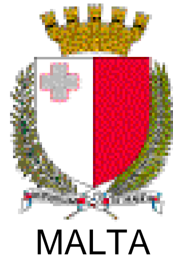

MALTA

COURT OF CRIMINAL APPEAL

**THE HON. CHIEF JUSTICE
VINCENT DE GAETANO**

**HON. MR. JUSTICE
JOSEPH A. FILLETTI**

**HON. MR. JUSTICE
DAVID SCICLUNA**

Sitting of the 15 th February, 2007

Number 12/2003

The Republic of Malta

v.

Ilija Vukadinovic

The Court,

Having seen the bill of indictment presented by the Attorney General on the 11th June 2003 whereby he charged the said Ilija Vukadinovic with having maliciously, with intent to kill another person or to put the life of such

other person in manifest jeopardy, caused the death of such other person;

Having seen the judgement delivered by the Criminal Court on the 8th July 2004 whereby that Court, after having seen the jury's verdict which found appellant (then accused), by eight (8) votes in favour and one (1) against, not guilty of the charge of wilful homicide but guilty of having caused grievous bodily harm to the person of Joseph Drago from which death ensued solely as a result of the nature or the natural consequences of the harm and not of any supervening cause and which death ensued within forty (40) days from the midnight preceding the crime, sentenced appellant to a term of fifteen (15) years imprisonment from which must be deducted any term spent under preventive custody only in connection with this offence and furthermore ordered that he pays the sum of one thousand three hundred and thirteen Maltese liri and fortyfive cents (Lm1,313.45) by way of all Court expenses incurred in connection with this case and issued a removal order so that appellant will be deported from these Islands as soon as he has served his term of imprisonment, and this after having considered the jury's recommendation of the accused to the mercy of the Court by five (5) votes in favour and four (4) votes against and this in view of his previous conduct[1], and after having considered as follows:

"Having heard and considered all submissions of Counsel for the Defence for the plea in mitigation of punishment which are duly recorded and in particular but not only the following :

That the accused was only twenty (20) years old when the incident took place;

The circumstances how the incident came about;

[1] This Court understands that the jurors wanted to point out appellant's clean conduct as the basis for this recommendation.

That he was in the wrong place at the wrong time and had he not been approached by the victim he would not have been facing trial today;

That he has been under preventive arrest for the past two (2) years;

That the verdict was not a unanimous one;

That five of the nine jurors felt they had to recommend him to the mercy of the Court;

That this was his first time abroad and he found himself in this situation;

That he was a first time offender both in Malta and in his own country and that it was he who actually went to the Police Station and released a statement.

Having considered also the submissions of Counsel for the Prosecution who stated that the jury in their eight – one verdict showed that they did not accept accused's plea of self defence and that his reaction had been completely out of all proportion and he had no reason to react as he did.

It was also submitted that there was no room for clemency in this case as the accused during the trial had resorted to all attempts to hide his guilt and it resulted that he had never shown any remorse whatsoever. He had even tried to be smart with the Police witnesses in this trial and at one point even with the presiding Judge. He therefore submitted that the punishment in this case should be close to the maximum of twenty (20) years.

Having seen sections 220 (1)(a), 484 and 533 of Chapter 9 of the Laws of Malta and sections 5(2)(b) and 15 of the Immigration Act."

Having seen the application of appeal of the said Ilija Vukadinovic filed on the 20th July 2004 wherein he

requested that this Court confirms the verdict and the first Court's finding that he is not guilty according to the charge in the bill of indictment and that it revokes the verdict and the part of the judgement of the first Court where it found him guilty of having on the 26th June 2002 at about 5.00 a.m., in The Strand, Gzira, caused grievous bodily harm to the person of Joseph Drago from which death ensued solely as a result of the nature or the natural consequences of the harm and not of any supervening cause, which death ensued within forty (40) days from the midnight preceding the crime, and consequently that this Court declares him not guilty of this offence and consequently acquits him of all charges; alternatively, in the event that this Court confirms the verdict, that it varies the punishment of imprisonment by inflicting a more fair and equitable one which reflects better his responsibility and the circumstances of the case;

Having seen all the records of the case and the documents exhibited;

Having heard the submissions made by counsel for appellants and counsel for the respondent Attorney General;

Considers:-

In his applications of appeal, appellant lists his grievances as follows:

"1. The appellant hereby states that from the evidence produced the jurors could not reasonably arrive to this guilt;

2. In the trial by jury there were a number of errors and irregularities which did not allow the appellant to have a fair trial and this on its own should be enough for this Honourable Court to uphold this appeal;

3. Without prejudice to the submissions contained in the above two paragraphs, in the event that this Honourable Court confirms appellant's guilt and

conviction, the sentence imposed by the Criminal Court should be reformed because it is excessive and not proportional to the crime committed."

In his application of appeal, appellant deals first with his second grievance where he alleges a number of irregularities that took place during the trial by jury.

The first alleged irregularity relates to a point towards the end of appellant's testimony when a juror asked the appellant about what shoes he was wearing and whether he had given those shoes to the police, to which appellant replied in the affirmative and the Court ordered that all the exhibits be brought into Court and shown to the jurors. Appellant argues:

"Therefore, not only the shoes were shown, but also other exhibits, which at the time had not been shown to the jurors and to the Court. The Court's order was made and carried out after that the prosecution had declared that they had rested their case and had no further evidence. What's worse is that the prosecution, on its own initiative, decided to produce a number of experts that [*recte:* who] had collected and analysed the exhibits which included clothes purportedly belonging to the deceased and even swabs. The experts did not have an opportunity to explain their findings to the Court, however, this notwithstanding, the jurors were shown swabs, blood stained clothes and other exhibits. This could not but unduly influence the jurors as it must have impressed them to the detriment of the appellant."

