THE COURT OF CRIMINAL APPEAL

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

Appeal Number: 671/2021

The Republic of Malta

vs

Bjorn RAAKE

Today, 9th June, 2025

The Court:

Having seen the following:

A. THE CHARGES

1. This is an appeal from a judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 29th May 2023 against **Bjorn RAAKE** of German nationality, aged (30) thirty, born in Wilheim-Pieck-Stadt Guben, Germany on the twelfth (12) day of June of the year nineteen hundred and ninety-one (1991) and residing at 5, Alhambra Flats, Flat 2, Tower Road, Sliema, bearer of a German Passport numbered C4VN5RY39, after having been charged, in the name of the Republic of Malta with having, in these Islands, and/or at number 5, Alhambra Flats, Flat 2, Tower Road, Sliema, during the night between the ninth (9^{th}) day of October of the year two thousand and twenty-one (2021) and the tenth (10^{th}) day of October of the year to thousand and twenty-one (2021):

1. Engaged in non-consensual carnal connection, that is to say, vaginal or anal penetration of a sexual nature with any bodily part, and/or, any object, or oral penetration with any sexual organ of the body of another person, namely on the person of *Omissis*;

2. Also for having in the same period, place and circumstances, committed any non-consensual act on the person of *Omissis* which act, does not in itself, constitute any of the crimes, either completed or attempted, referred to in Article 198 to 206 of Chapter 9 of the Laws of Malta.

B. THE APPEALED JUDGMENT

2. By means of the above-mentioned judgement, the Court of Magistrates (Malta) as a Court of Criminal Judicature, while abstaining from taking cognizance of the second charge under Article 207 of the Criminal Code and after having seen Article 198(1)(3) of the Criminal Code, found **Bjorn RAAKE** guilty of the first charge that is the crime of non-consensual anal penetration with a part of his body not being any sexual organ, on the person of *Omissis*, and condemned him to imprisonment for a term of three (3) years.

   For the purpose of Article 382A of the Criminal Code, the Court issued a Restraining Order against the offender for the protection of the security of *Omissis* for a period of three (3) years, which Order shall come into effect upon the execution of the punishment of imprisonment.

   For the purposes of Article 533 of Criminal Code, it condemned the offender to the payment to the Registrar within six (6) months, the sum of one thousand and five Euro and ninety seven cents (€1,005.97) by way of costs incurred in connection with the employment in the proceedings of two experts.[1]

[1] Here the Court of Magistrates (Malta) referred to Dr. Martin Bajada, Dok. MB1 and Dr. Katya Vassallo, Dok. KV1.

C. THE APPEAL

3. **Bjorn RAAKE** appealed from the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 29th May 2023 and requested this Court to vary the said judgement in the sense that "*whilst it confirms that part of the judgement were it abstained from taking cognizance of the second charge, it revokes and reverses that part of the judgment were the accused was found guilty of the first charge and/or alternatively varies that part of the sentence which relates to the punishment imposed, including the part regarding the applicability of Article 533 of Chapter 9*".

D. THE REPLY OF THE ATTORNEY GENERAL

4. In his reply of 29th January 2024, the Attorney General argues that for the reasons indicated in the said reply, there are no reasons at law for this Court to depart from the conclusions reached by the Court of First Instance and that this Court should therefore dismiss the appeal in its entirety and confirm the punishment meted out against appellant.

E. PARTIES' ORAL SUBMISSIONS

5. This Court heard the parties' oral submissons regarding appellant's appeal during the hearing held on 22nd April 2024.

F. THE CONSIDERATIONS OF THIS COURT

6. From the records of the proceedings, it transpires that on 5th October 2021, *omissis*, a French national arrived in Malta for a work experience. On that day, she downloaded the dating application *Tinder*, thereafter communicating on the said application with appellant **RAAKE**, a German national living in Malta. The two exchanged numbers and continued their conversation on *WhatsApp*, discussing meeting up, with the conversation evolving into a sexual one.

7. Eventually they decided to meet up for a sexual encounter. On 9th October 2021, at around seven o'clock in the evening (7:00 p.m.), appellant and *Omissis* met in Valletta. From there, after some time, they agreed to get the ferry from Valletta to Sliema, where they proceeded to appellant's apartment, and engaged in sexual activities. *Omissis* had informed her friends about this encounter and earlier on in the evening, whilst at appellant's apartment, she informed them via *WhatsApp* messages, that she would be spending the night at appellant's apartment and that she would probably see them sometime in the morning at around eight o'clock (8.00 a.m.).

8. It is undisputed that appellant and *Omissis* engaged in voluntary and deliberately planned sexual activities on the night of 9th October 2021, and that they voluntarily engaged in consensual vaginal and oral sexual intercourse. However, *Omissis* alleges that at one point, appellant inserted his finger into her anus without her consent, thereby giving rise to the charge of rape against appellant. In his testimony before the First Court, appellant denies having inserted his finger into *Omissis*'s anus. It further results that the parties later had vaginal intercourse, and engaged in other sexual activities, following which *Omissis* informed appellant that she was leaving his apartment to return home. Once at home, she texted to inform him that she had arrived safely, stating further that he had pushed her too hard, and that "*When someone told you I don't like this you have to listen even if you think it's the best thing ever. But I have to told you like 8 or 10 times don't or I don't like it*". Appellant replied *inter alia* that they were not meeting again: "*Its finished :9*".

9. It also transpires that on the next day, *Omissis* recounted this incident to her flatmates, and after some initial hesitation on her part, she then proceeded to file an office report to the Police against appellant on 14th October 2021. On the basis of this report, and of a search and arrest warrant issued against appellant, he was arrested on 16th October 2021 and arraigned before the Court of Magistrates (Malta) on 17th October 2021, subsequently being found guilty of the first charge brought against him, as above-stated. **RAAKE** appealed from this judgement.

10. In the **first grievance**, appellant maintains that the Court of Magistrates (Malta) could not have found him guilty within the temporal parameters of the charge brought against him. According to appellant, in terms of the charge sheet, the non-consensual acts are said to have been committed on the night between the 9th of October 2021 and the 10th of October 2021, whereas from the records of the proceedings, it results that the said acts occurred on the evening of 9th October 2021.

11. Article 360(2) of the Criminal Code reads as follows:

> The summons shall contain a clear designation of the person summoned and a brief statement of the facts of the charge together with such particulars as to time and place as it may be necessary or practicable to give. …

12. It is clear from the wording of the law that the summons need to contain such information as is required by the accused to prepare an adequate defence. Such information needs to be clear in indicating the facts of which the accused is being charged, including the particulars relating to time and place, as it may be necessary or practicable to give; in the Maltese version, the law refers to those particulars of time and place "*li jkunu jinħtieġu jew li jkunu jistgħu jingħataw*". The Prosecution has a duty to ensure accuracy in the indication of these particulars, once defined, and to request the correction thereof during the criminal process, should any such corrections be necessary. In this regard reference is made to the judgements delivered by this Court, differently presided, in the names **Il-Pulizija vs John Mary Briffa** of 18th October 2025, **Il-Pulizija vs Warren Piscopo** and **Il-Pulizija vs Rita Theuma**, both of 19th October 2011.

13. The Court cannot acquit the accused where the variance in the particulars indicated is not one which leads to a reasonable doubt in respect of the facts of the case. However, in those instances where it is immediately apparent that there is significant divergence or discrepancy between the particulars indicated in the summons and the facts emerging from the evidence adduced, a reasonable doubt will emerge as to the guilt of the accused in respect of the charges brought against him; a reasonable doubt which cannot be resolved other than through an acquittal of the accused.

