant.

persuni jigu ittutelati f'każ ta' incidenti jew sinistri stradali imputabbli għall-użu ta' dik il-vettura.

23. Fil-fatt, dan jirrifletti wkoll sa ċertu punt is-sens wara d-Direttiva 2009/103/KE tal-Parlament Ewropew u tal-Kunsill dwar l-assigurazzjoni kontra r-responsabilità ċivili fir-rigward tal-użu tal-vetturi bil-mutur u l-infurzar tal-obbligu ta' assicurazzjoni kontra din ir-responsabilità fejn skont ma jirrizulta mill-preamobolu tal-istess, l-obbligu li għandu jimpingi fuq kull Stat Membru huwa dak li jassigura li tinhareġ polza tal-assigurazzjoni **fir-rigward ta' vetturi** ta' persuni fiżiċi jew ġuridiċi pubbliċi jew privati. Anki l-prinċipju ta' ġurisdizzjoni, skont il-ħames paragrafu tad-direttiva, huwa marbut mat-territorju tal-pjanċa ta' reġistrazzjoni u mhux ma' xi kriterju ieħor rikondučibbli għas-sewwieq ta' dik il-vettura.

24. Huwa minnu li din l-Ordinanza tobbliga assiguratari awtorizzati li jkopru l-ħsarat sofferti minn terzi persuni konsegwenti sinistri jew incidenti stradali daqskemm huwa minnu wkoll li mhux possibbli li assiguratatur awtorizzat johroġ polza tal-assigurazzjoni li ma tkunx tkopri lil terzi persuni. Tant huwa minnu dan li l-artikolu 12(3) tal-istess Ordinanza jgħid li **kull klawżola** li tinsab fil-polza tal-assigurazzjoni li teskludi mill-kopertura tal-assiguratatur taht il-polza tal-użu jew sewqan ta' vetturi bil-mutur minn:

- (a) Persuni li ma jkunux awtorizzati jsuquha;
- (b) Persuni li ma jkollhomx liċenza li tippermettilhom isuqu dik il-vettura;
- (c) Persuni li jiksru l-ħtiġijiet tekniċi stabbiliti li jirrigwardaw il-kodnizzjoni u s-sigurta tal-vettura bil-mutur inkwistjoni **tkun invalida** fir-rigward talbiet għal danni minn terzi persuni.

25. L-artikolu 3(1) tal-Kapitolu 104 tal-Liġijiet ta' Malta però ma jistipulax biss l-obbligu ta' assigurazzjoni ta' vettura bil-mutur dwar riskji ta' terzi persuni fl-astratt. Il-Legislatur rabat dan l-obbligu **mal-użu ta' dik il-vettura bil-mutur fit-toroq mal-użu ta' dik il-vettura bil-mutur magħmul minn persuna jew persuni partikolari**. L-artikolu 3(1) tal-Kapitolu 104 tal-Liġijiet ta' Malta jipprojbixxi l-użu ta' vettura bil-mutur fit-toroq għal kull min – għall-użu ta' dik il-“**vettura minnu jew minn dik il-persuna l-oħra, skont il-każ**” - ma jkunx kopert b'polza ta' assigurazzjoni dwar ir-riskji ta' terzi persuni.

26. Dan l-artikolu allura jgħodq obbligazzjoni kemm fuq min ikollu l-kontroll fuq il-vettura bil-mutur in kwistjoni kif ukoll fuq min ikun jista' juża tali vettura bil-mutur fit-toroq.

27. Taht l-ewwel kategorija, kwalifikata bil-verbi “*iġieghel jew iħalli*” lil persuna oħra tuża vettura bil-mutur fit-toroq, jidhlu s-sid ta' dik il-vettura jew kwalunkwe persuna oħra li b'xi mod ikollha setgħa jew kontroll fuq l-użu ta' dak il-vettura bil-mutur fit-toroq b'mod li sabiex dik il-vettura tkun tista' tinstaq fit-toroq ikun jehtieg l-għarfien, kunsens, jew l-awtorizzazzjoni tagħha sabiex il-persuna li tkun trid issuq dik il-vettura takkwista l-aċċess għal dik il-vettura mingħandha.

28. Taht it-tieni kategorija jaqgħu dawk il-persuni kollha, awtorizzati jew mhumiex, li b'xi mod jiġu fil-kontroll ta' vettura bilmutur b'mod li jużawha fit-toroq.

29. Allura dan ifisser li dan l-artikolu 3(1) tal-Kapitolu 104 tal-Liġijiet ta' Malta ma jehtiegx **biss** li vettura bil-mutur trid tkun koperta b'polza tal-assigurazzjoni dwar ir-riskji ta' terzi persuni sabiex tkun tista' tinstaq fit-toroq. Li kieku kien hekk, il-Legislatur ma kienx jikteb dan l-artikolu 3(1) bil-mod kif inhu miktub u ċjoe li hadd ma jista' juża jew iġieghel jew iħalli

lil persuna oħra tuża vettura bil-mutur fit-toroq kemm-il darba, **għall-użu tal-vettura minnu jew minn dik il-persuna l-oħra**, skont il-każ, ma tkunx isseħħ polza ta' assigurazzjoni dwar ir-riskji ta' terzi persuni, skont iddisposizzjonijiet ta' din l-Ordinanza; iżda kien jagħmar sempliċiment li hadd ma jista' juża jew iġieghel jew iħalli lil persuna oħra tuża vettura bil-mutur fit-toroq kemm-il darba ma tkunx isseħħ polza ta' assigurazzjoni dwar ir-riskji ta' terzi persuni, skont iddisposizzjonijiet ta' din l-Ordinanza.