What went on at this stage of appellant's testimony is being hereunder reproduced for ease of reference:

"Juror: When he went to the police station was he still wearing the same shoes that he used during the incident?
Court: The question is clear, when you went to the police station in St. Julian's were you wearing the same shoes?
Witness: Yes.
Juror: Did the police ask to take your shoes?

Witness: Yes they took my shoes.
Court: Did they ever give it to you back?
Witness: No never. I made a request on very few times because I needed them in prison. They are exhibited as evidence.
Court: Can we see the exhibits please? Just to make sure, because I seem to remember something about shoes but I have to check. Let us check because I might be under a false impression.
You, put on your gloves and take out all the exhibits one by one and put them on the table.
Witness: Victim's.
Court: Those are the victim's shoes?
Witness: Yes.

(The witness has said that those are the victim's shoes but not his own.)

Court: Are the trousers yours?
Witness: No.

(The witness has been shown the black trousers and declared that they are not his own. The witness is now being shown a red stained white shirt.)

Court: Is that yours?
Witness: No.

(And he is declaring that it is not his own.)

Court: Do you know anything about that paper?
Witness: No.
Court: Let us see all the exhibits, then you will have all the time to put all the questions."

During oral submissions made before this Court, counsel for the defence stated that during the prosecution stage of the trial only the shoes had been shown and not the other exhibits. So all exhibits were shown without the possibility of experts elucidating on them and the fact that a number of the exhibits had blood stains on them meant that the jurors would have been unduly influenced.

It is clear that exhibits submitted in Court by prosecution witnesses should indeed be shown to the jurors at the appropriate time by the same witnesses who may have exhibited them before the Court of Inquiry in order to provide the necessary explanation regarding such exhibits. Section 655 of the Criminal Code in fact provides that "[t]he parties, the court, and, in cases within the jurisdiction of the Criminal Court, the jurors, may require the experts to give further elucidations on their report as well as on any other point which they may consider useful in order to make the opinion of the experts clearer." It must be stated that from the above reproduced transcription it does not result that there was a need for any elucidation. More importantly, however, it does not result that any objection was minuted by counsel for the defence with regard to the exhibits being shown at the stage when they were actually shown, that is to say during appellant's testimony. Having said that, this Court fails to understand how, simply viewing some blood-stained items, could have influenced the jurors the way the appellant is suggesting. It is to be observed that the jurors had already viewed photographs showing the deceased's battered face covered in blood and photographs of the deceased lying on the ground in a pool of blood, and had been given details, again with the assistance of photographs, by the medical experts of the injuries suffered by the victim. It is to be noted that in his note of reference of the 4th November 2005, appellant made reference to a judgement delivered by this Court in its Inferior Jurisdiction on the 30th July 1992 in the names **Il-Pulizija v. Jan sive John Leone Ganado**. The issue in that case related to the formalities which had to be observed in the preservation of evidence as required by sections 558 *et seq.* of the Criminal Code. In that judgement it was stated that the non-observance of such formalities did not produce as a consequence that the relative document could not be produced in evidence, **"imma tkun tista' biss, bejn wiehed u iehor, skond ic-cirkostanzi, tinfluwixxi fuq l-apprezzament tal-grad ta' prova li dak id-dokument ikun jista' jimmerita"**. This case thus has no bearing on the issue raised by appellant

in these proceedings. Consequently this Court deems appellant's complaint as unfounded.

The second point raised refers to the interventions made by the judge during appellant's testimony at the time of cross-examination. Appellant states:

"He was asked different questions as, for example, the name of the friends in whose company he had been in the night of the incident. The appellant tried to explain that he did not know their names. At this point the presiding judge intervened in a way which made it very obvious to the jurors that he was not believing him and that he would take drastic measures if it was decided that he was lying. This happened more than once and the presiding judge even shouted at the appellant and told him 'not to be arrogant'. This over-reaction by the presiding judge could not but have negatively influenced the jurors, even if they were instructed not to take cognizance of his actions because it was they who were to decide whether the witnesses were credible or not. The presiding judge acted in this way only towards the appellant, and failed to react in the same way to witnesses produced by the prosecution who failed to give clear and coherent testimony and whose testimony can be said to be shrouded in doubt if not in suspicion. The fact that the presiding judge reacted in this manner and only in the appellant's testimony was very unfortunate and should have been avoided at all costs because humanity being what it is, the judge's conduct could not but send a loud and clear message to the jurors that whatever the appellant had to say, he was not to be believed – the presiding judge himself was making it obvious! In real fact, the appellant's version of the facts was the most credible and was collaborated by a number of factors, while other witnesses gave a confusing and an illogical testimony. It would be prudent to point out that the appellant is twenty-two years of age and has spent two years in preventive custody awaiting a trial by jury for wilful homicide. It would be fair to predict even before the appellant took the witness stand that he was tense and preoccupied. The appellant on the witness stand reacted in such a manner

that suggested that he was tense and that he knew very well that he was facing a charge which had a maximum sentence of life imprisonment."