In this regard, reference is made to the judgement delivered by this Court as differently presided on 5th December 2023, in the names **Il-Pulizija vs Sabri Abdelaziz Khalifa**, wherein the following was held:

> 26. Biss, fejn ikun jirriżulta li l-partikolaritajiet indikati fiċ-ċitazzjoni huma għal kollox differenti minn dak li jirriżulta mill-provi - in kwantu jkunu jeżistu diskrepanzi fundamentali li jolqtu s-sustanza jekk mhux ukoll is-sostenibilta' tal-azzjoni kontra l-ġudikabbli - il-każ ma jkunx jista' jirnexxi fuq il-binarju tal-imputazzjoni kif miġjuba.
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> 30. Il-ġurisprudenza għalhekk taċċetta li f'ċerti ċirkostanzi jista' jkun hemm differenzi jew xi diskrepanzi bejn dak imputat u l-provi riżultanti – ossija *variances*. Iżda mhux kull tali *variance* twassal sabiex persuna mixlija tiġi meħlusa mill-imputazzjoni minħabba dubju dettat mir-raġuni dwar il-fatti tal-każ. Bħala eżempju, fl-appell kriminali **Il-Pulizija vs Joseph Zammit** deċiż fit-13 ta' Jannar 2016, ġie mistqarr li għalkemm ma kienx hemm dubju li "għall-ħabta tal 11.00" mhux l-istess bħal "għall-ħabta ta 14.00", l-anqas ma kien hemm dubju li l-appellant kien jaf sew għall-liema inċident il-każ kien qiegħed jirreferi. Imbagħad fl-appell kriminali **Il-Pulizija vs. Alfred Grixti** deċiż fis-26 ta' Marzu 2018 differenza fil-komparixxi bejn l-isem "Mary" u "Maria" kienet ritenuta bħala li ma taffettwax l-imputazzjoni u l-aggravju relattiv ġie miċħud.
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> 27. Fejn jirriżulta li jkun hemm differenzi jew diskrepanzi kbar jew sostanzjali bejn il-partikolaritajiet imsemmija fl-avviż u dawk riżultanti mill-provi, allura wieħed qajla jista' jitkellem fuq sempliċi *variance*. *Variance* tista' tkun kbira daqskemm żgħira. B'hekk il-Qorti tkun trid tistħarreġ in-natura ta' dik il-*variance* u l-effett li din ikollha fuq l-azzjoni penali li tkun qegħda tiġi trattata quddiemha.
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> 28. Id-dottrina tal-*variance* mhix intiża li tagħmel tajjeb għal differenzi jew diskrepanzi bejn il-partikolaritajiet imsemmija fiċ-ċitazzjoni u l-provi prodotti li jkunu ta' natura tali li jolqtu xi dettall essenzjali u importanti għall-integrita u sostenibilita tal-akkuża. Jekk id-diskrepanza jew differenza bejn il-partikolaritajiet fiċ-ċitazzjoni u l-provi prodotti jkunu tali li bihom

ikun jista' jinħoloq dubju dettat mir-raġuni dwar ir-reat innifsu, jew iwassal għal xi reat jew reati differenti minn dak imputat jew saħansitra għal nuqqas ta' reat - u dan jibqa' ma jiġix indirizzat bid-debiti korrezzjonijiet fl-istadji opportuni – allura l-kwistjoni hemmhekk ma tistax titqies li tkun riżolta b'sempliċi riferenza għad-dottrina tal-*variances* in kwantu l-integrita tal-azzjoni penali u s-sostenibilita tal-ġudizzju jkunu ġew milquta. Tant hu hekk li anke l-Imħallef Harding kien jisħaq li f'ċerti każi il-variance tkun tista' tirrendi l-imputazzjoni tant inċerta li allura tkun nulla minnha nnifisha.

29. B'hekk ladarba l-Prosekuzzjoni għandha r-responsabbilta' li tixli, hija trid tara li dak li tixli bih ikun fattwalment u legalment korrett. Jekk iċ-ċitazzjoni jkun fiha ineżattezzi jew żbalji, il-ġurisprudenza aċċettat li dawn fihom infushom ma jġibux, awtomatikament, in-nullita taċ-ċitazzjoni jew tas-sentenza. Iżda b'daqshekk ma jfissirx li l-Prosekuzzjoni tkun tista' tieħu attitudni leġġera jew allegra lejn dak li tikteb fiċ-ċitazzjoni, il-partikolaritajiet jew il-kontenut tagħha. Jibqa' dmir tal-Uffiċjal Prosekutur li jassigura li fejn ikun hemm żbalji, ineżattezzi jew impreċiżjonijiet, dawn għandhom jiġu korretti kemm jista' jkun malajr malli jiġi mikxuf l-iżball.

14. This Court notes that when *omissis* testified before the Court of Magistrates (Malta) on 25th October 2021, she mentioned that she met appellant on 9th October 2021 near the fountain in Valletta[2] at around "*nineteen hours*"[3]. The appellant also confirms that they met in Valletta.[4] *Omissis*'s version of events as recounted in her testimony is corroborated by the *WhatsApp* messages exchanged between her and appellant, wherein at 18:53, appellant texts that the ferry in Sliema was arriving and that he would be there in three minutes[5], with *omissis* replying at 18:54 that she was by the fountain with "*a pink towel around me*".[6] *Omissis* also confirms to have arrived at appellant's apartment in Sliema at around 8.00 p.m. and to have left the said apartment between "*ten fourty five and*

[2] A fol. 29 of the records of these proceedings.
[3] A fol. 49 of the records.
[4] A fol. 528 of the records.
[5] A fol. 136 of the records.
[6] A fol. 137 of the records.

eleven pm"[7]. Indeed, the timing of these events also emerges from the chat messages that *Omissis* sent to her flat mates on *WhatsApp*, Dok. ALX[8], where at 20:49, she sent a message that reads "*I am at his flat and at the moment all is well [smiley icon]*", to which her friend Amanda replied at 20:50, "*Perfect. Have a nice evening [icon with stars]*".[9] However, at 23:23, *Omissis* texts her friends again, this time stating "*There is a change I am coming back home*"[10]. *Omissis* also texts appellant at 00:51, telling him that she had arrived home safely.[11]

15. Therefore, as correctly submitted by appellant, the sexual encounter between appellant and *Omissis* occurred on the night of 9th October, 2021. Nevertheless, whilst referring to the night between the 9th of October 2021 and the 10th of October 2021, the charges cannot be deemed to cast any reasonable doubt in respect of the facts of the case. Indeed, the charges as proffered include also the night of the 9th of October 2021. Had the sexual encounter occurred in the early hours of the 10th of October 2021, a reference in the charges to the night between the 9th of October 2021 and the 10th of October 2021 would likewise have been correct, although the alleged criminal act would have taken place in the morning of the 10th of October 2021. The date on which the alleged criminal acts took place is included in the temporal parameters indicated in the charge sheet, and thus, appellant's first grievance is being rejected.

16. In his **second grievance**, appellant **RAAKE** challenges the decision of the Court of Magistrates (Malta), arguing that the First Court made an erroneous interpretation of the facts, thereby mistakenly coming to the conclusion that he was guilty of the first charge.

17. Appellant also argues that the Court of Magistrates (Malta) was not adequately assisted by the court appointed interpreter, who was more interested in explaining the semantics of the French language rather than carrying out his role of translating word for word the testimony of the witness.

[7] A fol. 49 of the records.
[8] A fol. 219 of the records.
[9] A fol. 312 of the records.
[10] A fol. 310 of the records.
[11] At fol. 137 of the records.

