MALTA

COURT OF CRIMINAL APPEAL

HON. MR. JUSTICE
JOSEPH GALEA DEBONO

Sitting of the 31 st May, 2007

Criminal Appeal Number. 6/2007

The Police
(Supt. Pio Pisani)

vs.

David
Rigglesford

The Court,

Having seen the charge brought against the appellant David Rigglesford before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having, in these island, at Ghadira, l/o Mellieha on the 16th October, 2001 at about 12.00 hrs, through imprudence, carelessness, unskillfullness in his art or profession or non-observance of the regulations, driven Jet Ski no. S-13362, Yamaha 700, and thereby caused the death of Christian Curmi of Mellieha.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 11th January, 2007, whereby, after the Court saw Sections 225 of Chapter 9 of the Laws of Malta and section 28A of the said Chapter, found appellant guilty as charged and condemned him to two (2) years imprisonment, which sentence should not take effect unless, during a period of two (2) years, the appellant commits another offence punishable with imprisonment.
The Court condemned appellant to pay within one month the expenses due to Captain Curmi who was appointed during the proceedings in conformity with section 533(1) of the Criminal Code. In default, such amount should be converted to forty-five days imprisonment in terms of section 533(2) and the prosecutor should be entitled to recover the said costs as a civil debt as laid down in the Code of Organisation and Civil Procedure in terms of sections 533(3)(4) of the Criminal Code.

Having seen the application of appeal filed by appellant on the 18th January, 2007, wherein he requested this Court to revoke, annul and repeal said judgement and to acquit appellant from the charges brought against him, and alternatively, to apportion responsibility between appellant and the deceased diver, taking into account his contributory negligence and in all cases to reduce the punishment imposed by the First Court and this subject to all such provisions as this Court may deem necessary.

Having seen the records of the case;

Having seen that appellant's grounds for appeal are the following, namely :- **1**. that the Court of Magistrates examined and evaluated incorrectly certain evidence produced in Court; **2.** that the First Court completely ignored the reports of certain Court experts declaring that the conclusions derived from such experts were in fact based on scant evidence or even assumptions (speed of jet ski at the moment of the accident); **3.** that the First Court completely ignored the issue of contributory negligence exercised by the deceased Christian Curmi; **4.** that the First Court concluded incorrectly that the

appellant was negligent and pronounced itself incorrectly on the legal point of negligent criminal responsibility under article 225 of the Criminal Code**; 5**. that, given appellant's clean conduct, given also the fact that he acted responsibly at all times, including the fact that had he not raised the alarm, nobody would have probably noticed the accident at all, and considering the conduct of the deceased driver in this accident, the punishment imposed , including the application of section 533 of the Criminal Code, is manifestly excessive and should be reduced.

Having heard oral submissions by learned Counsel for appellant and learned Counsel for the Prosecution in the course of the sitting of the 8th. February, 2007;

Having seen appellant's updated criminal conduct sheet (in Malta) filed by the Prosecution as ordered by this Court;

Having considered appellant's request for the Court's judgement not to be delivered before today's date because of personal family reasons, which was not opposed by the prosecution in the circumstances.

Now therefore considers :-

That appellant's first ground of appeal is that the First Court evaluated certain evidence incorrectly. Now it has been firmly established in local and foreign case law that both in cases of appeals from judgements of the Magistrates' Courts as well as from judgements of the Criminal Court, with or without a jury, that the Court of Criminal Appeal does not disturb the evaluation of the evidence made by the Court of first instance, if it concludes that that Court could have reached that conclusion reasonably and legally. In other words this Court does not replace the discretion exercised by the Court of first instance in the evaluation of the evidence, but makes a thorough examination of the evidence to determine whether the Court of first instance was reasonable in reaching its conclusions. However, if this Court concludes that the Court of first instance could not

have reached the conclusion it reached on the basis of the evidence produced before it, than that would be a valid – if not indeed a cogent reason – for this Court to disturb the discretion and conclusions of the Court of First Instance (confer: "*inter alia"* judgements of the Court of Criminal Appeal in the cases :"I**r-Republika ta' Malta vs. George Azzopardi"** [14.2.1989]; "**Il-Pulizija vs. Carmel sive Chalmer Pace"** [31.5.1991]; **"Il-Pulizija vs. Anthony Zammit"** [31.5.1991] and others.)