Regarding the judge's conduct during a trial by jury, Rosemary Pattenden, in her book entitled **Judicial Discretion and Criminal Litigation** (OUP 1990), says[2]:

"The English criminal trial is adversarial, which means that the parties determine the evidence to be called and the manner and timing of its presentation. The self-interest of the parties, so the theory goes, will ensure that all issues of law and fact are thoroughly aired. If taken to its logical conclusion this principle reduces the role of the judge to that of an umpire – someone whose job it is to see that the rules are obeyed but who takes no direct part. But theory and practice do not entirely coalesce and criminal judges are not, as the Supreme Court of Canada once put it, 'sphinx judges'. A trial is more than a contest between two parties. There is a public interest in seeing that justice is done and since the parties may be unevenly matched the judge may have to involve himself in the trial to ensure that the truth emerges. So long as he acts fairly and preserves an appearance of impartiality he will not be criticized for taking a relatively active stance.

One of the ways in which the judge may participate in the trial is by questioning witnesses. This is an example *par excellence* of the exercise of discretion during a criminal trial … in *R. v. Evans* Lord Justice Scarman affirmed that although 'our system is accusatorial and it is not the part of a Judge to run the case for the Crown or to run the case for the defence but to keep himself apart from the arena in which battle is joined, yet he does have a duty to ensure that justice is done and, if he thinks that justice requires him to put questions, then he has the right and the duty to intervene."

[2] F'pagna 98.

And in **Archbold, Criminal Pleading, Evidence and Practice, 2006, para. 7-81, page 1047**, we read:

"Interventions by the judge during a trial will lead to the quashing of a conviction: (a) when they have invited the jury to disbelieve the evidence for the defence in such strong terms that the mischief cannot be cured by the common formula in the summing up that the facts are for the jury, and that they may disregard anything said on the facts by the judge with which they do not agree; (b) when they have made it impossible for defending counsel to do his duty; (c) when they have effectively prevented the defendant or a witness for the defence from telling his story in his own way: *R. v. Hulusi and Purvis*, 58 Cr.App.R. 378, CA; see also *R. v. Frixou* [1988] Crim.L.R. 352, CA, and *R. v. Roncoli* [1998] Crim.L.R. 584, CA.… In *R. v. Matthews and Matthews*, 78 Cr.App.R. 23, the Court of Appeal said that in considering the effect of interventions made by the trial judge the critical aspect of the investigation was the quality of the interventions as they related to the attitude of the judge as might be observed by the jury and the effect that the interventions had either on the orderly, proper and lucid deployment of the defendant's case by his advocate or on the efficiency of the attack to be made on the defendant's behalf on vital prosecution witnesses by cross-examination administered by his advocate on his behalf. Ultimately the question was: might the case for the defendant as presented to the jury over the trial as a whole, including the adducing and testing of evidence, the submissions of counsel and the summing up of the judge, be such that the jury's verdict might be unsafe?"

This Court has examined the evidence given by appellant as transcribed and even heard the tape-recording of such evidence. Admittedly there were a number of interventions which showed that the presiding judge was not believing appellant and also some interventions where he was rather vociferous particularly in situations where

he believed that appellant was, as the prosecution put it, trying to be smart. The following are perhaps the main incidents encountered by this Court:

Almost towards the beginning of appellant's testimony, he was explaining how he had changed his residence from the Metropole Hotel to a flat and was asked by the Court where this flat was and how he had come to know about it[3]:

"Qorti: Where was this flat?
Xhud: In Sliema
Qorti: Where in Sliema?
Difiza: Can you explain the whereabouts? Or is there a landmark where?
Xhud: I don't know.
Qorti: Do you know the street?
Xhud: I don't know the address.
Qorti: How did you find your way to this flat if you didn't know the name of the place and the street?
Xhud: With the help.
Qorti: With the help you tell them I have a flat in Sliema?
Xhud: I believe it was actually some kind of advertisement or a newspaper, something like that.
Qorti: No I am not saying that, when you used to go this flat
Xhud: I have known where it is but I don't know the name of the street. I have known where to find it.
Qorti: But how do you know where to find it if you don't know the name of the street?
Xhud: By the position where it was situated, the building.
Qorti: Are you telling the truth on this point?
Xhud: I am telling the truth. I have never known the address, the street, I have known where the flat was.
Qorti: But how is it possible that you don't remember the address of the place where you were staying?

[3] Tape 10 Side B p. 4.

Xhud: I didn't say that I don't remember, I have never known the address."

Shortly after, appellant was asked who had given him the key to the flat, to which he replied that a friend of his offered him help[4]:

"Qorti: Who is this friend?
Xhud: I can't tell because I don't know.
Qorti: Look I have to warn you that once you are a witness now, you have to say the truth, the whole truth and nothing but the truth. Not part of the truth.
Xhud: I understand that, I am under oath and I am saying the truth.
Qorti: Now please take this warning seriously, and I am going to ask you again, who was the person who gave you the key to the flat? Because people don't normally give keys to flats to people they don't know? And to people who don't even know their name! Who was the person who gave you the key to the flat?
Xhud: A friend of mine.
Qorti: What is his name?
Xhud: I don't know. I don't remember."

Further on the Court commented as follows[5]::

"So we have asked you up to now where you were staying and you said you don't know, we have asked you what was the street where you were living and you said that you don't know, obviously the address you don't know either, you don't know the name of the person who gave you the key to tis flat where you were staying, and now I am asking you how much money you had on the 26th and you are saying you don't know as well."