18. Furthermore, appellant comments about the "*rather biased approach taken in his regard*" by the First Court, both in so far as his testimony is concerned, as well as the bearing given to the messages exchanged between the parties. He points out that despite the interpretation given by the First Court, it is clear at fol. 41 of the records that *Omissis* conceded that she did not object to appellant licking her anus.

19. During his oral submissions before this Court, appellant further argues that the Court of Magistrates (Malta) acted in breach of the principle of the chain of evidence with regards to the victim's mobile phone as the latter retained possession thereof until 26th October 2021, when the Court appointed expert Dr. Martin Bajada examined and extracted contents from the said phone in terms of his appointment by the First Court of 25th October 2021. Appellant complains that there was no control over *Omissis*'s mobile phone from such time as she landed in Malta on 5th October 2021 and dowloaded the *Tinder* app on her phone, until such time that the messages were retrieved by the Court appointed expert.

20. As regards the part of appellant's second grievance relating to the interpreter, the Court notes that appellant did not, prior to this stage of the proceedings, object to the manner in which the said interpreter executed his role. This Court has read through the transcripts of *Omissis*'s testimony and observes that although there were indeed instances where the interpreter went into a semantic explanation of the terminology used in the French language to clarify the manner in which the witness expressed herself as she recounted the incident of that night [12], yet the said interpretation did not unduly affect the narration of events on *Omissis*'s part. Indeed, the alleged victim was clear in her explanation of the events as they unfolded that night and her feelings at different stages of the narrative. The Court further notes that appellant had ample opportunity to cross-examine *Omissis*, which he in fact did, and he could have thus easily addressed or sought to clarify any point which he may have deemed to be insufficiently clear, through the intervention of the said interpreter. Therefore, this Court considers this grievance as unjustified.

[12] Thus, for instance, at fol. 45 of the records, the interpreter explained the difference between the word '*demander*' and *'exigence',* with the latter indicating a stronger request on the part of appellant, as *Omissis* testified that appellant created an atmosphere of exigency, rather than simply asking for or requesting certain sexual acts.

21. As regards the part of appellant's second grievance concerning the chain of custody in connection with *Omissis*'s mobile phone, the Court notes that at no point, in his appeal application, does the appellant raise this issue. Indeed, in his application he contests the biased approach taken by the First Court *inter alia* in so far as the weight given to the said messages by the said Court in its considerations and consequently, in its decision to find appellant guilty of the charge of rape. He does not, however, contest the admissibility of the said evidence.

22. In any case, it is clear that the chain of evidence principle serves to safeguard the authenticity of the evidence, which the parties intend to adduce in a criminal process. It ensures continuity in the preservation and handling of every piece of evidence from the onset of a criminal investigation to the moment that that same evidence is then presented in Court. A corollary of the principle of the chain of evidence is that each and every movement of this evidence must be traceable and readily documented so as to better guarantee its authenticity.

23. In the present case, it results that following *omissis*'s testimony before the First Court of 25th October 2021, during which she exhibited the *WhatsApp* chat messages that had been exchanged between herself and appellant between the 7th and the 9th of October 2021[13], upon the Prosecution's request, the Court appointed Dr. Martin Bajada as a technical expert in order to "*retrieve the mobile phone belonging to omissis and upon being given access to her What's App account, is to retrieve and download all messages, including voice message content, exchanged with the accused person and with a group chat containing all or some of the following names Eugenie, Chrystelle, Amber, Amanda, Marina, Elodie for the period between the 5th and 11th of October 2021*" as well as "*to obtain access upon being provided the necessary information, to Omissis's Tinder account and retrieve all data exchanged with Byorn Raake the accused person*". The said task had to be carried out by the Court expert by not later than 27th October 2021, although he was authorised to report his conclusions to the Court at a later date.[14]

[13] *Vide* Dok. ZC1, a fol. 89 *et seq* of the records.
[14] *Vide* a fol. 21 of the records.

24. From the said expert's report[15], it results that expert Dr. Martin Bajada met with *Omissis* on 26th October 2021 and examined and extracted contents from the mobile phone that she presented, namely a Samsung Galaxy S9+, which device she unlocked, giving the expert full access to the phone contents. The extracted data consists of i) a full phone data extraction; ii) a *WhatsApp* chat extraction exchanged with MSISDN +356 77060635, indicated by *Omissis* as that used by appellant and iii) a *WhatsApp* Group named '*Group de la classes Sam 2*', and is exhibited on a USB pen drive Dok. MBA, attached to the said report. It further results that the extraction from the *Tinder* chats was not possible, since it appeared that one party to the chat, namely, either *Omissis* or the appellant, had deleted their account, thus automatically removing all chats and the account itself.

25. This Court notes that appellant is correct in pointing out a time lapse between such time as the alleged incident took place and such time as the mobile phone's data was extracted. Furthermore, the Court notes that some of the chats exhibited by *Omissis*, specifically the final messages exchanged between herself and appellant, are not included in the chat messages exhibited in the expert's report. Nonetheless, the Court firstly notes that *Omissis* not only confirmed on oath that these were the entire *WhatsApp* chat messages exchanged between herself and appellant as from the 7th of October 2021, but the content of the said messages also tallies with the version of events she provides during her testimony. The same can be said with respect to the relevant messages that she sent on her friends' group chat whilst at appellant's apartment, which messages were also retrieved by expert Dr. Martin Bajada from *Omissis*'s phone and then translated by Dr. Anthony Licari. Furthermore, although a copy of the messages exchanged between appellant and *Omissis* was provided to appellant's defence counsel during *Omissis*'s testimony, prior to her cross-examination, at no point, neither in his note of submissions before the First Court, did appellant contest firstly, the admissibility of the said messages as evidence, and secondly, that these were indeed the messages that had been exchanged between *Omissis* and himself. In actual fact, parts of his testimony corroborate the content of these messages. Thus, for instance, in his testimony, whilst confirming that they had exchanged messages

[15] *Vide* a fol. 154 *et seq* of the records.

prior to their encounter, "*one to two days before*", the appellant states as follows:

> *To let's say get her into messaging something to me or replying in a normal way to me and then at some point I thought I was already thinking to myslef to cut this situation I mean cut the conversation because it was a lot of effort for me to get this person to meet or to agree on something that we meet at all which I had told her after so many dats that I mean I said I am just a normal guy I just wanna with you I just want to enjoy time with you I want to meet you I really had to re-ensure her in messages to her that I'm like that we just wanted to meet and see what we go through or what we want to go through. Then she said yeah right my fault.*[16]

26. Indeed, from the chat messages exhibited by *Omissis*, as well as the messages exhibited in the expert's report, it transpires that the following conversation took place between herself and the appellant on the morning of 9th October 2021, following a message by appellant at 03:21hrs, which she answers at 09:56hrs:

> *R*[17]*:* *Hey babe*
> *still awake?*
> *C*[18]*:* *I don't want talk again with you. Have a great day .... Ciao*
> *R:* *How come?*
> *Good morning :)*
> *whats the problem to meetup*
> *and enjoy each other?*
> *Especially me filling out your juicy pussy with my big cock ;)*
> *you really want to miss out on that . lol*
> *pls relax*
> *we will meet :)*
> *C:* *Because you always talking about what you want. You're selfish.*
> *R:* *so you tell me*
> *you dont want anything? :D*
> *whatever you feel like doing or want,*

[16] A fol. 535 of the records.
[17] Raake
[18] *Omissis*

I am going to do it and sacrifice me to you
of course

C: *Sacrifice?*

R: *after a while my tongue will hurt*
from sucking and licking
i still keep going i promise you that !
I apologise if you think that it is all about me
really
i want you to have fun time and enjoy every minute, it really
is importantt to me

C: *It's not about a sucking or licking ...*
I'm looking for more [than] *a sex friend. Somebody that I'm comfortable, have fun, go out, partying ..... but nothing serious. In 3 weeks I'm gone*

R: *yeah so far you dont even consider meeting*
So how can we even get to that point.