30. Li kieku bl-artikolu 3(1) tal-Kapitolu 104 tal-Liġijiet ta' Malta il-Legislatur ried jippenalizza **biss** l-ipoteżi fejn ma jkunx hemm polza ta' assigurazzjoni dwar riskji ta' terzi persuni maħruġa fuq vettura bilmutur partikolari – irrispettivament jekk minn min jużaha jkunx kopert b'dik il-polza jew le – allura kien sempliċiment iħalli barra l-frażi “**għall-użu tal-vettura minnu jew minn dik il-persuna l-oħra**” mill-artikolu 3(1) imsemmi. Iżda l-inkluzjoni ta' dik il-frażi ma kienetx biss xi żieda kożmetika, u għalhekk dik il-frażi giet inkluża għal raġuni.

31. Ladarba l-Legislatur għamar li hadd ma jista' juża jew iġieghel jew iħalli lil persuna oħra tuża vettura bil-mutur fit-toroq kemm-il darba, **għall-użu tal-vettura minnu jew minn dik il-persuna l-oħra**, skont il-każ, ma tkunx isseħħ polza ta' assigurazzjoni dwar ir-riskji ta' terzi persuni, loġikament iffisser li b'dik il-frażi l-Legislatur ried li jorbot l-obbligu tal-kopertura assikurattiva marbuta mal-użu ta' dik il-vettura bil-mutur fit-toroq **speċifikament** mal-użu tal-vettura minn dik il-persuna li b'xi mod ikollha kontroll fuq l-użu ta' dik il-vettura jew mill-persuna li effettivament tuża dik il-vettura bil-mutur fit-toroq.

32. U allura dan ifisser ukoll illi, indipendentement mill-obbligu statutorju li l-assiguraturi awtorizzati għandhom versu t-terzi persuni kwantu għal rizarċimenti ċivili għal danni sofferti konsegwenti incidenti jew sinistri stradali, il-Legislatur ried jassikura li kull min ikollu taht idejh il-kontroll



ta' vettura bil-mutur, jew juza tali vettura bil-mutur fit-toroq ikun kopert dwar ir-riskji ta' terzi persuni billi jkun ukoll inkluz f'dik il-polza tal-assigurazzjoni li tkun mahruġa għall-użu minnu ta' dik il-vettura bil-mutur fit-toroq bħala sewwieq legalment awtorizzat.

**33. Għalhekk huwa d-dmir ta' min ikun fil-kontroll ta' vettura bil-mutur nonche ta' min juza dik il-vettura bil-mutur fit-toroq li jaċċerta kemm li jkun hemm tali polza tal-assigurazzjoni dwar riskji ta' terzi persuni li tkun fis-seħħ fil-perjodu rilevanti, kif ukoll li din tkun tkopri s-sewqan ta' dik il-vettura bil-mutur fit-toroq, kif ukoll li din il-polza tkun tinkludi lilu - bħala persuna li għandha kontroll fuq dik il-vettura bil-mutur jew li jkun utent ta' dik il-vettura bil-mutur fit-toroq - fost dawk il-persuni jew kategoriji ta' persuni li jkunu inkluzi f'dik il-polza tal-assigurazzjoni b'mod li allura jkunu koperti taħt dik il-polza tal-assigurazzjoni dwar ir-riskji ta' terzi persuni bħala sewwieqa legalment awtorizzati.<sup>10</sup>**

**34. Għaldaqstant, l-eżami rikjest li jsir mill-artikolu 3(1) tal-Kapitolu 104 tal-Liġijiet ta' Malta huwa wiehed dupliċi u li jeħtieġ li tiġi determinata l-ko-eżistenza:**

**(a) tal-kriterju oġġettiv jekk tkunx fis-seħħ polza tal-assigurazzjoni li tkun tkopri l-użu tal-vettura bil-mutur de quo fit-toroq f'dak il-perjodu ta' żmien partikoli; magħqud mal-**

**(b) kriterju soġġettiv jekk il-persuna li tkun qegħda fil-kontroll ta' dik il-vettura bil-mutur jew li tkun qed tuża dik il-vettura bil-mutur fit-toroq tkunx koperta bħala sewwieq legalment awtorizzat taħt l-istess polza tal-assigurazzjoni.<sup>11</sup>**

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<sup>10</sup> Enfasi tal-esponent.

<sup>11</sup> Emphasis of the appellant.

35. B'hekk persuna tkun tista' tagħmel użu anki minn vettura li mhix proprjetarja tagħha dment li hija **tkun ukoll** koperta għall-użu ta' dik il-vettura skont il-polza tal-assigurazzjoni li tkun inħarġet fuq dik il-vettura billi tkun persuna inkluża bħala sewwieq legalment awtorizzat taht dik il-polza.

36. Allura l-użu tal-vettura fit-triq jista' jsir kemm minn persuna li tkun sid dik il-vettura kemm ukoll minn persuna oħra li għad li ma tkunx sid dik il-vettura jew persuna li tikkontrolla dik il-vettura bil-mutur, tkun għet awtorizzata jew imġieghla ssuqha minn dik ilpersuna li tkun is-sid tal-vettura bil-mutur jew li b'xi mod ikollha kontroll fuq l-użu ta' dik il-vettura fit-triq. Minn dan allura jsegwi wkoll li **mhux kull persuna li ssuq vettura bil-mutur fit-triq neċessarjament tkun dik il-persuna li tkun ħarġet il-polza tal-assigurazzjoni fuq dik il-vettura.**

37. L-Artikolu 4(4) tal-Kapitolu 104 tal-Liġijiet ta' Malta jgħid li polza tal-assigurazzjoni tkun tista' titqies li kienet magħmula skont il-Liġi u għalhekk valida, jekk l-assiguratur awtorizzat jorogġ ċertifikat fil-forma stabbilita **lill-persuna li ħadet il-polza.**

