COURT OF CRIMINAL APPEAL

HONOUR. JUDGE DR CONSUELO SCERRI HERRERA, LL.D., Ph.D.

Appeal Number: 545/2023/1 CSH

The Police

vs

Kaji Shyam Gurung

Today, 12th May, 2025

The Court;

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

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

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 judgement of the Courts of Magistrates (Gozo) dated 7th January, 2025, which found the defendant guilty as charged and condemned him to a fine (multa) of two thousand and four hundred euro (€2,400). Furthermore, the Court also disqualified him from obtaining or holding a driving licence for a period of twelve (12) months running from midnight of the following day of the date of the judgement of the First Court;

Having seen the application of the appealed Kaji Shyam Gurung where he is asking this Honourable Court to **reform** the judgement proffered against him in these proceedings by:

- Revoking the said judgement and, while exonerating defendant from every criminal responsibility and punishment orders the acquittal of the defendant.

Reasons for and grounds for appeal

The facts of the case are as follows:

On the 19th of September, 2023, the police conducted road checks on Triq Marsalforn, Rabat, Gozo, under the authorization of Police Inspector Gabria Gatt. At approximately 5:15 PM, a Yamaha motorcycle with registration number WQZ 387 was stopped by the officers performing the road check. The driver was identified as Kaji Shyam Gurung, holder of identity card number 314738(A), who presented a Nepalese driving license to the police. When asked to provide proof of his most recent arrival in Malta, he informed the officers that he had arrived on August 14, 2022. He was subsequently informed that criminal proceedings would be initiated against him for driving without a valid license.

Whereas the grievances are clear and manifest and consist in the following:

Defendant agrees with the part of the judgement whereby any statement given to the police by him at the time of the alleged offence should be ignored and should not be taken into consideration because he was not given his letter of rights at that time.

However, he does not agree with the First Court that it was his duty to prove that when he produced his Nepalese Driving License he also had to prove that he had been staying in Malta for less than a month.

The Court concluded that, for the purpose of this charge, it is the duty of the defendant to prove to the Court that he has been on the island for less than a year.

The Court argued that the duty of the prosecution was discharged once they produced evidence that the defendant was driving without a Maltese driving license albeit, with a foreign driving license. After that, the Inferior Court argued the onus shifted on the defendant to prove he had been in Malta for less than a year. Furthermore, the Court added that there were arguments in favour of this in view of the evident difficulties

which will be faced by the prosecution in view of current European Immigration Laws.

Defendant does not agree. Whilst it is conceded that some immigration laws might make the work of the prosecution more burdensome, this does not affect or change the rules of evidence. The rules of evidence make it mandatory that it is the prosecution, who has to prove the whole charge, and every constituent element of it. In this case it was up to the prosecution to prove this element as well.

This was endorsed in a very recent judgement delivered by this Court in a similar case with almost identical facts. This was the judgement in the case **The Police vs Sunil Gurung** decided by this Court on the 10th July 2024 wherein it was held that:

> *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*

This argument of the Court completely endorses the humble argument of the defence in this case, which argument the First Court chose to ignore for reasons which appellant (as explained above) does not regard to be valid.

For these reasons it is humbly submitted that the first charged has not been proved, and the defendant should be duly acquitted from this same charge.

In the second place defendant could not have been found guilty of the second charge, that is of driving without an insurance license. Witness Doriella Debono confirmed that the there was a valid insurance policy covering the vehicle. And it is only in the event that the driver had no driving license that this policy would not cover him. So in the case that the defendant is acquitted from the first charge by consequence he has to be acquitted of this charge, because a valid policy of insurance was *in vigore.*

Having seen the acts of these proceedings;

Having heard the parties make their oral submissions during the court sitting of the 5th February 2025;

Considers further:

Having seen the affidavit released by **PS 1040 John Grima** presented in the acts of these proceedings by the prosecution during the sitting of the 26th March 2024. He explains that on the 19th September 2024, upon a warrant issued by Inspector Gabria Gatt together with PC 76 Cini and PC 1151 Gatt affected a road check at Rabat Road, Marsalforn limits of Żebbuġ. At 17:15 a motorcycle bearing registration number WQZ 387 was stopped, and this was driven by the appellant. He produced a Nepalese Driving License; and when asked to produce proof of his 1st arrival into Malta, he stated that he arrived in Malta on the 14th August 2022. He was thus informed that court action would be taken against him; and was informed not to drive any further. He exhibited a photocopy of the driving license of the appellant. He also exhibited a copy of the police report marked as Doc. B drawn up by himself and duly signed by him too;

Having seen the affidavit released by **PC 1151** presented in the acts of these proceedings by the prosecution during the sitting of the 26th March 2024. He confirmed that on the 19th September 2024 between 16:30 and 18:00, together with PS 1040 and PC 76, they were holding roadblocks in Triq ir-Rabat, Marsalforn and this after having been given a warrant from Inspector Gabria Gatt;

As they were inspecting several cars coming from the direction of Marsalforn, there was a driver of a motor bike Yamaha registration number WQZ 387 driven by the appellant who was stopped. The driver had a Nepalese driving license; and asked if he had any evidence to give that he arrived in Malta less than a year before he was stopped, the appellant said he did not have such evidence. He was informed that the police would press charges.

Saviour Farrugia gave evidence on the 26th March 2024, on behalf of Transport Malta, and said that the appellant has a Maltese driving license category A1 and category AM, and this is valid from 5th December 2023 till 29th August 2026. He also said that the motorcycle, bearing registration number WQZ 387, is registered in the name of Fabrizio, and asked who could drive this car he said he was not able to reply. He exhibited a copy of the logbook marked as Doc. SF1 and a copy of the driving license marked as Doc. SF2. He also confirmed that the appellant could drive in Malta, with a foreign driving license, for a period of one year from his date of arrival in Malta, if the license was issued in a non-member state, otherwise he could drive in Malta till its date of validity.

Doriella Debono gave evidence on the 30th October 2024, gave evidence on behalf of National Insurance Brokers. She stated that the vehicle WQZ

387 was bought by Fabrizio Farrugia on the 9th December 2022. There is an insurance policy in force for the day, 19th September 2023. It is insured on Fabrizio Farrugia. She says that it is a QZ plate, and thus used for hire and reward, for leasing. The driver of such vehicle must have a valid driving license to be covered with this policy. She exhibited a copy of the insurance policy which was marked as Doc. DD1.

Considers further

That appellant's grounds of appeal are based on the First Court's wrong evaluation of the evidence, in particular where the Court states that there is a shift onus onto the appellant in regard to the offence he is charged with. 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 Repubblika ta' Malta vs. George Azzopardi**[1]; **Il-Pulizija vs. Carmel sive Chalmer Pace**[2]; **Il-Pulizija vs. Anthony Zammit**[3] and others.)

This Court also refers to what was held by LORD CHIEF JUSTICE WIDGERY in "**R. v. Cooper**[4]" (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*

[1] Decided by the Criminal Court of Appeal on the 14th February 1989.
[2] Decided by the Criminal Court of Appeal on the 31st May 1991.
[3] Decided by the Criminal Court of Appeal on the 31st May 1991.
[4] [1969] 1 QB 276.

doubt as to whether an injustice may have been done, then, very exceptionally, a conviction will be quashed.[5]*"*

In the Criminal Appeal **Ir-Repubblika ta' Malta vs Ivan Gatt**, decided on the 1st 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 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 namely that the appellant Sunil Gurung was stopped driving a motorcycle on the 19th September 2023 in Rabat Road, Marsalforn by PS 1040 and two other officials; and when he was asked how long he had been in Malta, he stated that he had been here for more than a year. He confirmed that he had a Nepalese license. On the basis of the incriminating evidence given by the appellant to the police as what he said was stated without him, being given a caution the appellant was arraigned in court and charged with the above two mentioned accusations.