This Court also refers to what was held by LORD CHIEF JUSTICE WIDGERY in "**R. v. Cooper"** ([1969] 1 QB 276) (in connection with section 2 (1) (a) of the Criminal Appeal Act, 1968) :-

"assuming that there was no specific error in the conduct of the trial, an appeal court will be very reluctant to interfere with the jury's verdict (in this case with the conclusions of the learned Magistrate) , because the jury will have had the advantage of seeing and hearing the witnesses, whereas the appeal court normally determines the appeal on the basis of papers alone. However, should the overall feel of the case – including the apparent weakness of the prosecution's evidence as revealed from the transcript of the proceedings – leave the court with a lurking doubt as to whether an injustice may have been done, then, very exceptionally, a conviction will be quashed." (Confer also : BLACKSTONE'S CRIMINAL PRACTICE (1991) , p. 1392)

In **"Ir-Republika ta' Malta vs. Mustafa Ali Larbed**" decided on the 5th July, 2002 by the Court of Criminal Appeal, presided over by three Judges, it was held that even if from the evaluation of the evidence conducted by this Court, for argument's sake, this Court comes to a conclusion different from the one reached by the jury, it still will not disturb the judgement of the jury in the evaluation of the evidence and replace it with its own when it is evident that the jurors had not made a manifestly wrong evaluation of the evidence and they could therefore reasonably and legally have reached that conclusion.

In Criminal Appeal : "**Ir-Republika ta' Malta vs. Ivan Gatt",** decided on the l st. December, 1994, it was held that the exercise to be carried out by this Court in cases where the appeal is based on the evaluation of the evidence, is to examine the evidence, to see, even if there are contradictory versions – as in most cases there would be – whether any one of these versions could be freely and objectively believed without going against the principle that any doubt should always go in the accused 's favour and, if said version could have been believed and was evidently believed by the jury, the function, in fact the duty of this court is to respect that discretion and that evaluation of the evidence.

This Court has accordingly evaluated the evidence anew with a view to establishing whether the Court of first instance could have legally and reasonably found the accused guilty of the charge of involuntary homicide proffered against him.

The evidence against the appellant is briefly the following:- On the 16th.October,2001 , appellant and his brother went to rent jet-skies from O' Yeah Water Sports in Mellieha Bay. They were asked to fill in a form which they duly did and signed. Appellant informed the man in charge of the establishment that it was the first time he was using a jet-ski. After some instructions were imparted to appellant and his brother, they both took their respective craft out to sea. Appellant kept to one side of the bay and his brother kept to the other side leaving a wide berth between their respective craft as instructed. Appellant then executed some turning manoeuvres to one side and then to the other to see how the jet-ski handled. When appellant was close to a marker buoy in the middle of the bay, close to which was moored an empty blue boat, suddenly something appeared before appellant's jet-ski. He took evasive action to the right and slowed down the craft but hit a submerged or semi-submerged diver, Christian Curmi, who was apparently diving to catch octopi close by the reef marked by the marker buoy.

Curmi sustained a head injury probably caused by a glancing blow from the jet-ski's side and sank to the bottom. On realising that he had most probably hit a diver after seeing a float with two octopi on it, appellant returned to the shore and informed the man operating the establishment of what had happened. The latter took appellant jet-ski and went on the spot of the accident but it was too late to save Curmi, whose body was later retrieved from the bottom of the sea.

The Court of first instance held that the accident was caused solely as a result of appellant's actions, who acted imprudently, carelessly, unskilfully and in violation of the rules he had signed to observe.

Having considered;

That it has to be stated from the outset that, even if it were true that the rental conditions were not read out to appellant before he signed them and that he was not given a copy of said conditions – not that this would have made much difference because he would certainly not have read them out while he was at sea on the jet-ski – it was still appellant's duty to have read them out himself and to make sure that he fully understood their implications before signing and taking the craft out to sea. Indeed, the document exhibited at page 395 of the case records starts with the opening line :-

"Please read carefully before operating craft."

In his testimony before the Court of first instances (page 381 of the records) appellant states that he did in fact read out all the conditions

If appellant had read the rules carefully, he would have surely noticed that clause 7 clearly stated that the user of the jet-ski had **to keep a good lookout for swimmers, divers and other boats at all times.** Indeed, even if appellant had not read this rule, any reasonable person possessing ordinary common sense knows that when driving, steering or piloting any land vehicle, sea craft or

aircraft, one has to keep a proper lookout at all times for any obstacle, vehicle , craft or person , which lies in his path. Appellant was in one of the most popular beaches in the Maltese Islands and he could easily foresee that he could come across a deep sea swimmer or a diver in the bay.