To which the appellant retorted:

"I said I don't remember. And it's not some big big point."

[4] Tape 10 Side B p. 5.
[5] Tape 11 Side A p. 4.

The Court replying:

"That is for the Court to decide and for the jury. You are not here to tell us what is important! We are trying to establish the facts at this point."

Another incident occurred when appellant was being asked about how he says that he had got to know about the fact that the person he had had an incident with at The Strand had died[6]:

"Qorti: So how did you find out about the case?
Xhud: I have been told.
Qorti: By whom were you told?
Xhud: By a friend of mine.
Qorti: Who is this friend?
Xhud: The same one I mentioned before.
Qorti: Who is he?
Xhud: I have told you about it before.
Qorti: Who is this friend? (loudly in exasperation and with a thump on the bench)
Xhud: I don't know his name. I don't remember his name.
Qorti: I warn you again, that I can order proceedings to be taken against you.
Xhud: I understand that.
Qorti: If I have reason to believe that you are not saying the truth, and don't think I am joking here. I mean what I am saying. So you don't have to smile.
Xhud: I am not smiling.
Qorti: You don't have to snigger and you don't have to look superior.
Xhud: It was never my intention.
Qorti: The Court is asking these questions because it wants an answer.
Xhud: It was, if I can explain.
Qorti: I am asking you again, who was this person who told you that this man had died and that the

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6 Tape 11 Side A p. 6.

police were still investigating? What is the name of this person?

Xhud: I don't remember his name."

And again when being questioned by prosecuting counsel[7]:

Pros: Now if I had to suggest to you Mr. Vukadinovic that your testimony which you gave a few moments ago so far is riddled with lies, that you have been lying under oath, what would your reaction be?

Xhud: I would say you are lying now.

Pros: What?

Xhud: I would have to say that you are lying now.

Pros: I am lying?

Xhud: If you say I am lying, one of us must be.

Qorti: So you are saying now that the counsel for the Republic Dr Said is lying?

Xhud: No I said that me saying a lie is a lie.

Qorti: There are two ways about it, Dr Said has suggested to you that you have been lying and you have just told him

Xhud: If he called me liar

Qorti: Would you please listen to me? You are speaking to the Court and when you are being addressed to the Court you have to be humble and wait until the Court finishes before you try to ridicule the Court, as you are trying to do. Am I understanding correctly that you are saying that when counsel for the Republic is suggesting that you have been lying you are telling him that he is lying? Or did I misunderstand you?

Difiza: Your Honour I object to the question just put by the prosecution about lying, there are ways to put the question.

Qorti: Dr. Mifsud don't repeat the same mistake that your client is making. Whenever the Court is talking you have to shut up.

[7] Tape 12 Side A p. 6.

Difiza: Yes, by all means.
Qorti: I am asking him whether we are misunderstanding him or whether perhaps he is using the bad turn of phrase in English, or whether he is actually trying to insult the Crown Advocate, the Counsel for the Republic. I am giving him a chance to explain himself.
Difiza: The question was an unfair question.
Qorti: Dr. Mifsud your client is stopping you from talking now.
Difiza: It was an unfair question.
Qorti: That is your submission. What is your reply to that question?
Xhud: First if you let me explain myself, yes there was a misunderstanding, then I completely agree with my lawyer that it was an unfair question. I did not mean to insult the Court.

And after being asked by prosecuting counsel whether he was saying that he never lifted a single finger on Mr. Drago[8]:

"Xhud: I didn't say that.
Pros: So what are you saying? Because so far, until I'm putting this particular question you didn't even mention once that in some way or another, even minimal, did you raise your hands, or even in a minor manner mind you, assault Mr. Drago.
Xhud: May I answer?
Pros: Yes.
Qorti: You don't have to ask the question whether you may answer, and I again warn you to watch your conduct. Don't adopt that superior attitude when you are being questioned by counsel. You are doing it all the time. You get a question, you give the answer and you don't have to be ironic or sardonic or anything.
Xhud: I am not ironic, I am just not familiar with the procedure.

8 Tape 12 Side A p. 7.

Qorti: Then proceed to answer the question without any comments and without any other questions, just answer."

The Court has clearly the right to warn a witness about his sworn duty to say the truth, the whole truth and nothing but the truth, and has also the right to warn him about his conduct on the witness stand and about any action that it may deem appropriate to take. This applies as much to ordinary witnesses as it does to the accused who is giving evidence. There is no doubt that there were moments when the first Court was exasperated with appellant's attitude. This Court is of the opinion that some of the trial judge's interventions and reactions could have been done with greater tact and circumspection and he should furthermore have refrained from emphasising those points where he was quite clearly showing his disbelief in what appellant was saying, particularly as the latter incidents occurred practically at the outset of appellant's testimony. Some "misunderstandings" were indeed the result of appellant's imperfect knowledge of the English language and at one point the trial judge himself pointed this out to appellant and asked him to speak slowly[9] and at another point he asked prosecuting counsel to "use simple English"[10].

Now, it is true that subsection (1) of section 501 of the Criminal Code provides *inter alia* that an appeal against conviction shall be allowed if the Court of Criminal Appeal thinks that there has been an irregularity during the proceedings which could have had a bearing on the verdict; however the proviso to this same subsection specifically states:

"Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal under paragraph (b) of this subsection might be decided in favour of the appellant, dismiss the appeal if it

[9] Tape 10 Side B p. 7.
[10] Tape 11 Side B p. 6.

considers that no miscarriage of justice has actually occurred."

