



**IN THE COURT OF MAGISTRATES (GOZO)
AS A COURT OF CRIMINAL JUDICATURE**

Magistrate Dr. Jean Paul Grech B.A., LL.D
M.Juris (Int. Law), Adv. Trib. Eccl. Melit

JUDGEMENT

Given today, Tuesday, the seventh (7th) of January 2025

Case Number 545/2023

The Police

(Superintendent Bernard Charles Spiteri)

Vs

Kaji Shyam Gurung

The Court,

Having seen the charges brought against **Kaji Shyam Gurung**, son of Nar Bahadur Gurug and Bhadra Kumari Gurung, born in Nepal on the twenty-ninth (29th) of August 1979 and residing at "Oak Tree", Flat 3, Triq Sir Paul Boffa, Victoria, Gozo holder of Maltese identity card number 314738(A) for having on the nineteenth (19th) of September

2023 at about quarter past five in the evening (17:15hrs) whilst in Rabat Road, Marsalforn, limits of Żebbuġ, Gozo:

(1) driven a motorcycle make Yamaha with registration number WQZ 387 without a driving licence;¹

(2) driven motorcycle make Yamaha with registration number WQZ 387 without being covered by an insurance policy regarding the risks for third parties.²

The Court was requested to disqualify the offender from having or obtaining a driving licence for a period which the Court deems fit and this according to article 15(3) of the Traffic Regulation Ordinance.

Having seen the sworn declarations and the documents which were submitted;

Having heard the witnesses which were produced by the Prosecution;

Having heard submissions by the parties;

Considers:

¹ Article 15(1)(a) of Chapter 65 and article 5 of Subsidiary Legislation 65.18.

² Article 3(1) of Chapter 104.

The facts of the case are as follows: on the nineteenth (19th) of September 2023 the Police were conducting road checks in Triq Marsalforn, Rabat, Gozo as per authorisation issued by Police Inspector Gabria Gatt. At about quarter past five in the evening (17:15hrs), a motorcycle Yamaha bearing registration number plate WQZ 387 was stopped by the Police officers conducting the road check. The driver was identified as Kaji Shyam Gurung holder of identity card number 314738(A) who handed also to the Police a Nepalese driving licence. He was asked to produce proof of his last arrival in Malta and he informed the police that he had arrived in Malta on the fourteenth (14th) August 2022. He was informed that criminal proceedings were going to be instituted against him since he was driving without a licence.

Considers:

The accused is being charged that he was driving without a driving licence and that he was not covered by an insurance policy as required by law. From the evidence submitted, the following points emerge:

- (a) on the nineteenth (19th) September 2023 the accused was in possession of a valid driving licence issued by Nepal, so much so that PS 1040 John Grima exhibits a copy of this licence together with his sworn declaration;

(b) the accused was not in possession of a valid Maltese driving licence. He only obtained a Maltese driving licence on the fifth (5th) December 2023;

(c) the Prosecution did not present any evidence showing that the accused had been in Malta for a period exceeding twelve (12) months from his last date of entry. Nor did the Defence present any evidence showing that the accused had been in Malta for a period less than twelve (12) months from his last date of entry.

In its final submissions, the defence puts forward two (2) lines of defence. In its first submission the defence argues that the Court cannot take into consideration what the accused told the Police at the time he was stopped because he was not given his legal rights. The defence is right in its claim. As soon as the Police stopped the accused and they were shown a Nepalese driving licence, the Police were made aware of the possibility that the person could potentially be driving without a driving licence as required by Maltese law. Hence, they were obliged to give him all his legal rights mainly the right to remain silent so as not to incriminate himself and the right to consult with a lawyer. From an examination of the sworn declarations of PS 1040 John Grima and PC 1151 Carm Gatt, there is no indication that the accused was given his legal rights. Hence what the accused told the Police precisely that he had arrived in Malta on the fourteenth (14th) of August 2022 cannot be considered admissible as evidence. This is line with various

court pronouncements on the matter. **Consequently, the Court will be discarding completely what the accused told the Police as regards his last date of entry.**

Secondly, the defence contends that it was the Prosecution's duty to bring forward evidence showing that the accused had been in Malta for a period exceeding twelve (12) months. This because a person in possession of a valid driving licence issued by a third country is authorised to drive in Malta for a period of twelve (12) months from his last date of entry. The defence goes on to argue that since the Prosecution failed to bring proof to this effect, the accused should be acquitted. The Defence also quoted a judgement given by the Court of Criminal Appeal (Inferior Jurisdiction) in the names ***The Police vs Sunil Gurung***, given on the tenth (10th) of July 2024 which endorsed an identical argument being made by the Defence in today's case.

The twelve-month concession period emerges from regulation 5 of Subsidiary Legislation 65.18. This regulation provides that a person in possession of a valid driving licence issued by the competent authority of a third country is authorised to drive a vehicle in Malta for a period of not more than twelve months from his last date of entry. Once this time limit expires, the person concerned would require a Maltese driving licence to continue driving in Malta.³

³ Reg. 5 of S.L 65.18 specifies: *"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*

The issue which this Court is being called upon to decide vis-à-vis the defence's second line of defence is whether it is up to the Prosecution or up to the Defence to prove the accused's last date of entry into Malta.

Maltese law of evidence is based on the maxim that *onus probandi incumbit ei qui dicit non qui negat*. This maxim also extends to criminal proceedings: it is the Prosecution – who is at the end of the day charging the accused – who has the duty to prove the case. The accused is deemed innocent until proven guilty: he does not need to prove his innocence unless he is called upon either by law or by need to rebut the evidence brought against him by the Prosecution.