C: *You're right*
My fault
Are you free today?[19]

27. These messages indeed tally with appellant's testimony cited above.

28. This Court further notes that despite the fact that the last messages exchanged between appellant and *Omissis* are not included in the text messages exhibited in the expert's report, yet during his testimony, appellant further concedes that these messages were indeed exchanged between himself and *Omissis*. The said messages were read out to appellant during his testimony, and whilst at no point did he contest that these were in fact messages exchanged between the parties, upon the Attorney General's and the First Court's questions regarding the same, he even goes on to provide his interpretation of the texts which he had received from *Omissis*, and to explain what he meant by the texts which he had sent to her.[20]

29. In view of the above considerations, the Court deems that despite appellant's grievance regarding the lack of chain of custody of *Omissis*'s mobile phone from the moment that she dowloaded the *Tinder* application

[19] A fol. 98 to 100 of the records and a fol. 170 of the records.
[20] *Vide* a fol. 546 and 547 of the records.

on 5th October 2021 to the moment that she actually provided her mobile phone to the Court-appointed expert on 26th October 2021, it is nonetheless satisfied that the chat messages exhibited by *Omissis* during her examination in chief, were indeed messages that had been exchanged between the parties and that this constitutes authentic evidence. Thus, this part of appellant's second grievance is likewise being rejected.

30. As regards the appellant's grievance that the First Court made a mistaken interpretation of the facts, thereby erroneously reaching the conclusion that he was guilty of the first charge, the Court firstly notes that it is a recognised principle in the jurisprudence of this Court, that as an appellate Court, it does not disturb the conclusions reached by the First Court, if the said Court could have legally and reasonably arrived at such conclusions (*vide* **Il-Pulizija vs Ishmael Cachia**, Court of Criminal Appeal, 20th December 2022); **Il-Pulizija vs Tyson Grech**, Court of Criminal Appeal, 11th January 2024; **Il-Pulizija vs Joseph Tabone**, Court of Criminal Appeal, 25th November 2022). As held in the judgement delivered by the Court of Criminal Appeal (Superior jurisdiction) on 21st April 2005, in the names **Ir-Repubblika ta' Malta vs Emanuel Zammit**:

> ... kif dejjem gie ritenut huwa principju stabbilit fil-gurisprudenza ta' din il-Qorti li hija ma tiddisturbax l-apprezzament dwar il-provi maghmul mill-ewwel Qorti jekk tasal ghall-konkluzjoni li dik il-Qorti setghet ragjonevolment u legalment tasal ghall-konkluzjoni li tkun waslet ghaliha. Fi kliem iehor, din il-Qorti ma tirrimpjazzax id-diskrezzjoni fl-apprezzament tal-provi ezercitata mill-ewwel Qorti izda taghmel apprezzament approfondit tal-istess biex tara jekk dik l-ewwel Qorti kinitx ragjonevoli fil-konkluzjoni taghha. Jekk, izda, din il-Qorti tasal ghall-konkluzjoni li l-ewwel Qorti, fuq il-provi li kellha quddiemha, ma setghetx ragjonevolment jew legalment tasal ghall-konkluzjoni li tkun waslet ghaliha, allura din tkun raguni valida, jekk mhux addirittura impellenti, sabiex din il-Qorti tiddisturba dik id-diskrezzjoni u konkluzjoni.[21]

[21] In this regard, the Court also referred to the following judgements: **Ir-Repubblika ta' Malta vs Domenic Briffa**, 16th October 2003; **Ir-Repubblika ta' Malta vs Godfrey Lopez** u **r-Repubblika ta' Malta v. Eleno sive Lino Bezzina**, 24th April 2003, **Ir-Repubblika ta' Malta vs Lawrence Asciak sive Axiak**, 23rd January 2003, **Ir-Repubblika ta' Malta vs Mustafa Ali Larbed**; **Ir-Repubblika ta' Malta vs Thomas sive Tommy Baldacchino**, 7th March 2000, **Ir-Repubblika ta' Malta vs Ivan Gatt**, 1st December 1994; and **Ir-Repubblika ta' Malta vs**

31. This Court agrees with the First Court that although *Omissis* voluntarily participated in uninhibited sexual activities with the appellant, whom she had befriended two days earlier via the *Tinder* dating application, and who was therefore a stranger to her, she nonetheless had the right to refuse her consent to any type of sexual activity that she did not want to get involved in, and to expect appellant to refrain from any such activity. Likewise, as held by the First Court, it is not the Court's role to pass judgement about the morality of *Omissis*'s and appellant's promiscuous activities, but to decide about the guilt or otherwise of appellant in relation to the charge proffered against him, on the basis of the evidence adduced in these proceedings.

32. It is also clear that there is no dispute between the parties that the sexual encounter that took place on the night in question, was both voluntary and premeditated and that they willingly engaged in consensual vaginal and oral sexual intercourse. The dispute that arose before the First Court was as to whether the appellant penetrated *Omissis*'s anus with his finger and if in the affermative, whether he did so with *Omissis*'s consent or against her will. According to *Omissis*, appellant had indeed penetrated her anus with his finger, without her consent, despite her several intimations that she was not willing to indulge in anal intercourse, whilst appellant testifies that at no point did he insert his finger into her anus, stopping short at licking her anus, with her express consent. It results from the judgement delivered by the First Court that on the basis of the evidence brought forward by both the Prosecution and appellant, the First Court relied on the credibility of the version provided by *Omissis*, as corroborated by the text messages exchanged between the parties and between *Omissis* and her friends, as well as her friends' testimony, whilst dismissing appellant's testimony on the matter as lacking in credibility, thereby proceeding to find him guilty of the first charge proffered against him.

33. This Court immediately states that on the basis of the detailed analysis of the evidence adduced carried out by the First Court, and contrary to

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George Azzopardi, 14th February 1989; and to judgements of this Court: **Il-Pulizija vs Andrew George Stone**, 12th May 2004, **Il-Pulizija vs Anthony Bartolo**, 6th May 2004; **Il-Pulizija vs Maurice Saliba**, 30th April 2004; **Il-Pulizija vs Saviour Cutajar**, 30th March 2004; **Il-Pulizija vs Seifeddine Mohamed Marshan et**, 21st October 1996; **Il-Pulizija vs Raymond Psaila et**, 12th May 1994; **Il-Pulizija vs Simon Paris**, 15th July 1996; **Il-Pulizija vs Carmel sive Chalmer Pace**, 31st May 1991.

appellant's argument in his appeal application and oral submissions, this Court finds nothing biased about the approach taken in his regard by the First Court both in so far as his testimony is concerned, as well as the weight given to the messages exchanged between the parties. Indeed, the First Court examined minutely the testimony tendered by both parties, including the chat messages between the two, and found that "*Omissis's version was consistent and credible from beginning to end*"[22], recalling every detail of the sexual encounter and explaining how she felt throughout. The First Court also found that *Omissis*'s testimony as to appellant's "*behaviour and actions at the time when he was pestering her for anal intercourse is unequivocal and was not contrasted or challenged effectively, or neutralised by conflicting evidence*".[23] On the contrary, the Court of Magistrates found that her version of events, whilst being consistent and credible, was corroborated by the messages exchanged between the parties both before and after their sexual encounter.