38. Ikun ukoll isegwi li sabiex il-persuna passibbli għal reat magħmul bi ksur tal-Artikolu 3(1) tal-Kapitolu 104 tal-Liġijiet ta' Malta teżimi ruhha mir-responsabilita' penali, hija trid jipprova sal-livell tal-probabbli li fir-rigward tas-sewqan ta' dik il-vettura bil-mutur fit-toroq tkun inħarġet polza tal-assigurazzjoni valida skont id-dettami tal-Artikolu 4(4) tal-Kapitolu 104 tal-Liġijiet ta' Malta u li tali polza kienet valida anki fiż-żmien li jaqa' fil-parametri tal-imputazzjonijiet kif ipprospettati mill-Prosekuzzjoni fil-konfront tagħha, kif ukoll li dik l-istess persuna kienet ukoll sewwieq legalment awtorizzat ta' dik il-vettura bil-mutur fit-toroq skont l-istess polza tal-assigurazzjoni.<sup>12</sup>

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<sup>12</sup> Emphasis of the appellant.

39. Id-distinzjoni bejn sid il-vettura jew min ikollu kontroll fuq dik il-vettura jew minn assigurat u kull sewwieq ieħor li jista' jkun qieghed jagħmel użu minn dik il-vettura, terġa' wkoll tirrizulta fl-Artikolu 7 tal-Kapitolu 104 tal-Liġijiet ta' Malta li tgħid:

Il-persuna li titlob liċenza jew it-tigdid ta' liċenza għal vettura bil-mutur għandha ggħib prova kif jiġi stabbilit illi jew-

(a) li fid-data meta l-liċenza jibda jkollha effett tkun isseħħ il-polza ta' assigurazzjoni meħtieġa għall-użu tal-vettura **mir-rikorrent jew minn persuni oħrajn b'ordni tiegħu jew bil-permess tiegħu**;<sup>13</sup> inkella

(b) li l-vettura hija wahda li għaliha jgħodd l-artikolu 3(4).

40. **Inoltre, r-reat ikkontemplat fl-Artikolu 3(1) tal-Kapitolu 104 tal-Liġijiet ta' Malta huwa 'strict liability offence'.**<sup>14</sup> Skont l-insenjamenti tal-Professur Mamo,<sup>15</sup> l-offiżi li jitqiesu 'strict liability offences' huma eċċezzjoni għar-regola 'actus non facit reum nisi mens sit rea' in kwantu:

*Strict liability offences do not require proof of fault and provide for a defence of an honest and reasonable mistake of fact. It is generally considered justified to impose strict liability to protect public health, safety and the environment.<sup>16</sup> It may also be imposed for regulatory offences. The general principle is that strict liability may be imposed where a person is*

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<sup>13</sup> Enfasi miżjuda mill-Qorti.

<sup>14</sup> Emphasis of the appellant.

<sup>15</sup> LL.B. I - First Year Criminal Law (Mamo Notes) Revamped by GhSL - Notes and Past Papers - accessed: 8 ta' Novembru 2022

<sup>16</sup> Enfasi ta' din il-Qorti

*placed on notice to guard against the possibility of inadvertent contravention.*

*.../...*

*'In determining whether an Act does create this more stringent prohibition, regard must be had to the object of the statute, the words used, the nature of the duty, the person upon whom it is imposed, the person by whom it would in ordinary cases be performed, and the person upon whom the penalty is imposed. In general, where the words of a modern statute amount to an absolute prohibition of a certain act without any reference to the state of mind of the actor, 'mens rea' is not an essential ingredient of the offence; and in such a case any inquiry as to the intent which actuated the accused would be immaterial - except, perhaps, with a view to the mitigation of the punishment.<sup>17</sup> (Blake-Odgers, op.cit. Vol I. 114). (page 73 ).*

41. Fejn il-Legislatur ried li jimponi regoli stretti biex jinforza aħjar ċerti projibizzjonijiet huwa ma ippermettix derogi. Minn qari testwali tal-Liġi stess jemerġi li s-sanzjoni hemmhekk ikkontemplata u r-reita' għall-ksur tal-istess tiskatta mal-mument illi jiġi ippruvat fattwalment li sar dak il-ksur.

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<sup>17</sup> Enfasi miżjuda.

42. Skont il-Professor Mamo<sup>18</sup> il-każijiet ta' 'strict liability' jammettu wkoll difiża fuq 'reasonable mistake of fact'. Ġurisprudenza kostanti tqis li mhux kull 'żball' jew 'mistake of fact' huwa ammess bhala difiża biex wiehed jeżimi ruhu mir-responsabilita' kriminali dwar ksur ta' xi liġi. Dan l-iżball irid ikun wiehed **essenzjali** nonche' li jolqot wiehed mill-elementi essenzjali tar-reat u jrid ikun ukoll **inevitabbli** tant li anki jew huwa juża' d-diligenza u l-prudenza kollha mehtieġa, xorta waħda kien jaqa' f'dan l-istess żball. Huwa biss jekk l-akkużat jirnexxilu jipprova dawn iż-żewġ elementi li tiġi newtralizzata rresponsabilita' kriminali. Fl-appell kriminali **Il-Pulizija vs. Hadrian Busietta** deċiż nhar it-28 ta' April 2010 gie ritenut:

*Din il-Qorti ma taqbilx. Apparti li zball ta' fatt, biex jinnewtralizza rresponsabbilta` penali, irid ikun zball 'essenzjali' (jigifieri zball dwar xi wiehed mill-elementi mehtieġa għall-eżistenza tar-reat – f'dan il-kaz ma hemmx kontestazzjoni dwar l-essenzjalita` ta' l-iżball), fil-kaz tar-reat kontemplat fl-Artikolu 3(1) in dizamina jrid ikun ukoll zball 'inevitabbli', cioe` li ma setax jigi evitat bl-uzu ta' attenzjoni normali.*

