



## The Court of Magistrates (Malta) as a Court of Criminal Judicature

**THE POLICE (INSPECTOR RACHEL AQUILINA) V SEAN DONALD JENKINS (ID. 286742A)**

**MAGISTRATE: DR. VICTOR G. AXIAK**

**10/12/2024**

THE COURTS,

Having seen the charges proffered against the person charged (hereinafter also referred to as "SD Jenkins"):

**As you have been charged that on the 08/07.2022 at about 14.45Hrs at Triq Il-Kbira, Ta'Qali, Limits of Rabat, whilst you were making use of motorcycle registered with registration number plate ECH596,**

- (1). You drove the mentioned motorcycle when it was not licenced by the Authority for Transport in Malta to be used on the road. (Sec.15(1)(a)(3) Chap.65).
- (2). You drove the mentioned motorcycle when it was not covered by a policy of insurance in respect of third partly risks. (Sec.3(1) Chap.104).
- (3). You dove the mentioned motorcycle when you had affixed registration number plates, i.e. number plates 201-D-3945, when they have not been issued by the Authority for transport in Malta and they did not refer to and belong to that particular motor vehicle. (Sec.32(5) LS.368.02)
- (4). You made use of a motor vehicle registration mark other than that allotted by the Authority for Transport in Malta. in relation to a particular vehicle. (Sec.44(5)LS.368.02)
- (5). As person who either by writing, draws or in any other manner, altered, defaced, mutilated or added anything to any licence for any motor vehicle OR You exhibited upon a motor vehicle a licence disk which had been altered, defaced, mutilated or added to as aforesaid.(vehicle licence JBR-961) (Sec.44(3) LS.368.02.)

Having seen that in the sitting dated 11<sup>th</sup> July 2024, counsel for the defence raised the preliminary plea *ne bis in idem* on account of a judgement that had been given by this Court against the person charged on 30<sup>th</sup> April 2024;

Having seen the written submissions filed for:

- the Prosecution, by Inspector Rachel Aquilina
- the Defence, by Dr. Kris Balzan

Gives the following

## **Decree**

1. In the judgement awarded on 30<sup>th</sup> April 2024, this Court as presided had acquitted SD Jenkins of having on the 8<sup>th</sup> July 2022 at about 14:45 hrs in the whereabouts of Ta' Qali l/o Attard and elsewhere in these islands, whilst driving a motorcycle with registration number ECH 596:
  - a. **altered, rearranged or defaced a vehicle registration mark on a motor vehicle or otherwise tampered with the registration plates of a motor vehicle (S.L. 368.02 Art. 44(4));**
  - b. **drove the mentioned motor vehicle with a vehicle license altered, defaced, mutilated or added to or with a license belonging to another vehicle, thus making use of a vehicle license issued on another vehicle with registration number JBR 961 (S.L. 368.02, Art. 44(7)(b)).**

The Court however found SD Jenkins of having on the same date, at the same time and in the same place:

- c. **made use of a motor vehicle registration mark other than that allotted by the authority in relation to a particular vehicle, thus making use of another registration plate 201-D 3945 (S.L. 368.02, Art. 44(5))**
2. In the present case, SD Jenkins is being charged of having on the 8<sup>th</sup> July 2022 at about 14:45 hrs in the whereabouts of Ta' Qali l/o Rabat whilst driving a motorcycle with registration number ECH 596:
  - a. **Drove the mentioned motorcyle when it was not licenced by the Authority for Transport in Malta to be used on the road (Ch. 65, Art.15(1)(a));**

- b. **Drove the mentioned motorcycle when it was not covered by a policy of insurance in respect of third party risks (Ch. 104, Art. 3(1));**
  - c. **Drove the mentioned motorcycle with registration number plates, i.e. number plates 201-D-3945, that had not been issued by the Authority for transport in Malta and that did not refer to and belong to that particular motor vehicle (S. L. 368.02, Art .32(5));**
  - d. **Made use of a motor vehicle registration mark other than that allotted by the Authority for Transport in Malta. in relation to a particular vehicle (L.S. 368.02, Art. 44(5));**
  - e. **Either by writing, drawing or in any other manner, altered, defaced, mutilated or added anything to any licence for any motor vehicle or exhibited upon a motor vehicle a licence disk which had been altered, defaced, mutilated or added to as aforesaid (vehicle licence JBR-961) (L.S. 368.02, Art. 44(3))**
3. The plea of *ne bis in idem* must be analysed in light of the relevant provisions of the law, that is, Art. 527 of the Criminal Code, Art. 39(9) of the Constitution of Malta, Article 4(1),(2) of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) as well as jurisprudence on the matter.
4. Article 527 of the Criminal Code states that:

**‘527. Where in a trial, judgment is given acquitting the person charged or accused, it shall not be lawful to subject such person to another trial for the same fact.’**
5. Article 39(9) of the Constitution of Malta is wider as it makes reference to both acquittals and convictions against the person charged:

**‘ 39(9) No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal or review**

**proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence ...'**

6. Article 4(1) and (2) of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) state as follows:

**'4. (1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.**

**(2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case'**

7. In the case decided on 3<sup>rd</sup> August 2022 "**The Police v. Mario Debono**" (Court of Magistrates presided by Mag. Dr. Elaine Mercieca), this Court made reference to a number of local judgements as well as judgements given by the European Court of Human Rights. The Court first quoted the judgement given by the European Court of Human Rights in **Mihalache and others v. Romania** (Application No. 63417/16 and others, 12/01/2023) where the ECHR held as follows:

"The Court reiterates that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision ... The Court observes that the wording of the first paragraph of Article 4 of Protocol No. 7 sets out the three components of the ne bis in idem principle: the two sets of proceedings must be "criminal" in nature (1); they must concern the same facts (2); and there must be duplication of the proceedings (3)."

**Ne bis in idem: two sets of criminal proceedings**

8. The first element of the principle is that there must be two sets of proceedings that are criminal in nature. This element is satisfied given that the judgement given on 30<sup>th</sup> April 2024 against SD Jenkins and the charges proffered against the same person in this case, are all pursuant to criminal proceedings undertaken by the Executive Police before a court of Criminal Jurisdiction, i.e. the Court of Magistrates as a Court of Criminal Judicature.

**Ne bis in idem: proceedings that concern "the same facts"**

9. This element is perhaps the one that raises the most questions when discussing whether the principle of *ne bis in idem* applies. Article 527 of the Criminal Code also makes reference to “another trial for the same fact”.
10. In the case “**Il-Pulizija v. George Azzopardi**” (Appeal 206/2012 per Judge Michael Mallia, 23/01/2014) the Court of Criminal Appeal held as follows:

“L-ewwel Qorti tidher illi tat tifsira pjutost wiesgha ghall-fatt illi persuna tkun akkuzata ghall-istess **fatt** li tkun suggetta ghal kawza ohra, fil-fatt fis-Sentenza taghha qalet, “*Illi ma hemmx id-dubju illi r-reati li dwarhom instab hati l-imputat fis-Sentenza tat- 18 ta’ Gunju, 2010 u r-reati li dwarhom huwa jinstab akkuzat illum kollha jirreferu ghall-istess incident u cioe` l-istess fatti li sehew fl-24 ta’ Jannar, 2009.*” Din il-Qorti tirrileva illi filwaqt illi tista tifhem illi hawn si tratta ghal dan l-istess incident zgur pero’ mhux ghall-istess fatti....

Dak illi gara fl-24 ta’ Jannar, 2009 meta gie arrestat l-appellat jirreferi ghal zewg reati nettament distinti u separati minn xulxin. Wiehed jirreferi ghall-lottu klandestin u l-iehor jirreferi ghat- tehid tad-droga. **Il-fatti u l-provi li jirreferu ghal wahda zgur ma jirreferux ghall-iehor** (emphasis made by this Court). Hekk insibu illi fil-kaz tal-lottu klandestin il-provi jirreferu ghad-dokument, kotba, notamenti u flus illi nstabu fuq l-appellat dakinhar illi gie arrestat. Il-provi illi jirreferu ghall-akkuzza kontra l-Ordinanza tal-Medicini Perikoluji jirreferi ghan-nuqqas ta’ awtorizzazzjoni ghal pussess ta’ din id- droga u l-kwantita taghha u c-cirkostanzi illi kienet filpussess ta’ l-appellat. L-ewwel Qorti gustament ikkwotat il-kawza “*Sua Maesta il-Re vs Agatha Mifsud u Carmelo Galea*” (15 ta’ Gunju, 1918) fejn ikkwotat giurisprudenza Ingliza u cioe` “**The true test by which the question whether such a plea (ie autrefois acquit) is a sufficient bar in any particular case may be tried, is whether the evidence to support the second endowment would have been sufficient to proof a legal conviction upon the first.**” (emphasis made by this Court)” F’dan il-kaz zgur li ma jistax jinghad illi l-provi migbura fit-tieni process, cioe` dan il-kaz kellhom ikunu bizzzejjed sabiex jippruvaw htija dwar l- ewwel reat, dak ta’ lottu klandestin. Ghalhekk ma nistghux nghidu illi hawnhekk si tratta ta’ l-istess fatti u l-Artiklu 527 tal-Kodici Kriminali ma japplikax. Ghal dak li jirrigwardja l-Artiklu 39(9) tal-Kostituzzjoni ta’ Malta l-kliem testwali illi jorbot kollox huwa, “*Ghal dak ir-reat jew ghal xi reat kriminali ie hor li ghalih setghet tigi misjuba hatja fil-proceduri ghal dak ir-reat ...*”. L-interpretazzjoni korretta li ghandha tinghata lil din id-dicitura hi li persuna ma tistax tingieb il-Qorti **twiegeb ghall-akkuzi li dwarhom diga ghadda in gudikat jekk l-akkuzi l-godda setghu jigu nkorporati, involuti jew alternattivi ghall-ewwel akkuza** (emphasis made by this Court). Per ezempju jekk ghall-istess fatt persuna tigi misjuba hatja ta’ serq ma tistax tigi mresqa f’kawza ohra ghall-istess fatt din id-darba akkuzat b’misappropazzjoni. Jghodd ukoll l-