34. Having thouroughly analysed the parties' respective testimonies, and the messages exchanged between the two, and between *Omissis* and her friends on the night of 9th October 2021, this Court cannot but agree with the First Court's interpretation of the evidence adduced. Although it is undoubted that their sexual encounter had been planned, their differing expectations, as noted by the First Court, were evident from the messages exchanged. She speaks about "*looking for more* [than] *a sex friend. Somebody that I'm comfortable, have fun, go out, partying ... but nothing serious. In 3 weeks I'm gone*"[24], whilst appellant is persistent about sex, at one point querying "*What do you mean? U don't wanna get fucked?*", to which *Omissis* replies "*Not like that ... Date before A drink maybe Little talk Flirting*"[25], and after informing him that she did not want to talk to him again, "*Because you always talking about what you want. You're selfish*", he asked "*whats the problem to meetup and enjoy each other? Especially me filling out your juicy pussy with my big cock ;) you really want to miss out on that. lol*".[26] At one point, he states that he had to relax "*you just make me horny*", to which *Omissis* replies "*I don't know why*

[22] A fol. 599 of the records.
[23] Ibid.
[24] A fol. 100 of the records.
[25] A fol. 93 and 94 of the records.
[26] A fol. 98 and 99 of the records.

you're like that What is happening?[27] His persistence in general, compared to her more prudent approach is also evident from the said text messages, as clearly outlined by the First Court at fol. 600 and 601 of the record. His messages "*but still you need to know, i am very very naughty boy"* to which she answers "*If your not violent and be gentlemen it's okay*"[28], whether she felt like having some good long sex, and his reference to "*some pounding*", lead her to reply "*Relax*" and "*Will see*".[29] His comment, during this same conversation, that "*I think one thing might not be happening then*" because of her blocked nose, is followed by her reply to "*Stop*", to which he answers "*Oki Yes I need to control*" and her immediate reply "*You annoying me. I swear*" and "*No pressure Talk laughs. Know each other ... Eat some Japanese food ... And will see*".[30] This leads this Court to further agree with the First Court in considering that this lends credibility to *Omissis*'s testimony regarding appellant's imposing attitude, relentlessly expecting her to comply with his sexual needs during their meeting, including his intensity during their first sexual intercourse, to which she refers as "*very intense and in his excitement, he was alone, he was exciting himself alone*"[31], oral sex in the shower wherein she states that he twice attempted to push his penis deeper into her mouth, to which she reacted by pushing him away, sexual intercourse while on all-fours in front of a mirror in the bedroom, licking her anus, which she didn't find pleasurable, sexual intercourse without protection and anal penetration, with *Omissis* emphatically refusing the latter two requests.

35. As rightly interpreted by the First Court, these messages clearly show appellant's enthusiasm and fervour about their prospective sexual encounter, even commenting that he was curious as to whether "*you can handle me and my size*"[32], with *Omissis* telling him at one point to "*think of me my body*" and "*Be gentle with my body*".[33] The fact that *omissis* downloaded the *Tinder* application upon her arrival in Malta, with a view to a sexual encounter, as appellant rightly states in his oral submissions,

[27] A fol. 121 of the records.
[28] A fol. 110 of the records.
[29] A fol. 117 and 118 of the records.
[30] A fol. 118 and 119 of the records.
[31] A fol. 35 of the records.
[32] A fol. 114 of the records.
[33] A fol. 122 of the records.

does not lead this Court to interpret the messages exchanged between the parties differently from the First Court. Despite her obvious willingness to a sexual encounter, their respective approaches to the said encounter were clearly different, as evidenced also by *Omissis*'s discussion with her friends prior to meeting with appellant.

36. *Omissis*'s last messages to appellant, following their encounter, are amply clear to this Court, as they were likewise clear to the First Court and tally perfectly well both with *Omissis*'s testimony, as well as with the text messages she sent to her friends from appellant's apartment, together with her friends' testimony on *Omissis*'s reaction to having been anally penetrated by appellant. Indeed, after informing appellant that she had returned home safely at 00.51hrs, she proceeds to tell him that she didn't feel good "***I wasn't good***" and that "***you push me too hard***", to which appellant replies "*yeah happened",* thereby admitting that this was the case, "*was nice meeting you was first and last time :D too many mental blocks you have*" – a reply she also mentions during her testimony - and to which she replies, almost incredulously, "*You think it's my fault?*" and goes on to tell him "*When someone told you I don't like this* ***you have to listen*** *even if you think it's the best thing ever. But* ***I have to told you like 8 or 10 times don't or I don't like it***" [emphasis of this Court]. Appellant does not contest this assertion, but simply replies to her previous question with "*Hey no one to blame. Its finished :9*".[34]

37. These messages tie in precisely with *Omissis*'s testimony that she had refused anal penetration during their meeting. In this regard, she testifies before the First Court in the following manner:

> Witness: ... He continued to ask me to have anal sex. ... When he asked me for anal penetration, he asked me so many times and each time I told him no I don't want. I don't like I don't want. ...[35]
>
> Witness: We were on the bed. We were kissing each other and caressing each other. At one moment I don't know why and how, **he asked me again for anal penetration and I said no**, but **he**

[34] A fol. 138 and 139 of the records.
[35] A fol. 37 of the records.

did it just the same with the finger. He penetrated me with his finger.

...

Witness: I think I was, we were both in a spoon position ... he was behind me.

...

Witness: I pushed him and I told him 'what are you doing?' This lasted three seconds but it was three seconds too much because **I had passed the evening at repeating 'no'**. He told me 'how could you tell that you don't like it if you don't try?' I was shocked very much, I was humiliated. He treated me like an object for his sole pleasure.

...

Dr. Abela: Mela she was telling us, before this incident, that he asked her again to have anal sex, and she replied 'no I don't want', issa from her statement 'no I don't want' to when she felt his finger inside her anus, how long did it pass? Seconds, minutes?

Witness: Five seconds.

Dr. Abela: So she is saying exactly after she told him 'no I don't want', he inserted his finger in her anus.

Witness: Yes and I felt that **the more I said no** the more he wanted, the more he asked.

...

Witness: ... When he asked it was always 'come on let me do it', 'I feel a lot', 'I cannot hold back', 'Your bottom excites me so much'.

...

> Witness: Yes he was telling me 'I want I want' 'I cannot hold back'.
>
> ...
>
> Witness: He used pressure. He told me you must try. He repeated you must try as if I was doing him a big gift.[36]

38. Her reaction after having been anally penetrated by appellant's finger is consonant with her having constantly refused appellant's requests for anal penetration during their encounter:

> I pushed him. I pushed myself, I moved back. I told him 'what are you doing?' and he told me 'it's not something important'. It's not; 'grand chose' ...
>
> ...
>
> I was shocked, at that moment I did not understand, I did not the notion of rape, I understood that he did not respect my consent ...
>
> ...
>
> lost. I started to be afraid. ... I didn't want to panic and we had sex in spoon position ...[37]

39. Indeed *Omissis* explains how shortly afterwards, she left appellant's apartment, clearly feeling apprehensive of appellant after penetrating her anally. From the content of her *WhatsApp* chat messages with her friends, it results that prior to leaving his apartment, she texted her friends on their group chat at 23:23: "*There is a change I am coming back home*"[38]. This also corroborates her version of events.

40. Her friends *omissis 1* confirm that on the next day, *Omissis* told them that appellant had penetrated her anus with his finger against her will. *Omissis*

[36] A fol. 38 to 40 of the records.
[37] A fol. 41 of the records.
[38] A fol. 310 of the records.