*"Din il-Qorti ma taqbilx. Apparti li zball ta' fatt, biex jinnewtralizza rresponsabbilta` penali, irid ikun zball 'essenzjali' (jigifieri zball dwar xi wiehed mill-elementi mehtieġa għall-eżistenza tar-reat – f'dan il-kaz ma hemmx kontestazzjoni dwar lessenzjalita` ta' l-iżball), fil-kaz tar-reat kontemplat fl-Artikolu 3(1) in dizamina jrid ikun ukoll zball 'inevitabbli', cioe` li ma setax jigi evitat bl-uzu ta' attenzjoni normali.*

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<sup>18</sup> LL.B. I - First Year Criminal Law (Mamo Notes) Revamped by GhSL - Notes and Past Papers - Issuu access 23 ta' Novembru 2022.

43. Hekk ukoll fl-appell kriminali **Il-Pulizija vs. Rennie sive Nazzareno Agius** deciż nhar il-11 ta' Lulju 2002, ġie mistqarr:

*Illi umbaghad dik il-parti tal-motivazzjoni tas-sentenza appellata fejn intqal li l-Libjan waqqa' lill-appellat fi zball , li ovojament qed tirriferi ghal zball ta' fatt jew "mistake of fact" , ukoll ma tidhirx accettabbli , ghaliex biex zball ta' fatt ikun skuzanti fil-kaz tad-dritt penali , hemm bzonn li mhux biss ikun zball ta' natura essenzjali , imma irid ikun "INEVITABBLI" (enfasi tal-Qorti). Jigifieri anki kieku l-appellat verament emmen li l-libjan kellu permess jew licenzja biex jahdem hawn Malta u mhux biss kellu passaport biex ikun Malta , dan it-twemmin zbaljat ma kienx wiehed inevitabli . Ghaliex kif jghid l-istess Prof. Sir. Anthony Mamo (ibid. p. 98):-*

*"The mistake must be 'inevitable' , that is, such that it could not be avoided by the exercise of reasonable care.*

The appellant makes also reference to the judgment **Il-Pulizija vs Moira Micallef**, decided by this Honourable Court on 28<sup>th</sup> March 2023, (which judgment was subsequently cited in the judgment **Il-Pulizija vs Christian Calleja**, decided by this Honourable Court on 14<sup>th</sup> December 2023) wherein, after also making reference to our courts' aforementioned jurisprudence, including the aforementioned judgments **Il-Pulizija vs Angelo Scuderi** and **Il-Pulizija vs Stefan Apap**, the divergence on the

interpretation of Article 3(1) of Chapter 104 of the Laws of Malta and the proof regarding the insurance, held as follows:

Kap. 104 tal-Ligijiet ta' Malta jixbah hafna l-ligi Ingliza u cioe' r-*Road Traffic Act* 1988. Lord Denning fis-sentenza *Nettleship v. Weston*<sup>19</sup> qal hekk:

*“Parliament requires every driver to be insured against third party risks. The reason is so that a person injured by a motor car should not be left to bear the loss on his own, but should be compensated out of the insurance fund. The fund is better able to bear it than he can. But the injured person is only able to recover if the driver is liable in law. So the judges see to it that he is liable”*

Referenza ghar-**Road Traffic Act** indikat *supra* saret ukoll fis-sentenza **Il-Pulizija vs Jonathan Grech**.<sup>20</sup> Din is-sentenza taghat interpretazzjoni differenti ghall-Artikolu 3(1) tal-Kap. 104 tal-Ligijiet ta' Malta u ghamlet ukoll referenza ghal xi sentenzi ohrajn:

*“ILli kif gie ritenut fl-Appell Kriminali “Il-Pulizija vs. Plamen Petkov” [2.11.2006]:-*

*.... gie ritenut minn din il-Qorti fl-Appell Kriminali “Il-Pulizija vs. Peter Paul Micallef” [18.9.2002] meta kienet saret ukoll riferenza ghas-sentenza “Il-Pulizija vs. Carlo Abela” [15.07.96] fejn din il-Qorti irriteniet li galadarba persuna ma*

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<sup>19</sup> [1971] 2 QB 691 p699.

<sup>20</sup> Deciza mill-Qorti tal-Appell Kriminali nhar il-25 ta' Jannar, 2007.

*jkollhiex licenzja tas-sewqan, hi ma tistax tkun koperta b' polza ta' assikurazzjoni u fil-fatt dik hi l-pozizzjoni legali, għax galadarba jiġi pruvat li d-driver ma jkollux driving licence, ebda insurance ma tkoprieh.<sup>21</sup> Jekk umbagħad id-driver ikun daqstant fortunat li jsib xi assikurazzjoni li lesta li tkoprieh anki meta ma jkunx licenzjat biex isuq, jispetta lillu biex jagħmel il-prova ta' tali kopertura u mhux lill-Prosekuzzjoni li tipprova li dik il-karozza partikolari ma kienetx koperta b'polza ta' assikurazzjoni jew li tali assikurazzjoni ma tkunx tkopri lil dak id-driver.<sup>22</sup> Biex issir tali prova altrimenti kull darba jkunu iridu jigu prodotti bhala xhieda r-rapprezentanti tal-assikurazzjonijiet kollha li joperaw f'Malta u Ghawdex biex jiddikjaraw jekk hemmx polza għall-dik il-vettura jew le u f'kaz li iva jekk id-driver individwalment hux kopert . F'kull kaz, anki kieku il-karozza tkun koperta b'assikurazzjoni, dan ma jfissirx li kull driver li jirkeb fiha, ikunx licenzjat jew le, ikun ukoll kopert b'polza kontra r-riskji tat-terzi persuni għax jistghu ikun hemm restrizzjonijiet dwar min ikun kopert b'polza partikolari.<sup>23</sup>*

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<sup>21</sup> Enfasi tal-esponent.