eżempju li gab l- Avukat Generali meta persuna tkun mixlija bir-reat ta' tentattiv ta' omicidju f'kaz wiehed u għall-istess cirkostanzi u fatt ikun mixli f'kaz iehor għal ferita gravi u dana peress illi wiehed huwa kompriz u nvolut fl-iehor. Forsi għall-ahjar soluzzjoni ta' din il- vertenza jkun għaqli illi l-Qorti tirrikorri għall-origini ta' din id- dicitura ne bis in idem u cioe' għad-dritt Roman fejn dana jghallem illi, "*Nemo debet bis vexari si constat curie quod sit pro una et eadem causa*" Hadd ma għandu jigi pprocessat darbtejn jekk jigi ppruvat lill-Qorti jekk dana huwa, '*For one and the same cause*'.

Taht l-ebda tigbid ta' l-immaginazzjoni ma nistghu nghidu illi l- akkuza kontra l-lottu klandestin hija l-istess bhall-akkuza kontra l-Ordinanza dwar il-Medicini Perikoluzi. Kif ga nghad għad illi dan l-incident huwa wiehed il-persuna hija wahda pero' l-fatti li jirrigwardjaw akkuza minnhom huma ferm differenti mill-fatti illi jirrigwardjaw it-tieni akkuza u zgur illi hawnhekk m'għandniex *one and the same cause...*"

11. In the judgement given by the European Court of Human Rights in **Sergey Zolotukhin v. Russia** (App. No. 14939/03, 10/01/2009) the ECHR stated as follows:

"The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings..."

This was cited by approval by the ECHR in the case **Grande Stevens v. Italy** (App. No. 18640/10, 07/09/2014) where it held that:

"220. The guarantee enshrined in Article 4 of Protocol No. 7 becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of res judicata. At this juncture the available material will necessarily comprise the decision by which the first 'penal procedure' was concluded and the list of accusations levelled against the applicant in the new proceedings. Normally these documents would contain a statement of facts concerning both the offence for which the applicant has already been tried and the offence of which he or she stands accused. In the Court's view, such statement of fact are an appropriate starting point for its determination of the issue whether the facts in both proceedings were identical or substantially the same.

221. The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings [see Sergey Zolotukhin, cited above, § 84] .....

224 it follows from the principles set out in the case of Sergey Zolotukhin, cited above, that the question to be answered is not whether or not the elements of the offences set out in Articles 187 ter and 185 § 1 of Legislative Decree No. 58 of 1998 are identical, but whether the offences with which the applicants were charged before the CONSOB and before the criminal courts concerned the same conduct”

12. In the case “**R v. Rosaria Portelli**” (23/02/1904, Vol XIX, Pt IV, Pg 1) the Criminal Court held that:

“La legge intende il fatto principale in quanto meritevole di pena, o come altri si espresse non intende semplicemente il fatto storico o naturale nei suoi diversi momenti ma il fatto giuridico nel suo complesso”

13. In the case “**Il-Pulizija v. Salvatore Saliba**” (28/02/1953) the Court of Criminal Appeal stated that:

“Biex jista’ jingħad li hemm l-estinzjoni minħabba sentenza preċedenti hemm bżonn li **ikun l-istess fatt fiżikament rigwardat** (ara art. 521 Kap. 12) ; ma hux biżżejjed li jingħad li sar fl-istess kuntest ta’ azzjoni, għaliex jista’ jagħti l-każ li jsir fl-istess kuntest t’azzjoni, u ntant ikun materjalment distingwibbli”

14. In his notes on Criminal Procedure, Professor Anthony Mamo says that:

“... it must be strongly emphasised that for the plea to succeed the fresh proceedings must be placed on the very same fact. (Criminal Appeal: ‘Il-Pulizija vs Piscopo’ 21 ta’ Marzu 1953). The mere circumstances that an act is done more or less at the same time (nello stesso contesto) as another act does not necessarily mean that they constitute one and the same fact, if the two are materially distinguishable as separate events. (v. Cr.App. ‘Pulizija vs Saliba 28/2/1953 and Pol versus Cassar 9/1/1954; cf also Cr.App Police versus Attard.’)”