This Court is of the opinion that the incidents outlined above are unfortunate ones. However, the primary issue is whether the questioning by the judge and his comments were of such central significance as to affect the overall fairness of the trial. This Court has indeed considered the conduct of the trial as a whole which results to have been procedurally correct. It has also considered that, notwithstanding such incidents, appellant had the opportunity all the same to explain himself; he insisted over and over again that he was telling the truth; he was asked by his counsel those questions deemed appropriate; after cross-examination, defence counsel was allowed to carry out a re-examination; and appellant was allowed to produce documents he had not produced before, including a certificate issued by the Municipal Court of Kragujevac indicating that no investigation was instituted or indictment brought against him for any criminal offences, a certificate showing his home address, a copy of his student booklet and a school leaving certificate[11]. Furthermore, the members of the jury were able to, and in fact did, put several questions to appellant to clarify any queries they may have had regarding every part of his testimony.

Reference must also made to what the presiding trial judge said in his summing-up regarding the judge's conduct during the trial[12]:

"More important again you are not in any way to be influenced by anything I might have said in the course of the trial especially when witnesses were giving evidence. It sometimes happens in this court like in all other courts, that there will be a witness who for one reason or another might appear to the judge not to be saying the truth or the whole truth, and the judge according to law, if he thinks in his own best

[11] See Criminal Court records at p. 287 to p. 304.
[12] Tape 20 Side A p. 6.

judgement that that particular witness can be brought to order and shown that he is being inconsistent, for example, that he is saying something which is not prima facie credible, the judge can warn him, can tell him off, can even tell him that he can keep him apart from other witnesses, and that he can even keep him arrested for a short while, and possibly even take action against him - I am not referring to this particular case of course – but even when the judge, in the course of the hearing of the evidence, decides to tackle a witness perhaps rather toughly, it does not mean that you should not believe that witness because after all the judge might be wrong, it might be the witness who is right and the judge might be making a mistake. It is not always that when the referee whistles or when the linesman puts up the flag to declare a player, an attacker offside, that in actual fact that player would be offside, everybody makes mistakes, so the fact that the whistle is blown here, should in no way influence you saying well the judge made some remarks to him, it is obvious that he did not believe him, so I am not going to believe him as well. That is wrong as well. You might agree with that assessment, but if you agree with that assessment it is not because the judge has made that intervention, but because the way you are evaluating the witness yourself from those benches, and not from up here, leads you to that conclusion. So you are in no way bound by what ever the judge says on points of facts. Please this is to be kept in mind all the time.”

It is therefore necessary to examine the remaining grievances and all the facts of the case to determine whether there has or has not been a miscarriage of justice in this case.

The third point raised by appellant regards the validity of the statement taken by the Police which he contends was taken from him after a suggestion of favour was made to him. He says:

“The presiding judge practically ignored this claim and did not instruct the jurors on what constituted a valid and a legal admission or statement. Instead, the presiding judge merely mentioned the fact that the appellant was contesting not only the contents of the so called statement, but also the validity of the statement as a whole and that it was null and void. It is the submission of the appellant that this falls short of the requirement of the law that the presiding judge addresses the jury adequately but in addition it must have given the jurors the wrong impression that this was a matter that the presiding judge himself did not consider worth addressing more than he did.”

This Court has examined the trial judge’s address and found that, contrary to appellant’s submissions, the trial judge spoke exhaustively on this matter as evidenced by the following excerpt:

“At this point I have to tell you about the statement, that any declaration that the accused makes whether verbally or in writing can be used against him. However our courts have always held that one has to be cautioned especially if he is under investigation about this and that he has a right to remain silent and he is not bound to say anything at all. So the accused has three choices, he might decide, the person investigated might decide not to say anything, and one cannot infer anything against him by refusing to say anything. He can decide to say whatever he likes to say, and that could be the truth or a pack of lies or half lie and half truth, and you have the accused’s version here telling you that not all that there is in the statement is true because at some point he also had deliberately told the police some lies because he wanted to give them a story because as far as he was concerned that statement was just some paper-work according to what the inspector told him so that it would enable him to release him and he could go away and then possibly also he could get some help from the police to arrange about his passport to be able to leave the Island. This of course is flatly denied

by Inspector Micallef and by the two inspectors who also testified as to the circumstances of the statement. For you to consider the statement as evidence you have to be satisfied that it was done voluntarily not necessarily spontaneous – that he offered to give it even if he was questioned and then he gave an answer, provided it was done voluntarily without any threats, intimidations, promises or suggestion of favour.

Threats – unless you make a statement I am going to keep you arrested here. Unless you make a statement I am going to hit you or torture you, or whatever else, for example – these are examples.

Intimidations – if during the interrogations it results that there was somebody who was banging, or shouting and taking the chair from under him, or something to this effect or throwing a spotlight on his face for example, for a number of hours, to scare him, to intimidate him.

Promises or suggestions of favour – if you admit then you will get a light sentence. If you admit, we will not prosecute you or else if you give us a story we will arrange to give you a passport to leave the Island. If any one of these results that it has happened then the statement will not be admissible as evidence. This is a question of fact which you have to decide.