<sup>22</sup> Enfasi ta' din il-Qorti.

<sup>23</sup> Din is-sentenza giet iċċitata fis-sentenzi fl-ismijiet Il-Pulizija vs Tarquin Vella, mogħtija minn din l-Onorabbli Qorti fit-23 ta' Marzu 2021 u Il-Pulizija vs Mohammed Knaan mogħtija minn din l-Onorabbli Qorti fis-7 ta' Frar 2023.



“Illi l-artikolu 3 (1) tal-Kapitolu 104 tal-Ligijiet ta’ Malta jiddisponi li:-

“Hadd ma jista’ juza ..... vettura tal-mutur fit-toroq kemm il-darba għall-uzu tal-vettura MINNU (enfasi ta’ din il-Qorti) ..... ma tkunx tezisti polza ta’ sikurta’ dwar ir-riskji tat-terzi persuni....”

“Illi t-test tal-ligi Ingliza li tkopri dimaterja u cioe’ Sec. 143(1)(a) tar-Road Traffic Act huwa kwazi identiku għall-dan l-artikolu w jghid testwalment:-

*“a person must not use a motor vehicle on the road unless there is in force in relation to the use of the vehicle BY THAT PERSON (enfasi tal-Qorti) such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act...”*

“Illi l-pozizzjoni fil-ligi u l-Qrati Inglizi hi hekk ukoll. Di fatti kif jghid l-ARCHBOLD [Criminal Pleading, Evidence and Practice, 1998, London, Sweet & Maxwell, p. 2417] fl-osservazzjonijiet tieghu fuq dar-reat analogu tal-ligi Ingliza:-

*“The Prosecution has to prove that the defendant used a vehicle on the road. Once that is established, it is for defendant to prove that there was a valid policy of insurance in force at the time: Philcox vs Carberry {1960} Crim. L.R. 563, D.C.”*

*Illi saret f’ dik is-sentenza riferenza ukoll ghall Criminal Law Review, 1960 li b’riferenza ghal din is-sentenza fuq citata, kkumenta hekk:-*

*“It is an established rule of evidence that where the truth of the party’s allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it lies upon the latter.” {Halsbury’s Laws of England, 3rd edn, Vol.15, 270} In the Criminal Law, it is submitted that the rule should be confined to cases where it is an offence to do some act in the absence of a licence or permission and similar cases. It was stated by Talbot J., obiter, in Williams v. Russell (1933) 149 L.T. 190, that on a charge of using a motor vehicle without there being in force a policy of insurance, the onus was on the accused to prove he had a policy. This would seem, with*

*respect, a proper application of the principle and is confirmed by the present case."*

*Umbaghad* BLACKSTONE'S  
CRIMINAL PRACTICE (1992)  
[Blackstone Press Limited, p.1788]  
*jgħid:-*

*"In the case of driving without a licence, it is for the accused driver to prove that he is insured. (Williams v. Russell [1933] 149 LT 190; Philcox v. Carberry [1960] Crim. L.R. 563).*

*Għal dawn il-motivi, din il-Qorti qed tichad l-appell u tikkonferma sentenza appellata, b' dan li l-iskwalifika tal-licenzja kollha tas-sewqan tibda' ssehh minn nofs il-lejl (12 pm) tal-lum."*

In the aforementioned judgment **Il-Pulizija vs Moira Micallef**, after also having made reference to the judgment **Il-Pulizija vs Joseph Gatt** and after having provided an extract of what had been declared in Parliament when this law was being discussed,<sup>24</sup> this Honourable Court claimed the following:

*In vista tas-suespost, din il-Qorti temmen illi mhux biss il-vettura għandha tkun assigurata kif enfasizzat l-Ewwel Qorti, izda*

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<sup>24</sup> Ara folii 24 sa 28 tas-sentenza.

*wkoll is-sewwieq li jkun qiegħed isuq il-vettura. Fil-kaz odjern, is-sewwieq Ryan Azzopardi, ma kellux licenzja tas-sewqan u għalhekk dan ma setax ikun kopert bil-polza tal-assigurazzjoni esebita fl-atti. Oltra minn hekk, l-unika sewwieqa indikata fil-polza hija l-appellata Moira Micallef.*

In the judgment **Il-Pulizija vs Anthony Galea**,<sup>25</sup> this Honourable Court explained as follows:

*27. Illi l-Artikolu 3(1) tal-Kapitolu 104 tal-Liġijiet ta' Malta jipprojbixxi l-użu ta' vettura bil-mutur fit-toroq meta dik il-vettura ma jkollhiex maħruġa fil-konfront tagħha polza ta' assicurazzjoni għar-riskji ta' terzi persuna. Il-polza tinħareġ f'isem persuna speċifika u tkun tkopri r-riskji relattivi u deroanti mis-sewqan ta' dik il-vettura partikolari li fir-rigward tagħha tkun inħarget l-imsemmija polza. Il-polza assikurattiva tkun allura marbuta ma vettura speċifika. L-Artikolu 3(1A) tal-Kapitolu 104 tal-Liġijiet ta' Malta jikkreja preżunzjoni (iuris tantum) li ma jkunx hemm polza t'assikurazzjoni fis-seħħ kemm il-darba min ikun gie mixli bir-reat imsemmi fl-artikolu 3(1) tal-Kapitolu 104 tal-Liġijiet ta' Malta ma jgħibx prova li kien fil-pussess ta' polza t'assikurazzjoni.*

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<sup>25</sup> Deċiż fl-20 ta' Diċembru 2022.