It is well accepted in the Maltese legal system that a suspect enjoy certain cardinal rights when being interrogated and considered as a suspect inter alia the right to remain silent, not to incriminate himself and the right to legal assistance. Prior to investigation, a suspect should be given his rights as dictated in the letter of rights found in schedule E in the Criminal Code. Amongst such rights is the right to legal assistance as found under the EU Directive 2013/48 EU.

Preamble 17 of the Directive provides the following *In some Member States certain minor offences, in particular minor traffic offences, minor offences in relation to general municipal regulations and minor public order offences, are considered to be criminal offences. In such situations, it would be unreasonable to require that the competent authorities ensure all the rights under this Directive. Where the law of a Member State provides in respect of minor offences that deprivation of liberty cannot be imposed as a sanction, this Directive should*

[5] Confer also: BLACKSTONE'S CRIMINAL PRACTICE (1991) , p. 1392).

therefore apply only to the proceedings before a court having jurisdiction in criminal matters.

Article 21 of the Preamble continues:

> *Where a person other than a suspect or accused person, such as a witness, becomes a suspect or accused person, that person should be protected against self-incrimination and has the right to remain silent, as confirmed by the case-law of the European Court of Human Rights. This Directive therefore makes express reference to the practical situation where such a person becomes a suspect or accused person during questioning by the police or by another law enforcement authority in the context of criminal proceedings. Where, in the course of such questioning, a person other than a suspect or accused person becomes a suspect or accused person, questioning should be suspended immediately. However, questioning may be continued if the person concerned has been made aware that he or she is a suspect or accused person and is able to fully exercise the rights provided for in this Directive.*

Therefore, the use of auto-incriminatory declarations in criminal proceedings, especially where such declarations consist of the basis of the evidence of the prosecution, are to be considered as inadmissible evidence. Therefore, the Court will be disregarding all that the appellant said to the police when he was stopped during the roadblock. 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.

It is the prosecution that has to prove its case beyond reasonable doubt. In the case **Il-Pulizija vs Eleno sive Lino Bezzina**[6]:

> *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' probabbilità, 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 oltrè kull dubbju dettat mir-raguni u f'kaz li jkun hemm xi dubbju ragonevoli, il-prosekuzzjoni tigi kunsidrata li ma ppruvatx il-kaz taghha ta' htija u ghalhekk il-Qorti hija obbligata li tillibera.*

[6] Decided by the Criminal Court of Appeal on the 24th of April, 2003.

The Criminal Court of Appeal in the case **Pulizija vs Peter Ebejer** decided on the 5th 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-dubbji ombra ma jistghux jitqiesu bhala dubbji dettati mir raguni. Fi kliem iehor dak li l-gudikant irid jasal ghalih hu li, wara li jqis ic-cirkostanzi u l-provi kollha, u b'applikazzjoni tal-buon sens tieghu, ikun moralment konvint minn dak il-fatt li trid tipprova l-prosekuzzjoni. Ghamlet sew infatti l-ewwel qorti li ccitat b'approvazzjoni l-ispjegazzjoni moghtija 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).*

The Court makes reference to a similar case decided by her on the 10th July 2024, in the names **The Police Vs Sunil Gurung** wherein it was held that:

> *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.*

In this case the prosecution brought no admissible evidence to prove that the appellant had been in Malta for a whole year prior to being stopped during the roadblock on the 19th September 2023. This piece of evidence had to be brought by the prosecution who has the obligation to prove its offences to a level beyond reasonable ground. In the absence of the

inadmissible statement made by the appellant *a tempo vergine* the prosecution brought no other evidence to sustain its accusations.

This Court does not agree with the reasoning of the First Court, where it stated that the prosecution has to prove that the appellant has a foreign driving license, and then it is the appellant to prove that he was in Malta for a period more than one year from when he is stopped. This shift in onus adopted by the First Court does not come out from the law. There is no exception to this offence found in the law which provides for the argument brought forward by the First Court.

Consequently this Court is revoking the judgement of the First Court and declares the appellant not guilty of the charges brought against him and acquits him accordingly from any punishment.

Dr Consuelo Scerri Herrera
Judge

Jake Mejlak
D/Registrar