1 describes *Omissis* as "*very annoyed*"[39], that "*She was sad and had tears in her eyes*"[40], and Dos Santos states that "*We realised that she was hurt by what had happened ... She wept. And she told us. Because she was weeping we realised how she felt, but then she told us too*"[41]. On her part *Omissis 1* states that *Omissis* "*explained to us that she felt very bad about it and she wanted to leave ... his place – but she didn't know how to go about it, she wished very much to leave she was afraid to leave immediately, so she did not leave right away*"[42].

41. *Omissis*'s messages to appellant after their encounter, in view of her testimony, leave no doubt that she was referring to appellant's incessant requests for anal penetration, and cannot be interpreted otherwise. Indeed, during her testimony she expressly states that she was here referring to his constant requests for anal intercourse and for sexual intercourse without the use of protective contraception. She was categorical and unambiguous in her testimony that she had explicitly refused anal penetration, but that this notwithstanding, appellant nonetheless proceeded to insert his finger into her anus.

42. Furthermore, this Court notes that appellant's version on this matter was not credible. As already noted above, appellant denied having penetrated *Omissis*'s anus with his finger; "*it didn't happen at all*"[43]. Yet, appellant does not explain why *Omissis* left his apartment so suddenly, when they had previously agreed that she would spend the night at his apartment. In addition, the Court deems as absolutely not credible appellant's version that *Omissis*'s messages after their meeting referred to their messages prior to their encounter, rather than to anything that had happened during their encounter, that she had not objected to anything at all during their meeting, and that he had not requested anal sex whilst they were in each other's company. He actually states that he had requested anal sex prior to their meeting, through their chat messages, and that *Omissis* had objected to this: "*I was in messaging asking about anal and that I like to do it. But with Omissis, I experienced really quickly through the*

[39] A fol. 182 of the records.
[40] A fol. 183 of the records.
[41] A fol. 196 of the records.
[42] A fol. 377 of the records.
[43] A fol. 542 of the records.

messaging ok she is really objecting a lot", with reference to anal sex[44], and goes on to state that "*I was very aware of that*"[45] and "*before we met I was quite aware especially with Omissis there will not be anal sex*"[46]. Yet, although it is noteworthy that appellant concedes that he had requested anal penetration and that *Omissis* was absolutely opposed to it, no such specific messaging results from the text messages exhibited by *Omissis* and those contained in the expert's report. He concedes that in her last chat messages to him, *Omissis* was referring to anal intercourse and that his reference to her mental blocks in reply to her messages related to anal sex, "*about not having anal and why not having anal*". Furthermore, at one point upon being asked by the First Court as to whether anal sex was discussed during their meeting, and whether he did ask *Omissis* for anal intercourse during such meeting, he admits "*Erm, I might have in a way asked for let's say when she realised, ok maybe something maybe I would go towards something like this which was towards the end when I asked her to if I could lick around her butt but erm*".[47] In view of this, this Court cannot but conclude firstly, that appellant was very well aware that *Omissis* was not open to anal penetration, even though as correctly submitted by appellant in his oral submissions before this Court, no explicit chat massages regarding anal sex, between the parties, may be found within the content of the messages exhibited, secondly, that his passion for anal intercourse corroborates *Omissis*'s version that during their sexual encounter, he had persistently requested such intercourse, rendering his version that anal intercourse was not really on his mind during the encounter as totally unlikely, thirdly, that contrary to his assertion, anal intercourse was indeed discussed during their encounter, and fourthly, that these final messages referred specifically to that which had happened during their encounter, namely, that despite his ongoing persistence about anal intercourse, and despite her constant flat refusal to the same, he had indeed penetrated her anus with his finger, without her consent and against her will.

43. In actual fact, his version that in her last messages, she was referring not to their encounter, but to their previously exchanged messages, does not

[44] A fol. 544 of the records.
[45] Ibid.
[46] A fol. 545 of the records.
[47] A fol. 548 of the records.

hold ground, and had matters turned out as per appellant's version, there would have been no reason for *Omissis* to tell him that he had failed to listen to her, or even that she had told him eight or ten times "*don't or I don't like it*", right after their encounter. Given these considerations, similarly, his version that her message stating that he had pushed her too hard referred to his previous messages, is likewise not credible. Indeed, following this assertion, upon being asked by the Court to explain his reply "*Yeah it happened*", after *Omissis*'s claim that he had pushed her too hard, he states "*I was referring to the whole encounter*".[48] In this context, this Court fully agrees with the First Court that "***the Court cannot find any significance to Omissis's message at 00.56h unless this message is placed in the context of the accused's persistent requests for anal intercourse during their immediately-preceding encounter, which despite her having flatly refused, he carried out nonetheless with the insertion of his finger into her anus.*** *There can be no other reasonable explanation for Omissis's evident disappointment at this behaviour on the part of the accused, so much so that she felt she had to point it out again after having arrived home from his place from which she claims to have abruptly left*"[49] (emphasis of the First Court). Here again, in view of the evidence adduced, the Court cannot but agree with the First Court that "*there is little doubt left in the Court's mind that Omissis's messages sent to the accused after she abruptly left from his place, referred to none other than the* ***materialisation of the accused's fetish for anal penetration notwithstanding and against her express and repeated negative responses to his requests***. *Moreover, in the Court's view, Omissis's abrupt departure, which the accused also admitted to, is explained precisely by the surreptitious penetration of her anus with his finger, which penetration was not only non-consensual but performed notwithstanding and in violation of the victim's express veto*"[50] (emphasis of the Court of Magistrates).

44. Appellant's lack of credibility and consistency further emerges when he states that he had, following their encounter, decided not to meet *Omissis* again since she had refused anal intercourse. In this respect he states that "*I mean this was not in my mind at this time, erm, but afterwards for*

[48] A fol. 551 of the records.
[49] A fol. 605 of the records.
[50] A fol. 607 of the records.

sure"[51] and '*Afterwards, a few days later like, I didn't have it in my mind that evening right away, just because I was so exhausted I did not even think about it*"[52]. Yet, it clearly transpires from the chat messages exchanged between the two that during their last conversation two hours after their meeting, he had immediately told *Omissis* that it was over and that it had been their first and last meeting. Indeed, no messages were exchanged again between the parties following this conversation.

45. Like the First Court before it, this Court is also convinced that despite the fact that *Omissis* conceded to appellant licking her anus, she had surrendered to this reluctantly, having continously and categorically refused anal penetration.

46. Thus, this Court cannot but agree with the First Court that on the basis of the evidence adduced, in particular *Omissis*'s unequivocal testimony, the content of the messages exchanged between the two both prior to and following their meeting, as well as appellant's version of events, which is absolutely not convincing and not in the least probable, "*the Court is not only satisfied that the accused did indeed penetrate Omissis's anus with his finger but is also wholly convinced that he did this after and despite persistent requests which were expressly turned down*".[53]

47. In his oral submissions before this Court, appellant argues that he had accepted the fact that *Omissis* refused anal intercourse via his penis, but yet she had consented to him licking her anus. Thus, argues appellant, how was he meant to understand that her refusal to anal penetration included penetration through his finger, when she had so readily accepted that he lick her anus? Appellant points out that the context within which the act complained of occurred is vital, since anal penetration took place at the moment that appellant was licking *Omissis*'s anus. How was he meant to distinguish therefore, between that which the victim consented to and that which she did not consent to? How could he reasonably believe that *Omissis* was not consenting to anal penetration through his finger?