Moreover, in the Il-Pulizija vs Ahmad Aljooma, decided on 1<sup>st</sup> December 2023, this Honourable Court stated as follows:

*Illi, konsegwentement tenut kont tad-dicitura tal-ligi applikabbli għal din l-imputazzjoni in dizamina, ma setatx l-Ewwel Qorti tgħaddi biex tillibera lill-appellat mit-tieni imputazzjoni miġjuba kontra tiegħu meta mhux biss kien ippruvat illi huwa kien qiegħed isuq vettura mingħajr licenzja valida tas-sewqan, iżda ukoll meta huwa naqas milli iressaq il-prova permezz ta' ċertifikat tal-assigurazzjoni illi is-sewqan tiegħu kien kopert b'polza tal-assigurazzjoni valida. Dan għaliex l-Artikolu 3 tal-Kapitolu 104 tal-Liġijiet ta' Malta jipprospetta l-ħtija tal-persuna li ssuq vettura meta l-polza ta' l-assigurazzjoni ma tkopriex tali sewqan minn dik il-persuna. Din il-prova ma ssirx mill-Prosekuzzjoni, iżda trid issir mill-persuna mputata, prova li neċessarjament hija f'idejha bħala dik il-persuna li hija mixlija bl-att vjolattiv. Dan għaliex hekk kif ikun hemm ix-xilja taħt il-Kapitolu 104, hemm il-presunzjoni illi ma kienx hemm polza ta' l-assigurazzjoni, liema presunzjoni trid tingħeleb mill-persuna mixlija bir-reat. Illi din il-prova ssir bil-produzzjoni ta' ċertifikat ta' l-assigurazzjoni li*

*għandu jkun jikkonforma mar-rekwiżiti stabbilit fl-artikolu 4(4) ta' l-Att, u fuq kollox illi dan iċ-ċertifikat huwa tali li jkopri kwalunkwe ħsara li talvolta tista' tkun minnu kkaġjonata waqt li hu kien qiegħed isuq il-vettura.*<sup>26</sup>

Illi, t-test bl-Ingliż ta' din id-disposizzjoni tal-liġi, fil-fehma tal-Qorti huwa iktar ċar u inekwivoku meta hemm hekk dispost:

*Subject to the provisions of this Ordinance, it shall not be lawful for any person to use or to cause or permit any other person to use a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance in respect of third-party risks as complies with the requirements of this Ordinance. (enfazi tal-Qorti)*

Illi, id-dicitura adoperata għalhekk tinneċċessita prova dwar l-eżistenza ta' polza tal-assigurazzjoni li tikkonforma ruħha mar-rekwiżiti stabbiliti fl-Ordinanza u li tkopri lis-sewwieq li jkun kiser il-liġi u li hi maħruġa favur tagħha, u dan skont id-disposizzjonijiet tal-artikolu 4(4) tal-Att. F' dawn iċ-ċirkostanzi probatorji l-Qorti ma tarax illi l-appellat jista' jgħid mir-responsabbiltà penali għal din l-infrazzjoni tal-liġi meta huwa evidenti illi huwa lanqas biss kien liċenzjat li jsuq. Għalhekk, fid-dawl ta' dawn il-konsiderazzjonijiet il-Qorti tqies li l-aggravju mressaq mill-Avukat

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<sup>26</sup> Emphasis of the appellant.

Ġenerali jisthoqqlu akkoljiment u li l-Ewwel Qorti errat meta għaddiet sabiex tillibera lill-appellat mit-tieni mputazzjoni dedotta fil-konfront tiegħu.

Additionally, the appellant makes reference to the UK judgment, *Director of Public Prosecutions v Hay*,<sup>27</sup> wherein the UK Court declared that:

*It has long been the law that in prosecutions both for driving without a licence and for driving without insurance, once the prosecution have proved that the defendant drove a motor vehicle on a road, then it is for the defendant to show that he held a driving licence and that there was in force an appropriate policy of insurance, since these are matters that are peculiarly within his knowledge: see the decision of this court in John v Humphreys [1955] 1 All ER 793, which was followed in Philcox v Carberry [1960] CLR and DPP v Kavaz [1999] RTR 81.<sup>28</sup>*

Thus, taking cognisance of all the above, the appellant contends that **the current position (in line with the more recent judgments) is that, as per Articles 3(1) and 3(1A) of Chapter 104 of the Laws of Malta, when a person is accused of driving a vehicle without there being in force an insurance policy in respect of third party risks, irrespective of whether he has a valid driving licence or not, there is the presumption that no insurance policy in respect of third party risks is in force and that such a presumption must be rebutted by the accused person. This is rebutted by the accused providing a certificate of insurance issued in accordance with the requirements mentioned in Article 4(4) of Chapter 104 of the Laws of Malta. Such**

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<sup>27</sup> [2005] EWHC 1395 (Admin).

<sup>28</sup> *ibid* [9].

**an insurance policy must cover any damages that could be caused by the person driving the vehicle in question. Thus, in line with the aforementioned Articles 3(1) and 3(1A), there is the inversion of proof, in the sense that the accused must prove that he was covered by an insurance policy in respect of third party risks when he was driving the particular vehicle, and, in accordance with recent judgments, this is independent on whether the accused has a valid driving licence or not.**

The appellant further argues that in line with the aforementioned jurisprudence, such an insurance policy regarding third party risks must be:-

- (i) in force in the relevant period,
- (ii) (ii) covers the driving of that particular motor vehicle on the roads, and
- (iii) (iii) includes the driver - as a person who has control over that motor vehicle or is a user of that motor vehicle on the roads - among those persons or categories of persons who are included in that insurance policy as drivers legally authorised to drive the vehicle.