Clause 5 also warned **clients to keep 200 metres from other crafts** (Sic!). Now the blue boat which was being used by the diver Christian Curmi was plainly visible moored in the middle of the bay close by the marker buoy indicating the reef. This should have alerted appellant's attention that, once no one was visible on the boat, it was possible, indeed likely, that there could be somebody in the water close by as it was not likely that a boat be moored so far out in the bay and remote from the nearest landfall. In the circumstances therefore appellant would have been advised to give the blue boat a wide berth in case there should be any swimmer or diver, who had taken off from that boat, in its vicinity.

In other words it was not unforeseeable that there could be swimmers or divers in the vicinity of the boat and the marker buoy indicating the reef. Hence it was appellant's duty to proceed with caution and keep a proper lookout.

If on the other hand appellant had only glanced at the rules in a perfunctionary manner and opted to sign the rules and conditions blindly, he has only himself to blame and no one else. If as he himself acknowledges, this was the first time he was using a jet ski, prudence would have dictated that he should have made it a point to read and fully comprehend the rules and hints to avoid accidents listed in the document and then to adhere to them fully. It would only have taken him a minute or two to go through these rules and conditions, listed in thirteen one or two line sentences.

The emphasis made by Defence Counsel and appellant that he was not given adequate verbal warning of the possible presence of divers in the vicinity of the blue boat in the middle of the bay, which appellant states was only

mentioned as an indication of the jet-ski's limits of operation, even if this were the case, does not negative appellant's own negligence and imprudence in this matter in not following the instructions he claims to have read.

Appellant testified before the first court on the 26th. October, 2005 (pages 270 to 287 of the case records), on the 27th. February, 2006 (pages 368 to 375 of the case records) and again on the 3rd. March, 2006 when he was cross-examined by Dr. Abela (pages 379 to388 of the case records). The Court examined appellant's evidence very closely .

Appellant describes the last moments before the accident occurred as follows :-

"… so I approached the beacon (i.e. the marker buoy) *..I did a slow , sorry, long turn manoeuvre , to start heading back towards the sandy shore …in the centre of the bay. I started accelerating, I thought I must look for my brother , so I looked to my left , looked in front of me, looked to my right , and as I looked back in front of me again, around three to five metres in front of me , I thought I saw something submerged in the water ..it was a dark silhouette and as I passed over the area, I immediately released the accelerator , and turn(ed) the handlebars to the side. At which point I ended ninety degrees to the path I have (Sic!) been taking.. and the beacon was now on my left hand side and the area that I had passed over was also at left hand side."*

Questioned as to whether he had felt anything, appellant replied *:-*

"I did not feel anything at that point, as I looked down into the water …I could see nothing ..so I decided to slowly do a circle manoeuvre back round to the path…

Asked what was the shadow he had seen , appellant replied :-

"It looked like the head and shoulders… of a diver, but it was…if, because if it was a dark wet suit, it was very hard to actually be sure that I had seen.."

Appellant added that *:-*

"I circled back round and looked down into the water ..at which point I had seen nothing in the water…I looked up and around to see where my brother was ..and as I lifted my head up , I saw an orange buoy , …about ten metres away from me …The buoy had two dead dark octopus on it and this to me confirmed the possibilities of seeing somebody under the water when I was using the jet-ski."

He also stated that before the accident he had not seen swimmers in the water. The buoy was thirty to forty centimetres long, twenty centimetres wide and of an oval shape, that lies flat on the water. It was an orange buoy, a life preserver similar to that which a life guard would use.

Having considered that:

Now if this orange life preserver was visible to appellant after the accident, it should have been equally visible to him prior to the impact with the diver. It is the duty of any driver of a vehicle on land – and equally of the person steering any sea craft - "*to see what is in plain view"* (Criminal Appeal : "**The Police vs. Joseph Vella"** [10.8.1963]) and if a person fails to see what should have been clearly visible, it means that he was not keeping a proper lookout. (Criminal Appeal **"The Police vs. J. M. Laferla**" [17.6.1961])

As is clearly evident from the photos : documents 02 CEK 115,116 and 119 exhibited in the folder at page 146 of the records, the presence of the empty blue boat moored in the middle of the bay near the marker buoy and, more so, that of an orange float close by, similar to a life preserver used by lifeguards, in this Court's view, should have alerted appellant even more to the possible and likely presence of some person in the water, either on the surface or submerged. This was surely a foreseeable

possibility and in the circumstances appellant should have kept his eyes wide open and should have been be fully prepared to take timely evasive action should a diver at any time surface in his path.

Sea craft and particularly power boats and jet skies can be lethal weapons if they come into collision with swimmers and divers and this puts a higher duty of care on their users, particularly when, as was the case here, they are inexperienced in the handling of these sea craft.