15. In the judgement given this Court on 30<sup>th</sup> April 2024 against the person charged the proceedings were initiated following a report made by Enforcement Officer 337 Christopher Grech who also happens to be the main witness of the Prosecution in the present case. According to EO 337’s affidavit, on the day, at the time and in the location indicated on the charge sheet the accused was stopped by the said enforcement officer whilst driving a Black Mash motorcycle with registration number 201-D 3945 since it had a Maltese circulation license affixed on its left side. Upon further inspection by the said officer it resulted that the circulation license displayed on the motorcycle (JBR 961) did not correspond to that vehicle but belonged to a

different vehicle (a Honda Civic). Furthermore it resulted from the chassis number that the motorcycle driven by the accused was registered by Transport Malta as ECH 596. Both the road license and the insurance were expired.

16. In the first case (i.e. the one that has since become *res judicata*) SD Jenkins:

- a. was charged with and acquitted of
  - i. having altered/rearranged the registration plates in question (i.e. in that he removed the registration plate ECH 596 from the motorcycle being driven and replaced it with Irish registration plate 201-D 3945),
  - ii. having driven the motorcycle in question with a circulation license belonging to another vehicle (i.e. in that the motorcycle being driven had affixed to its left side a circulation license belonging to a Honda Civic with registration number JBR 961),
- b. was charged with and convicted of:
  - iii. having made use of a registration plate other than that allotted by Transport Malta in relation to that motorcycle (i.e. in that he motorcycle being driven had the Irish registration plate 201-D 3945 affixed to it, rather than the registration plate that had been assigned to it by Transport Malta, i.e. ECH 596).

SD Jenkins was however not charged with having driven the motorcycle in question with an expired circulation license or without being covered by a policy of insurance in respect of third party risks, both being the subject of the first two charges in the present case.

17. There's no doubt that the acts or events that gave rise to the first set of charges were done at the same time ("*nello stesso contesto*") as the acts or events that gave rise to the charges in the present case.

18. Moreover:



- a. the facts constituting the third charge in the present case (driving the motorcycle with a registration number plate that had not be issued by Transport Malta, i.e. 201-D-3945) are identical to the facts that constituted the second charge of the first case (of which he was found guilty). This is so even though the article of the law cited by the Prosecution in the present case (i.e. Art. 32(5) of Subsidiary Legislation 368.02) is different from that cited in the first case (i.e. Art. 44(5) of Subsidiary Legislation 368.02).
  - b. the facts constituting the fourth charge in the present case (making use of a motor vehicle registration plate other than that allotted by Transport Malta) are identical to the facts that constituted the second charge of the first case (of which he was found guilty) and indeed in both cases the same article of the law was cited (Art. 44(5) of Subsidiary Legislation 368.02).
  - c. the facts constituting the fifth charge in the present case (exhibiting upon the motor vehicle a licence disk which had been altered or added to, i.e. license disk of vehicle JBR-961) though not identical to the facts that constituted the third charge in the first case (of which he had been acquitted), could have been incorporated into or brought alternatively to the same charge.
19. Therefore, it is clear that the *ne bis in idem* rule applies to the third, fourth and fifth charges in the present case.
20. Now with regard to the first two charges in the present case, awhen applying the **R v. Agatha Mifsud and Carmelo Galea** test it would seem that the evidence in support of them in this case would not have been sufficient for the Prosecution to support its case with regard to the charges brought in the first case (and vice-versa). Moreover, although Enforcement Officer 337 Christopher Grech’s affidavit in the first case made reference to the fact that SD Jenkins was driving the motorcycle with an expired road license and without being covered by a policy of insurance in respect of third party risks, that **evidence by itself** would not have been enough to secure a conviction for these two charges (excluding the fact that the charge under Article 3(1) of Chapter 104 inverts the burden of proof onto the person being charged). No evidence *per se* was brought in the first case in respect of these two charges. Therefore the *ne bis in idem* principle does not apply in their regard.

**21. Having premised the aforesaid, the Court therefore accepts the plea of *ne bis in idem* with regard to the third, fourth and fifth charges but orders the continuation of the criminal proceedings in so far as they relate to the first and second charges.**

V.G. Axiak  
Magistrate

Y.M. Pace  
Dep. Registrar