The appellant further asserts that the Court of Magistrates erred when it acquitted the appellante from the second charge on the basis that the prosecution did not provide *prima facie* evidence that the vehicle and appellante were not covered under an insurance policy in respect of third party risks. This is because the prosecution did not have to provide such a proof. It did not even have to prove that the appellante did not have a valid driving licence for this charge. All that it needed to prove was that the appellante was driving the vehicle in question and this it did provide through the testimonies of PS 1040 and PC 1151, who caught the appellante red-handed driving the KYMCO motor cycle bearing registration number CED 213.

On the other hand, it was up to the appellante to prove his innocence by providing a certificate of insurance issued in accordance with Article 4(4) of Chapter 104 of the Laws of Malta. Such a certificate should have confirmed that the relative insurance policy in respect of third party risks (i) was in force on 19<sup>th</sup> September 2023, (ii) covered the driving of that KYMCO motor cycle bearing registration number CED 213



on the roads, and (iii) included the appellate as one of the drivers legally authorised to drive the said vehicle. However, the appellate failed to provide such a certificate of insurance to the Court. Hence, the prosecution had managed to prove the offence contemplated in the second charge, that is the appellate drove a KYMCO motor cycle bearing registration number CED 213 without being covered by an insurance policy in respect of third party risks, in violation of Article 3(1) of the Motor Vehicles Insurance (Third-Party Risks) Ordinance, Chapter 104 of the Laws of Malta.

Thus, the appellant claims that, from an analysis of the evidence tendered before the Court of Magistrates, it can be ascertained that all the elements of the offences contemplated in the charges brought against the appellee subsist. Hence, **the Court of Magistrates could not have reasonably and legally acquitted the appellate from the charges brought against him. To the contrary, it should have found the appellate guilty beyond reasonable doubt of the said charges and inflicted the relevant punishment.**

Having seen the relevant acts of the proceedings.

Having heard the parties make their submission before her during the Court sitting dated 13th June 2024.

Considers further;

That appellant's grounds of appeal are based on the First Court's wrong evaluation of the evidence. Now it has been firmly established in local and foreign case law that both in cases of appeals from judgements of the Magistrates' Courts as well as from judgements of the Criminal Court, with or without a jury, that the Court of Criminal Appeal does not disturb the evaluation of the evidence made by the Court of first instance, if it concludes that that Court could have reached that conclusion reasonably and legally. In other words this Court does not replace the discretion exercised by the Court of first instance in the evaluation of the evidence, but makes a thorough examination of the evidence to determine whether the Court of first instance was reasonable in reaching its conclusions. However, if this Court concludes that the Court

of first instance could not have reached the conclusion it reached on the basis of the evidence produced before it, than that would be a valid – if not indeed a cogent reason – for this Court to disturb the discretion and conclusions of the Court of first Instance (confer: “*inter alia*” judgements of the Court of Criminal Appeal in the cases :**Ir-Republika ta’ Malta vs. George Azzopardi**<sup>29</sup>; **Il-Pulizija vs. Carmel sive Chalmer Pace**<sup>30</sup> ; **Il-Pulizija vs. Anthony Zammit**<sup>31</sup> and others.)

This Court also refers to what was held by LORD CHIEF JUSTICE WIDGERY in “**R. v. Cooper**<sup>32</sup>” (in connection with section 2 (1) (a) of the Criminal Appeal Act, 1968) :-

*“Assuming that there was no specific error in the conduct of the trial, an appeal court will be very reluctant to interfere with the jury’s verdict (in this case with the conclusions of the learned Magistrate), because the jury will have had the advantage of seeing and hearing the witnesses, whereas the appeal court normally determines the appeal on the basis of papers alone. However, should the overall feel of the case – including the apparent weakness of the prosecution’s evidence as revealed from the transcript of the proceedings – leave the court with a lurking doubt as to whether an injustice may have been done, then, very exceptionally, a conviction will be quashed.”*<sup>33</sup>

In Criminal Appeal : **Ir-Republika ta’ Malta vs. Ivan Gatt**, decided on the 1<sup>st</sup> December, 1994, it was held that the exercise to be carried out by this Court in cases where the appeal is based on the evaluation of the evidence, is to examine the evidence, to see, even if there are contradictory versions – as in most cases there would

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<sup>29</sup> Decided by the Criminal Court of Appeal on the 14<sup>th</sup> February 1989.

<sup>30</sup> Decided by the Criminal Court of Appeal on the 31<sup>st</sup> May 1991

<sup>31</sup> Decided by the Criminal Court of Appeal on the 31<sup>st</sup> May 1991

<sup>32</sup> ” ([1969] 1 QB 276

<sup>33</sup> Confer also : BLACKSTONE’S CRIMINAL PRACTICE (1991) , p. 1392)

be – whether any one of these versions could be freely and objectively believed without going against the principle that any doubt should always go in the accused’s favour and, if said version could have been believed and was evidently believed by the jury, the function, in fact the duty of this court is to respect that discretion and that evaluation of the evidence.

These principles apply equally to cases where appeals from judgements of the Court of Magistrates are lodged by the Attorney General on behalf of the prosecution.

This Court has accordingly evaluated the evidence anew with a view to establishing whether the Court of first instance could have legally and reasonably acquitted the defendants of the charges proffered against him.

That from a detailed examination of the evidence tendered before the Court of first instance the following emerges.

**PS 1040 John Grima** stated in his affidavit presented in the acts of these proceedings that on the 19<sup>th</sup> September 2023 together with PC 76 Cini and PC 1115 Gatt effected a road check in Rabat Road, Marsalforn limits of Zebbug. At 17.30 He inspected a motor cycle CED 213 which was being driven by the appellate Sunil Gurung who produced Nepal Driving License Number 0-07-00967636 however when asked to produce proof of arrival in Malta namely that he arrived less than a year prior he stated that he arrived in Malta in August 2022. He was informed that Court action is being taken against him and was refrained from driving. Together with his affidavit he presented a photograph of his driving license marked as Doc. B fol. 5 together with a copy of the police occurrence report marked as Doc. C fol. 6.