You have heard the evidence of the accused on this point, where he said that some of the statement is true, some of the statement is not true, that he deliberately told the police some lies because he was not obligated he said – those are the exact words – to say the truth. On the other hand you have the Inspector, the Superintendent Cilia who signed the statement, Inspector Valletta and Inspector Micallef who explained and under cross-examination denied. We also had a confrontation between the accused and Inspector Micallef about certain points, especially about the taking of the statement, you remember what

both of them said and then you will be able to draw your conclusions because this is a question of fact.

If you decide that that statement is taken under threats, or promises, or suggestions of favours or intimidations then you are free to discard[13] it and not to consider it all and put it aside. If on the other hand you are satisfied that the statement was taken as it is usually taken – the accused mentioned the point that the questions were not put down, it is not necessary for a statement to be admitted in law to have a question and answer statement. You could ask the question and you could just jot down the answer, because you can have the opposite. You can have a question and answer statement where the question is: 'Yesterday did you kill that man?' The answer is: 'I don't reply.' 'Yesterday, am I correct to say that you were in the company of XYZ when you killed that man?' The answer is: 'I don't reply.' In that kind of statement, the Court would have warned you, the first thing it would have warned you that you must not pay attention to the question but only to the answer, because the question can be very loaded, it can be unfair, it can be captious, and therefore when you go through a question and answer statement, you have to look at the answer not at the question, because there can be a trick in the question, a double question were if you answer one you are admitting the other for example. So the question is not important, the answer is important. And in this case they chose, it was up to the police, they have every right to do it, they chose the method of just putting the answers down and not the question. That does not invalidate the statement in any way. What would invalidate the statement is if you are not satisfied, and this on a balance of probability, it does not have to result to you beyond reasonable doubt, it is enough if once the accused is saying it, you believe that you are satisfied on the grounds of probability, to the degree of probability,

[13] It would have been more precise for the trial judge to say "then you must discard that statement" rather than "then you are free to discard that statement". But there is no grievance specifically directed towards, or based upon, this apparent lack of precision.

that he was either intimidated or threatened or promised something as a reward for making that statement, then you are free to discard that statement[14]. If you discard it, then of course whatever was said in the statement cannot be used as evidence either for or against the accused."

Consequently, appellant's third complaint is dismissed as well.

This Court will now turn to appellant's first grievance wherein he submits that there was not sufficient evidence for the jury to reach a guilty verdict beyond reasonable doubt; and this is really the crux of the whole case in view of the proviso, already mentioned, to subsection (1) of section 501. He submits that (a) there was a total absence of forensic evidence that connected him to the deceased; (b) the so-called eyewitnesses, Alfred Borg and Robert Bonnet, were to say the least unconvincing witnesses; (c) the police investigations were unreliable and they jumped to conclusions leaving him no option but to just give them a story in order to conclude the matter.

These matters require an evaluation of the evidence produced before the first Court. This Court is a Court of review and, in carrying out this function, it has examined carefully the record of the proceedings, including the transcriptions of evidence and the documents exhibited, to determine whether on the basis of the evidence produced, the jury, correctly addressed by the first Court, could have legitimately and reasonably reached its conclusion. This Court has moreover gone further than that; it has examined the evidence with a view to find out whether it is satisfied that there has been no miscarriage of justice notwithstanding any possible irregularity or wrong application or interpretation of the law which could have had a bearing on the verdict.

In **Blackstone's Criminal Practice 2001** we read (at para. D22.15 page 1622):

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[14] *Ibidem*

"The case of *Cooper* [1969] 1 QB 267 continues to provide guidance on how the word 'unsafe' should be interpreted in determining a criminal appeal. In that case, Lord Widgery CJ explained that if the overall feel of a case left the court with a 'lurking doubt' as to whether an injustice may have been done, then a conviction will be quashed, notwithstanding that the trial was error-free. Lord Widgery said (at p. 271 C-G):

'[This is] a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act 1966 [which somewhat widened the court's powers to quash a conviction] it was almost unheard of for this court to interfere in such a case.

However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it'."

And in its judgement of the 1st December 1994 in the names **Ir-Repubblika ta' Malta vs Ivan Gatt** this Court, differently composed, said:

"Fi kliem iehor, l-ezercizzju ta' din il-Qorti fil-kaz prezenti u f'kull kaz iehor fejn l-appell ikun bazat fuq apprezzament tal-provi, huwa li tezamina l-provi dedotti f'dan il-kaz, tara jekk, anki jekk kien hemm versjonijiet kontradittorji - kif normalment ikun hemm - xi wahda minnhom setghetx liberament u serenament tigi emmnuta minghajr ma jigi vjolat il-principju li d-dubju ghandu jmur favur l-akkuzat, u jekk tali versjoni setghet tigi emmnuta w evidentement giet emmnuta, il-funzjoni, anzi d-dover ta' din il-Qorti huwa li tirrispetta dik id-diskrezzjoni u dak l-apprezzament."

From a thorough examination of the records of the case and the evidence submitted before the first Court, it is evident that all the matters complained about were put to the consideration of the jury which was free, and was directed by the judge presiding over the trial, to evaluate all the evidence produced and decide as to whether it was ready to accept one version or another. The jury had the obvious advantage of seeing and hearing the witnesses and evidently concluded by rejecting appellant's version as being unsustainable.

Appellant submits that there was a total absence of forensic evidence that connected him to the deceased. Although there may be no forensic evidence, there is appellant's own declaration that there was an incident whereby the deceased accosted him in an indecent manner and appellant reacted by "pushing and fighting". What is to be considered is whether there is sufficient evidence to show that the fatal blows were directed at the deceased by appellant. This depends primarily on whether the witnesses Alfred Borg and Robert Bonnet are to be considered as credible witnesses.