[51] A fol. 547 of the records.
[52] Ibid.
[53] A fol. 603 of the records.

48. In this respect, the Court firstly notes that from the evidence adduced, the events as outlined by appellant in his submissions do not quite tally with the sequence of events as recounted by *Omissis*, whose testimony, as explained, the Court finds very credible and reliable, contrary to that provided by appellant, who within this context also seems to be admitting to having actually penetrated *Omissis*'s anus by using his finger. As to the sequence of events, *Omissis* states that appellant's licking of her anus came after his insertion of his finger and that the two actions were not contemporaneous. It thus transpires from her testimony, that whilst they were in spoon position, kissing and caressing each other, appellant again requested *Omissis* for anal penetration, which she categorically refused, but nonetheless within five seconds, he proceeded to penetrate her anus with his finger. She also recounts how following this, he licked her anus, with her consent, and then vaginal penetration ensued, after which she proceeded to get dressed in order to leave the apartment.

49. As already stated above, it is clear to this Court that *Omissis* had categorically refuted to be anally penetrated by appellant, that she had made this amply clear throughout the whole evening and that appellant had nonethless proceeded to insert his finger into her anus, despite the fact that she had again uttered her refusal to be anally penetrated five seconds earlier. It was only after this episode that he then proceeded to lick her anus, this time with her express consent, which he requested prior to proceeding. This Court finds that the two actions were clearly distinguishable, that which was allowed and disallowed by *Omissis* was made amply clear to appellant, and that within the context of the events as they unfolded that night, it may not be said that appellant reasonably believed that *Omissis* was consenting to any anal penetration of any sort. To the contrary, it is evident that appellant did not reasonably believe that *Omissis* consented to the anal penetration at issue.[54]

[54] In the United Kingdom, the Sexual Offences Act 2003 defines rape as having been committed when the accused (i) intentionally penetrates the vagina, anus or mouth of the victim with his penis; (ii) the victim does not consent to the penetration and (c) **the accused does not reasonably believe that the victim consents** (emphasis of this Court). Whether a belief is reasonable must be determined with regard to all the circumstances including any steps the accused has taken to ascertain whether the victim consents. The test of reasonable belief under Common Law requires the judge of fact to identify what steps, if any, had the accused taken to obtain the consent of the victim, examining how the suspect knew or believed the victim to be consenting to sex and to check if the consent was given for all the sex acts and not just some (What is consent? Accessed 20th May 2025). It is clear that the test under Common law is not purely objective but requires an assessment of the circumstances in which the consent was given, as well as an understanding of the behaviour of the accused in that given context. Under Maltese Law,

50. Article 198(1) of the Criminal Code states as follows:

> Whosoever shall engage in non-consensual carnal connection, that is to say, vaginal, anal or oral penetration with any sexual organ of the body of another person, shall, on conviction, be liable to imprisonment for a term from six (6) to twelve (12) years:
>
> Provided that whosoever shall engage in non-consensual vaginal, anal, or oral penetration with any other part of the body not mentioned in sub-article (1) on the body of another person, shall, on conviction, be liable to imprisonment for a term from three (3) to nine (9) years:
>
> Provided further that penetration with any bodily part shall be deemed to be complete by its commencement, and it shall not be necessary to prove any further acts. (Emphasis of this Court)

Furthermore, Article 198(3) of the said Code provides as follows:

> The acts referred to in sub-articles (1) and (1A) shall be deemed to be non-consensual unless consent was given voluntarily, as the result of the person's free will, assessed in the context of the surrounding circumstances and the state of that person at the time, taking into account that person's emotional and psychological state, amongst other considerations.

51. The Maltese Criminal Code, as amended by means of Act XIII of 2018, thus defines a non-consensual act as one where consent is not given voluntarily as a result of a person's free will. In order for the crime of rape to subsist, this must be accompanied by the sexual act, namely, either the carnal connection or vaginal, anal or oral penetration with any other part of the body, not being any sexual organ, as well as the formal element on the part of the offender, as with all criminal offences. The *dolus* of the offender must subsist independently of the lack of consent on the part of the victim.

52. To quote from *Blackstone's Criminal Practice*[55]*: -*

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as per the amendments introduced to Article 198 of the Criminal Code by means of Act XIII of 2018, the law too establishes a test for consent that is based on an assessment of the surrounding circumstances and the state of mind of the victim in those set of circumstances, among other considerations.

[55] *JH -v- MF judgment, Blackstone's Criminal Practice (2020 at B3.28), accessed: 20th May 2025.

"the definition in s74[56] with its emphasis on free agreement, is designed to focus upon the complainant's autonomy. It highlights the fact that a complainant who simply freezes with no protest or resistance may nevertheless not be consenting. Violence or the threat of violence is not a necessary ingredient. **To have the freedom to make a choice a person must be free from physical pressure, but it remains a matter of fact for a jury as to what degree of coercion has to be exercised upon a person's mind before he or she is not agreeing by choice with the freedom to make that choice. Context is all-important."** (Emphasis of this Court)

53. Reference is also made to the judgement in the names **Il-Pulizija vs David Xuereb** of 28th September 2022, where this Court differently presided, maintained the following:

> Il-fatt illi r-rapporti intimi u ta' natura sesswali kienu fl-istadju inizjali konsenswali ma ifissirx illi r-reat tal-istupru ma jissussistiex fil-mument illi dak il-kunsens jiġi mċaħħad. Kif tajjeb deċiż f'sentenza mogħtija mill-Corte di Cassazione fl-Italja:
>
> *"5.1 È noto che le relazioni sessuali, per la loro variegabilità, costituiscono uno degli essenziali modi di espressione della persona umana, rientranti tra i diritti inviolabili tutelabili costituzionalmente. Se da un lato la libertà sessuale va intesa come libertà di espressione e di autodeterminazione afferente alla sfera esistenziale della persona - e dunque inviolabile - è del pari innegabile che tale libertà non è indisponibile, occorrendo una forma di collaborazione reciproca tra soggetti che vengono in relazione (sessuale) tra loro: collaborazione che deve però permanere senza soluzioni di continuità e incertezze comportamentali per l'intera durata del rapporto. Le costanti precisazioni di questa Corte Suprema sul tema dell'abuso sessuale determinato da un mutamento dell'originario consenso iniziale, fanno sì che* ***anche una conclusione del rapporto sessuale, magari inizialmente voluto (il che non pare essere accaduto nella specie per quanto si osserverà a breve), ma proseguito con modalità sgradite o comunque non accettate dal***

[56] Section 74 of the Sexual Offences Act.

partner, rientri a pieno titolo nel delitto di violenza sessuale.
(Emphasis of this Court)

54. As amply stated above, the non-consensual nature of the penetration in this case has been amply proved. Moreover, on the basis of the parties' respective testimonies and the messages exchanged between the two following the sexual encounter, it also amply clear that *Omissis* refused consent to anal penetration of any sort or by any means, such that as rightly stated by the First Court "***there could not have reasonably been any doubt in the accused's mind, from an examination of all the surrounding circumstances of the case that he was forbidden from penetrating her anus in any manner. This is not a case of mistaken belief that there was consent on the pretext that the parties were engaging in consensual vaginal intercourse and caresses, but an absolute lack of consent made clear from the outset and also continuously until the moment of the surreptitious penetration, where the victim immediately manifested her resistance not only vocally, but also physically, when she pushed him and exclaimed: "what are you doing?"***[57] (emphasis of the First Court). *Omissis*'s refusals to appellant's requests for anal penetration were not merely implied, but very manifest and categorical. Yet, notwithstanding that appellant had clearly understood that *Omissis* did not consent to anal penetration, as he indeed admitted during his testimony, he nonetheless proceeded to insert a finger into her anus, prompting her to immediatey protest and to leave his apartment some time later, despite her initial intention of spending the night. Again, this Court agrees with the First Court that "*In view of the facts established from an examination of the evidence, there can be little doubt that Omissis's express rejection of the accused's requests for anal penetration should, and effectively must, have alerted him to the fact that he did not have her consent to penetrate her anally even with his finger*."[58]

55. This Court must also add that unlike this Court, the First Court had the opportunity to assess both the victim's demeanour as well as that of appellant, and given the above considerations, this Court finds no reason whatsoever to distance itself from the considerations of the First Court

[57] A fol. 613 of the records.
[58] A fol. 614 of the records.

about the evidence brought forward and its interpretation of the facts, in respect of which it finds no biased approach taken in regards of appellant. Indeed, the First Court took into consideration and analysed in minute detail all the evidence adduced before it, and reached a conclusion that is both reasonable and legal in the circumstances of the case. For these reasons, the Court rejects the second grievance brought forth by appellant.