**PC 1131 Carm Gatt** gave evidence also by affidavit (Dok D fol. 8) wherein he confirmed that together with PC 1040 and PC 76 they made road checks in Rabat Road, M'form. They were inspecting several cars coming from the direction of Rabat going towards M'form and it transpired that the driver of the motorcycle CED 213 was the appellate Sunil Gurung and he presented a driving license issued in Nepal. The driver was asked to provide evidence that he had been in Malta for a period less than a year though this resulted in the negative. He was given two days to bring such evidence though this was never forthcoming.

**Saviour Farrugia** on behalf of Transport Malta gave evidence on the 15<sup>th</sup> February 2024 confirmed that the appellate Sunil Gurung has not Maltese driving license.

The appellate **Sunil Gurung** gave evidence voluntarily on the 15<sup>th</sup> February 2024 confirmed that he had an international license. He confirms that when he was stopped by the police in Malta he had been in Malta for a period of one year. He stated that he had come to Malta on the 1<sup>st</sup> September 2023.

Considers further.

The Court remarks that the prosecution did not carry out its duty according to law. In the first place as remarked by the first court it does not result that PC 1151 gave the letter of rights to the appellate before interrogating him in regard to the offences under examination. Thus, whatever the appellate could have said to this same witness will

be disregarded in its totality in line with recent jurisprudence and more so according to law. Secondly when the appellate took the witness stand he was asked a number of questions where the replies given overlapped and thus his evidence is definitely unclear and this court cannot rely on it.

It is the prosecution that has to prove its case beyond reasonable doubt. In the case *Il-Pulizija vs Eleno sive Lino Bezzina*<sup>34</sup>:

*Illi l-grad ta' prova li trid tilhaq il-prosekuzzjoni, sakemm ma jkunx hemm specifikat mod iehor fil-ligi, huwa tal-htija lil hinn minn kull dubbju dettat mir-raguni. Fil-kamp kriminali huwa l-oneru tal-prosekuzzjoni li tipprova l-akkuza taghha kontra l-akkuzat 'beyond reasonable doubt,' kif gie deciz fil-kawza **Pulizija vs Bugeja**, tas-26 ta' Marzu, 1987. Illi min-naha l-ohra d-difiza, msahha bil-presunzjoni tal-innocenza tal-akkuzat, tista' tibbaza u/jew tipprova l-kaz taghha anke fuq bilanc ta' probabbilita`, jigifieri jekk huwa probabbli li seta' gara dak li gie rrakkuntat mill-akkuzat kif korroborat mic-cirkostanzi jew le. Illi dan ifisser li l-prosekuzzjoni ghandha l-obbligu li tipprova l-htija tal-akkuzat oltre` kull dubbju dettat mir-raguni u f'kaz li jkun hemm xi dubbju ragonevoli,*

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<sup>34</sup> Decided by the Criminal Court of Appeal on the 24 ta' April, 2003,

*il-prosekuzzjoni tigi kunsidrata li ma ppruvatx il-kaz tagħha ta' htija u għalhekk il-Qorti hija obbligata li tillibera.*

The Criminal Court of Appeal in the case Pulizija vs Peter Ebejer decided on the 5<sup>th</sup> December, 1997 stated that:-

*“Ta' min ifakkar hawnhekk li l-grad ta' prova li trid tilhaq il-prosekuzzjoni hu dak il-grad li ma jhalli ebda dubbju dettat mir-raguni u mhux xi grad ta' prova li ma jhalli ebda ombra ta' dubbju. Id-dubbi ombra ma jistghux jitqiesu bhala dubbji dettati mir-raguni. Fi kliem iehor dak li l-gudikant irid jasal għalih hu li, wara li jqis ic-cirkostanzi u l-provi kollha, u b'applikazzjoni tal-buon sens tiegħu, ikun moralment konvint minn dak il-fatt li trid tipprova l-prosekuzzjoni. Għamlet sew infatti l-ewwel qorti li ccitat b'approvazzjoni l-ispjegazzjoni mogħtija minn Lord Denning fil-kaz “Miller v. Minister of Pensions” [1974] 2 All E.R. 372 tal-espressjoni "proof beyond a reasonable doubt";*

*"Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the*

*evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence "of course it is possible but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice" (373-374).*

Therefore, in this case it was the prosecution that should have proved that the accused had been in Malta for a period of one year prior to the day when he was stopped by the police for the road check. The law only provides for a shift in the onus of proof in relation to the charge relating to driving without an insurance in particular that the driver of a vehicle has to bring forward a copy of his insurance policy when charged with such an offence of driving with an insurance cover in terms of sec 3 (1) of chapter 104 of the laws of Malta. There again however even here the accused will have to bring forward this piece of evidence once the prosecution proves that he had been in Malta for a period more than one year from the day he was stopped. The jurisprudence that the prosecution made reference to in its application of appeal relates to the question as to proof relating to the issuance of an insurance policy and not to the question as to who is to prove that the driver was in Malta for a period in excess of one year and thus contrary to SL 65.19.

Therefore, in the light of the evidence brought forward, the Court believes that the first Court was correct in its judgment and thus confirms the judgment of the first

Court in its totality and thus declares that once again it is acquitting the appellate form both charges brought forward against him.

Accordingly this Court is dismissing the appeal and confirming the findings and conclusion of the Magistrate's Court in the judgement under appeal.

**Consuelo-Pilar Scerri Herrera**

**Judge**