In the case under examination from the evidence submitted, it is clear that the Prosecution proved the following:

- (a) on the nineteenth (19th) of September 2023 at around quarter past five in the evening (17:15hrs) the accused was driving a motorcycle bearing registration number WQZ 387 in Triq ir-

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:

Provided that a person holding a driving licence issued by the competent authority of a third country may not drive a vehicle in licence categories C1, C1E, C, CE, D1, D1E, D, DE or f unless that person is also in possession of a certificate of professional competence issued in accordance with regulation 29 or unless that person is an exempt driver in accordance with regulation 28."

Rabat, Marsalforn, limits of Żebbuġ, Gozo. The fact that the accused was driving emerges clearly from the sworn declaration of PS 1040 John Grima and PC 1151 Carm Gatt. PS 1040 John Grima also duly ascertained the identity of the accused as the person driving the motorcycle and even took a photo of his Nepalese driving licence which was shown to him by the same accused;

(b) at that point in time the accused **was not in possession of a valid Maltese driving licence** entitling him to drive in Malta. This as confirmed by the evidence given by Saviour Farrugia during the sitting of the twenty-sixth (26th) of March 2024. The accused only got his Maltese driving licence on the fifth (5th) of December 2023;

(c) although a Nepalese driving licence was handed over to the Police Officers by the accused, this was not accompanied by any other documentary evidence indicating that the accused had been in Malta less than twelve (12) months from his last date of entry. Nor was such documentation provided at a later stage, notwithstanding that the accused was given the possibility to produce the same.⁴

⁴ Refer to the sworn declaration of PC 1151 Carm Gatt at fol. 19 of the Acts.

On the basis of the above, the Court considers that the Prosecution managed to prove beyond reasonable doubt that on the nineteenth (19th) September 2023, the accused was driving the motorcycle without a driving licence.

Since the Prosecution managed to prove its case, the accused therefore found himself in a situation wherein it became necessary and impellent upon him to rebut the evidence adduced against him by the Prosecution with a view to disprove the facts being alleged. In order to be successful in his defence and hence secure an acquittal, the accused needed only to disprove the fact on a balance of probabilities.

In the case under examination, the accused tried to undermine the Prosecution's case by claiming that he was in possession of a valid Nepalese driving licence. Consequently, on the basis of regulation 5 of Subsidiary Legislation 65.18 he was authorised to drive without him not having to prove anything else. **The Court however does not consider that by simply showing that he was in possession of a valid Nepalese driving licence, the accused had on a balance of probabilities disproved the Prosecution's claim that he was driving without a driving licence. To satisfy the balance of probabilities requirement⁵ in the circumstances of this case, the Court considers that the accused had also to adduce proof showing that he had not been in Malta for a**

⁵ This has been defined as as convincing the Court that the facts being ascertained are more likely and probable to have happened rather than not.

period exceeding twelve (12) months from his last date of entry. In this way the accused would have triggered successfully the application of regulation 5 of Subsidiary Legislation 65.18 and consequently disproved the Prosecution's case. Since the accused did not bring evidence as regards his last date of entry, it cannot be said that he managed to effectively puncture the Prosecution's case. Hence the Prosecution's case still holds.

Furthermore, the Court considers that nowadays as a direct consequence of the free movement of persons within the European area, it is immensely difficult not to say impossible for the Prosecution to prove the date of a person's entry into Malta. Malta forms part of the Schengen area meaning that if a person would have entered Malta via another EU state which forms part of the Schengen area, there would be no controls vis-à-vis that person upon his arrival in Malta. Therefore, there would be no administrative record of that person's entry into Malta; nor a stamp on his passport indicating the date of entry into Malta. Hence, to prove such entry, the Prosecution would need to summon all representatives of airlines flying into Malta as well as representatives of vessels sailing into Malta to establish when a person would have travelled on a particular airline or vessel with a view to determine the exact date of entry. This would be quite an impossible feat.

In the light of all the above, the Court is dismissing the Defence's plea that the Prosecution was under an obligation to prove the date of the accused's last entry into Malta.

Consequently, the first (1st) charge, as already pointed out earlier, has been proven by the Prosecution and consequently the Court will be finding the accused guilty of the first (1st) charge.

As regards the second (2nd) charge, since the accused was not in possession of a driving licence, it cannot be said that he was covered by a valid insurance policy as required by Chapter 104 of the Laws of Malta. This as pointed out in various recent Court of Criminal Appeal judgements, amongst which, **II-Pulizija vs Mohammed Knann**.⁶ As highlighted in these judgements, to exclude criminal responsibility in so far as the charge contemplated under article 3(1) of Chapter 104 is concerned, the accused had to actively prove that the insurance policy would have covered him all the same notwithstanding that he was driving the vehicle without a valid driving licence. No evidence was produced by the accused to this effect. Rather witness Doriella Debono⁷ – who testified in her capacity as an employee of the National Insurance Brokers – confirmed that for the insurance cover to be effective, the person driving the vehicle in question had to be in possession of a

⁶ Decided 7th February 2023, Appeal Number 479/2022.

⁷ Fol. 31 et seq of the Acts.

driving licence. Otherwise, he would not be covered by the policy. Hence this second charge has been proved as well.

- **Decide**

Therefore, for the reasons expounded above the Court after having seen articles 15(1)(a) and 15(3) of Chapter 65, articles 3(1), 3(2)(a) and 3(2A) of Chapter 104 is finding the accused guilty of all charges brought against him and is condemning him to a fine (*multa*) of two thousand and four hundred euro (Euro 2,400).

Furthermore, the Court is disqualifying the offender from obtaining or holding a driving licence for a period of twelve (12) months running from midnight of tomorrow.

(sgd.) Dr. Jean Paul Grech
Magistrate

(sgd) Diane Farrugia
Deputy Registrar

True Copy

For The Registrar