56. In his **third grievance**, appellant contends that the punishment inflicted by the First Court, was excessive in the circumstances of the case. In this respect, he refers to the deletion of Article 209A of the Criminal Code, by virtue of Act LXIV of 2021, following which the Court may today apply the provisions of Article 21 of the Criminal Code and impose a punishment below the minimum prescribed at law for the offence. He further refers to the fact that the victim wanted to follow the lesser form of prosecution available under French law, the fact that she expressly stated that she was looking for a "*sex friend*" and that he has a clean criminal record, as well as the very intense sexual activity that took place between two consenting adults.

57. This Court refers to the judgement delivered by the Court of Criminal Appeal on 24th April 2003, in the names **Ir-Repubblika ta' Malta vs Eleno sive Lino Bezzina**, wherein the Court stated as follows:

> ... din il-Qorti taghmel referenza ghall-kawza fl-ismijiet "**Ir-Repubblika ta' Malta vs David Vella**" deciza fl-14 ta' Gunju, 1999 fejn din il-Qorti kienet qalet illi:-
>
> *"Mhux normali pero`, li tigi disturbata d-diskrezzjoni ta' l-Ewwel Qorti jekk il-piena nflitta tkun tidhol fil-parametri tal-ligi u ma jkun hemm xejn x'jindika li kellha tkun inqas minn dak li tkun fil-fatt"*

Furthermore in the judgement dated 25th August 2005 in the names **The Republic of Malta vs Kandemir Meryem Bilgum and Kucuk Melek**, the Court of Criminal Appeal referred to *Blackstone's Criminal Practice 2004* on this matter, whilst reiterating that this is the position consistently adopted by the Court of Criminal Appeal, both in its superior and in its inferior jurisdiction:

"***The phrase 'wrong in principle or manifestly excessive' has traditionally been accepted as encapsulating the Court of Appeal's general approach. It conveys the idea that the Court of Appeal will not interfere merely because the Crown Court sentence is above that which their lordships as individuals would have imposed. The appellant must be able to show that the way he was dealt with was outside the broad range of penalties or other dispositions appropriate to the case. Thus in Nuttall (1908) 1 Cr App R 180, Channell J said, 'This court will…be reluctant to interfere with sentences which do not seem to it to be wrong in principle, though they may appear heavy to individual judges' (emphasis added). Similarly, in Gumbs (1926) 19 Cr App R 74, Lord Hewart CJ stated: '…that this court never interferes with the discretion of the court below merely on the ground that this court might have passed a somewhat different sentence; for this court to revise a sentence there must be some error in principle." Both Channell J in Nuttall and Lord Hewart CJ in Gumbs use the phrase 'wrong in principle'. In more recent cases too numerous to mention, the Court of Appeal has used (either additionally or alternatively to 'wrong in principle') words to the effect that the sentence was 'excessive' or 'manifestly excessive'. This does not, however, cast any doubt on Channell J's dictum that a sentence will not be reduced merely because it was on the severe side – an appeal will succeed only if the sentence was excessive in the sense of being outside the appropriate range for the offence and offender in question, as opposed to being merely more than the Court of Appeal itself would have passed.***"[59]

58. The Court considers that the punishment inflicted by the First Court, was within the parameters of the punishment prescribed at law and that indeed the said Court applied the minimum punishment applicable in this case, thus clearly taking into account, the entire circumstances of the case, including appellant's clean criminal record. Rightly so, the Court of Magistrates also considered that the punishment applicable by virtue of Act LXIV of 2021 was more favourable to appellant than the punishment applicable at the time of the offence, and thus, applied the former lesser punishment. This Court additionally deems that there exist no special and

[59] Page 1695, para. D23.45

exceptional circumstances or reasons, in terms of Article 21 of the Criminal Code, which lead it to apply a lesser punishment than the minimum punishment prescribed at law. Contrary to that stated by appellant, *Omissis* was looking for more than a sex friend, although she intended nothing serious, and indeed, even if she were looking merely for a sex friend, she had every right to her sexual modesty. Neither did the circumstances of the night in question exclude any effect of the non-consensual act on the victim, as amply clear from her testimony and the testimony of her friends, and despite the fact that she initially intended to proceed with the lesser form of prosecution under French law, upon further consideration, she proceeded to file an official report against appellant, in full knowledge of the consequences that would and could ensue. Thus, the Court rejects this third grievance of appellant.

59. In his **fourth and last grievance**, appellant maintains that the application of Article 533 of the Criminal Code, in so far as Dok. KV1 is concerned, is incorrect.

60. In this respect, the Court firstly notes that Dok. KV1 is the transcript of *omissis*'s testimony, following the appointment of Dr. Katya Vassallo by the Court of Magistrates to transcribe the said testimony, during the sitting held before the said Court on 1st December 2021, in adherence to the Attorney General's request through his note of *renvoi* of 29th November 2021.[60] This Court notes however that this testimony was also transcribed by transcriber Carmen Magro, and inserted in the records at fol. 24 *et seq* thereof, which means that Dr. Katya Vassallo's appointment was unnecessary and that the costs incurred in connection therewith should not be borne by appellant. Appellant's fourth grievance is thus being upheld.

CONCLUSION

For the above reasons, the Court is hereby deciding the appeal of **Bjorn RAAKE** by acceding *in parte* to the said appeal and varies the judgement of the Court of Magistrates (Malta) as a Court of Criminal Judicature, such that:

[60] *Vide* a fol. 148 and 150 of the records.

i. it confirms the said judgement in so far as the First Court abstained from taking cognisance of the second charge proffered against appellant and found him guilty of the first charge brought against him;

ii. it confirms that part of the judgement in virtue of which it condemned appellant to imprisonment for a term of three (3) years;

iii. it further confirms the judgement in so far as a Restraining Order was issued against appellant for the protection of the security of *Omissis* for a period of three (3) years, which Order shall come into effect upon the execution of the punishment of imprisonment;

iv. it revokes that part of the judgement, where appellant was condemned to the payment unto the Registrar of the sum of one thousand and five euro and ninety-seven cents (€1,005.97), by way of costs incurred in connection with the employment, in the proceedings, of two experts. Instead, it condemns appellant to pay to the said Registrar the sum of eight hundred, eighty six euro and thirty-five cents (€886.35), representing the costs incurred in connection with Dr. Martin Bajada's report, Dok. MB1. The said costs shall be paid within a period of six (6) months from the date of this judgement, in default of which they shall be converted into a term of imprisonment in terms of law.

Natasha Galea Sciberras
Judge