Appellant submits that these two witnesses were unconvincing. Notwithstanding the horrific version of events they testified about, they agreed to leave deceased where he was and continue about their business without reporting the matter to the Police, and

this notwithstanding that they threw some water on the deceased and saw that he did not move. From their lack of credibility, argues appellant, one may infer that appellant's version that he was not present for a second attack on deceased is more credible and that another person may have been involved.

In this Court's opinion, appellant's suggestion that another person may be involved is mere conjecture. It is true that the fact that the said two witnesses did not immediately inform the Police about what had happened does not say much about the way they view their civic duties and *mores*. It is evident that in such a situation the persons concerned did not want to get involved. Alfred Borg says that he was confused about what he should do; that he asked passers-by for help but to no avail; and that he was afraid. Robert Bonnet confirmed that Borg was frightened and said that there was nothing they could do as the person was dead and that he told Borg that if anyone had seen them, "to tell the truth". Subsequently, however, Robert Bonnet approached Inspector Frans Micallef and told him all that had happened.

Alfred Borg, it must be said, did not recognize appellant when he gave evidence before the Criminal Court. However, when giving evidence during the compilation proceedings[15], he specifically made reference to "the accused". Furthermore, when describing what happened during the early morning hours of the 26th June 2002, he refers to two separate incidents within minutes of each other in which the same person was involved. Referring to the first incident he says that while fishing he heard and then saw two persons running towards him – the deceased being chased by a foreigner who managed to reach the deceased. He got up from where he was fishing and tried to separate them. The foreigner started punching the deceased in the head and he tried stopping him. At that moment he saw Robert Bonnet and called for his assistance. Bonnet agreed to accompany the foreigner to his hotel. Borg said that the deceased told him that he

[15] See p. 279 – 283 of the compilation proceedings.

was afraid of the foreigner. Borg told the deceased to go home and in fact the deceased left. Some fifteen minutes later Borg again saw the foreigner chasing the deceased, kick him and drop him to the ground. Borg said that he got up again from where he was fishing but could not keep the foreigner back, who started to hit the deceased and almost hit him as well. The foreigner kicked deceased in the face about five times. Borg said that he started shouting and when the foreigner left in the direction of Sliema after an exchange of words with him, Bonnet returned and he told him what had happened. After throwing water on deceased's face and noticing that he was lifeless, he moved towards Sliema and Bonnet went home. The Police never spoke to him before he was summoned to give evidence during the compilation proceedings.

Robert Bonnet said that on the day in question he was jogging when a fisherman, Alfred Borg, called to him to stop because a foreigner had punched a Maltese person. These two persons were next to Borg. Bonnet said that the foreigner tried to hit the Maltese person again but he held him and convinced him to go jogging with him. They jogged towards the Kennedy Hotel. While doing so, the foreigner told him, among other things that the Maltese person had tried to abuse him. At a certain point he said that he is going back and, to Bonnet's question "Going back where?" the foreigner replied "To punch him." The foreigner did in fact go back while he continued jogging towards Manoel Bridge. Bonnet was shown a photo of appellant contained in the report presented by Dr. Mario Scerri and he confirmed that the photo showed the person who came jogging with him that day. Eventually he confirmed that "the accused" (appellant) was the person concerned. Bonnet said that after jogging he sat down on a bench opposite the Kennedy Hotel and then heard shouting. Thinking that the foreigner was hitting the fisherman, he went to his help and found the deceased on the ground. Alfred Borg was there and told him that the other person had gone running. He looked and saw a person running at some distance. Alfred Borg told him that the other person had kicked deceased six times, besides

tripping him and he hit his head on the pavement; that he continued hitting him and that he (Borg) “was afraid of him because he tried to hold him but he did not care.” He said that some four or five days passed before he spoke to Inspector Frans Micallef about what had happened.

Inspector Frans Micallef confirmed that it was some time after the incident in question (he mentions about four to five weeks but also states that he was not certain about the time that elapsed) that he met Robert Bonnet who spoke to him about the case and also told him about the fisherman Alfred Borg. Inspector Micallef also confirmed that he did not talk to Borg.

There is no doubt that when appellant made his statement to the Police on the 26th June 2002, Inspector Micallef did not know the identity of the persons who may have seen the incident, particularly Alfred Borg. This is being pointed out as appellant is suggesting that the Police jumped to conclusions and that all he could do was to “just give them a story to conclude the matter”. However, there are details in his statement which corroborate what the aforementioned witnesses (Borg and Bonnet) stated: the reason why appellant said that he attacked deceased, the fact that he gave him a series of blows to the face and head, the fact that he kicked him and the fact that there was a person fishing who tried to intervene by staying between them. Furthermore, the account he gives of the blows and kicks he gave deceased (even though he seemingly combines them in one episode and not two separate ones as results from what Borg and Bonnet said) shows considerable aggressiveness on his part which is confirmed by what the pathologists and the expert in forensic medicine state.

When Prof. M’Therese Camilleri and Dr. Sarfraz Ali were giving evidence, they stated that when examining the body they found “multiple blows, multiple injuries, multiple sites of blunt trauma”[16] and again “multiple impacts to the head, to the neck” and they said that “the cause of death

[16] Tape 3X Side A p. 5.

is not ascribable to one single impact, it is a result of multiple impacts, multiple blows”[17].