It is therefore this Court's considered view that appellant was surely at least partly to blame for the fatal accident in question by failing to keep a proper lookout and take proper precautions when he was approaching an unoccupied boat moored in the middle of a wide bay, close to which there was an orange life preserver which must have been visible floating on the surface.

Having considered that;

Appellant also submits that the court of first instance ignored his Counsel's submissions as to the victim's contributory negligence. This ground of appeal is a valid one. It resulted that although the victim was diving and probably under water fishing – as the octopus catch on the life preserver suggests – he was not showing the internationally recognised sign of his underwater activity , i.e. a float with a flag on top of it. This in this Court's view also contributed to the fatal accident, as had this float been used by the victim, it would have given appellant an earlier and unequivocal warning of a diver's presence in the area, thus enabling him to take the proper precautions to avoid an accident in case the diver surfaced in his path.

The fact that the victim had other proper equipment is not relevant to the point in issue as the only equipment which could in any way have helped to avoid the accident in this case was the internationally recognised sign carried on a float with the proper flag attached to it. This the victim did not have and instead he made do with an orange life preserver float which he seemed to have been using more

to deposit his catch on it, while he continued with his under water fishing, than for anything else.

Furthermore appellant submits that the diver could and should have heard the underwater vibrations from the jet-ski's engine and that in the event he should not have surfaced before the noise had subsided showing that the coast was clear. This would have been a more valid submission had the diver been using oxygen cylinders and underwater breathing apparatus. But in this case the diver was not using any such apparatus and he would have had to surface from time to time when he ran out of breath. As such, there would come a time when the victim would have to surface for air whether he thought it was safe to do so or not. Consequently this submission would not afford much of a defence unless appellant proved, at least to the degree of probability, that the victim surfaced in front of his craft when he could have avoided doing so. This did not result in any way.

Having considered that:

In criminal proceedings the contributory negligence of the victim does not absolve the person causing the damage, bodily harm or death from criminal responsibility unless it is the only cause of that accident (Criminal Appeals : "**The Police vs. P. Vassallo"** [Collection of Published Judgements, Vol. XXXVIII .p. iv. page 883]; "**The Police vs. Gaetano Schembri** [16.3.1961] ; **"The Police vs. John Polidano"** [3.11.1963] "**The Police vs. Rev. C. Mifsud"** [Coll. Vol. XXXVII, p. iv. page 1131] and others.) However it may be taken into account for purposes of punishment .

Having considered that the victim had certainly and in no small way contributed to the fatal accident in question, this would certainly have to be taken into consideration when reviewing the punishment awarded by the court of first instance.

Now therefore it partially upholds appellant's appeal that he was not solely responsible for the fatal accident;

Having considered;

That with respect to appellant's plea regarding the punishment inflicted by the court of first instance, the above conclusion regarding the victim's contributory negligence, should have a bearing on said punishment and having considered that, in cases of involuntary bodily harm or homicide, the awarding of suspended prison sentences – particularly to foreigners who like appellant live away from these Islands – is not the best and most suited punishment in the circumstances, as such suspended sentences are mainly intended to ensure the rehabilitation of the offender and to deter him from relapsing – a very unlikely event in case of involuntary offences and accidents - this Court feels that this ground of appeal should be upheld and that the sentence of imprisonment – albeit suspended for two years – should be altered to a pecuniary punishment.

Similarly, the order that appellant should pay **all** court expert Captain Curmi's expenses should be reviewed in the light of the above conclusion on the merits, and therefore appellant's ground for appeal on this point is also being upheld.

For the above reasons, this Court is in part upholding appellant's appeal and varying the judgement of the Court of Magistrates (Malta) dated 11th. January, 2007, by confirming it in so far as it found appellant guilty of the offence of having caused the death of Christian Curmi of Mellieha, through imprudence, carelessness, unskilfulness in his art or profession or through non-observance of the regulations when driving a Yamaha 700 Jet Ski number S-13362 at Mellieha, on the 16th. October, 2001, and by revoking it where it condemned appellant to two years imprisonment, which sentence was not to take effect unless, during a period of two years the offender commits another offence punishable with imprisonment, and where it condemned appellant to pay the expenses due to the Court Expert Captain Curmi within one month and in default such amount of court expenses shall be

converted to forty-five days imprisonment in terms of section 533 (2); and instead condemns appellant to a fine (multa) of one thousand Malta Pounds (LM1000) and condemns him to pay only one half (½) of the expenses of the Court Expert Captain Jeffrey Curmi, in view of the victim's contributory negligence. In default of payment of said fine (multa) and half of the Court expert's expenses, these shall be converted to a term of imprisonment according to law.

< Final Judgement >

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