Of considerable interest also are Dr. Mario Scerri’s conclusions in his report[18], viz. that the dust pattern found on deceased’s clothes together with the pattern of bruising found on the right side of the corpse was compatible with the pattern of the floor tiles and by no way indicative of tyre marks; that the fine spattering on the large pavement close to the sea which had both magnitude and direction indicate that deceased received blows in this place; that a number of injuries sustained by deceased were compatible with blunt trauma; that the fracture of the thyroid cartilage associated with fresh bruising in the muscles of the neck is a typical fracture caused by lateral manual pressure on the neck; that the abrasion associated with bruising on the left side of the neck is compatible with pressure on the neck; that the haemorrhages described in the abdomen were compatible with blunt trauma; that the fracture of C5 was caused by forced hyperextension of the neck and is the type of fracture one encounters when an arm lock is applied to the neck; that all the lesions indicate that deceased had been beaten aggressively; that the lesions certainly were not a result of deceased being run over by a car; that deceased died as a result of the blows he received which were mostly concentrated on the head. Dr. Scerri also concluded that from the medicolegal examination conducted on appellant, it did not result that appellant had any fresh lesions which indicate that he might have been physically assaulted by deceased and furthermore that the swelling on the dorsal aspect of the palm of appellant’s right hand is compatible with blunt trauma caused by blows on a hard object like for example the face or the skull.

Consequently the jurors could reasonably and legitimately conclude that appellant was not credible when, during his evidence before the first Court, he tries to belittle the

[17] Tape 4Y Side A p. 2.
[18] See p. 129 – 133 of the Criminal Court records.

episode of violence where he hit deceased; when he dismissed the presence of Robert Bonnet; when he said that when the following morning he noticed that his hand was hurting he could not "recognize the exact cause why it was hurting"[19]. They could reasonably and legitimately refute his confutation of a good part of his statement in the light of what was said by the police officers involved in the investigations. The jurors would also have noticed a number of contradictions in his evidence as when he was asked where he had learnt that the person with whom he had had this incident had died and he replied "From media" and on being asked what media he replied "I don't know, I don't speak Maltese language anyway"[20]; and then says that he had been told by a friend[21]; and at a later stage that from what this friend told him he only concluded that something had happened there (the place of the incident) and that his friend had got to know this from the media[22]. They were able to observe the confrontation that took place between appellant and Inspector Micallef regarding the manner in which the drawing up of the statement was conducted. They also undoubtedly took note of how appellant tried to dismiss what Dr. Scerri said about having examined him and about having heard appellant say, in the presence of Inspector Silvio Valletta, that the deceased had hassled him and he grabbed him by the neck with his left hand and punched him with his right fist.

This Court believes that it does not need to go into further detail to show that the jurors could reasonably and legitimately have reached the conclusion they did in fact reach, that is to say that appellant was guilty of having caused grievous bodily harm to the person of Joseph Drago from which death ensued as a result of the nature or the natural consequences of the harm and not of any supervening cause and which death ensued within forty days from the midnight preceding the crime. The Court

[19] Tape 11 Side B p. 2.
[20] Tape 11 Side A p. 5 – 6.
[21] Tape 11 Side A p. 6.
[22] Tape 12 Side B p. 1 – 2.

further affirms that it is satisfied that no miscarriage of justice has occurred in the instant case – s. 501(1).

This brings us to appellant's final grievance relating to punishment.

Appellant points out first that as to the Court's order for him to pay the sum of Lm1313.45 expenses incurred in connection with the case, Martin Bajada and Robert Caruana [*recte:* Cardona] were not called by the prosecution to present their reports while Architect Richard Aquilina's report was irrelevant to the case as it merely described deceased's residence. As to Dr. Mario Scerri's report he states that it contained imprecise material.

From an examination of the list of expenses at page 308 of the Criminal Court records, it appears that no expenses were listed in respect of Martin Bajada and Architect Richard Aquilina. As to Robert Cardona, this expert had presented his report during the compilation proceedings. The fact that he did not give evidence during the trial does not justify appellant's submission. Consequently the experts' fees are to be paid as determined by the first Court.

Appellant also complains that the punishment imposed was excessive taking into consideration not only the overall circumstances of the case but also those factors which relate to him personally, such as his young age, his clean conduct and status in Malta and especially the fact that the majority of jurors had pleaded for clemency. He also says that the sentence was excessive when compared with other sentences meted out by the same Court in similar cases, some of which were more serious than that of appellant.

It is not the function of this Court as a Court of appellate jurisdiction to disturb the discretion of the first Court as regards the quantum of punishment unless such discretion has been exercised outside the limits laid down

by the law or in special circumstances where a revision of the punishment meted out is manifestly warranted.

There is no doubt that the punishment awarded by the first Court is within the limits laid down by law. Section 220(1)(a) of the Criminal Code indeed provides for a minimum punishment of six years imprisonment and a maximum punishment of twenty years imprisonment.

As to the factors in mitigation of punishment, these were all taken into consideration by the first Court which even specifically referred to section 484 of the Criminal Code in relation to the jury's recommendation for clemency and this after hearing the prosecution submit that the punishment should be close to the twenty year maximum. Consequently, this Court finds no reason to disturb the discretion exercised by the first Court when it imposed a fifteen-year prison term on appellant.

For these reasons:

This Court rejects the appeal and confirms the appealed judgement in its entirety.

< Final Judgement >

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