



COURT OF CRIMINAL APPEAL

**THE HON. MR. JUSTICE
DAVID SCICLUNA**

Sitting of the 4th May, 2011

Criminal Appeal Number. 466/2010

App. No. 466/2010 DS

The Police

v.

Andrew Stephen Roberts

The Court,

Having seen the charges brought against Andrew Stephen Roberts before the Court of Magistrates (Malta) as a Court of Criminal Judicature, that is to say that:

(1) on the 10th October 2008 at about 2.20 p.m. at the Old Horse Track, Marsa Sports Ground, limits of Qormi, through imprudence, carelessness, unskilfulness in his art or profession, or non-observance of regulations, he

caused grievous bodily harm to Anthony Busuttil as certified by Dr. Rene Camilleri;

(2) on the same day, time, place and circumstances, through imprudence, carelessness, unskilfulness in his art or profession, or non-observance of regulations, he wilfully committed any spoil, damage or injury to or upon any immovable or movable property, and hence on a cart and horse, where same horse lost its life to the detriment of Anthony Busuttil;

(3) on the same day, time, place and circumstances he drove vehicle make Austin Mini registration number HAH-893 which did not have a valid license issued by the Transport Authority;

(4) on the same day, time, place and circumstances, he drove vehicle make Austin Mini registration number HAH-893 which was not covered by an insurance policy to cover third party risks;

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 28th October 2010 whereby that Court, having seen articles 226(1)(a) and 328 of Chapter 9 of the Laws of Malta, article 15(1)(2) of Chapter 65 of the Laws of Malta, and article 3 of Chapter 104 of the Laws of Malta, found the said Andrew Stephen Roberts not guilty of the third and fourth charges brought against him, and consequently acquitted him from said charges, but found him guilty of the first and second charges and condemned him to a term of imprisonment of one year. Moreover, that Court ordered the said Andrew Stephen Roberts to pay Anthony Busuttil by way of damages the sum of three thousand three hundred and fifty euros (€3,350) in terms of article 24 of Chapter 446 of the Laws of Malta;

Having seen the application of appeal filed by the said Andrew Stephen Roberts on the 2nd November 2010 wherein he requested this Court to reform the appealed judgement in the sense that it confirms that part of the

judgement whereby appellant was acquitted of the third and fourth charges brought against him whilst revoking that part of the judgement whereby appellant was found guilty of the first and second charges or, alternatively and subordinately, it varies the appealed judgement by providing a lesser and more suitable punishment;

Having seen the record of the proceedings;

Having heard submissions;

Having considered:

Appellant's grievances are in synthesis the following: (1) that he was fully observing the rules of the road when driving on the Marsa race track and the accident occurred solely as a result of the non-observance of regulations by Anthony Busuttil; (2) that the punishment meted out by the first Court is in any case out of proportion to the circumstances of the case; (3) that article 24 of Chapter 446 of the Laws of Malta is not applicable.

In respect of his first grievance, appellant states that as results from the evidence he was driving on the left hand side of the track whilst the victim, unlike all the other horses which were being driven on the track at the time of the accident, was racing his horse-driven sulky on the right hand side of the track, i.e. on appellant's side. Therefore the accident occurred because Anthony Bsuuttil was racing on the wrong side of the track. Appellant says that while the first Court commented that it was a known fact that the old race track was very often frequented by the horse-riding community and it was also common to find people walking in the race track, it failed to note that it was also a well known fact amongst all users of the track that the track was also frequently used by vehicles who needed to enter or exit the Malta Golf Club's service facilities, and this on a daily basis, not to mention the vehicles which regularly used to drive behind the horse-driven sulkies in order to assess the progress of the sulkies. Appellant observes that Anthony Busuttil was a veteran jockey and was fully aware of the fact that

vehicles frequently used the track, as was the case for appellant, and that he had to observe the rules of the road even though the track is actually a private road. "Therefore", opines appellant, "placing the responsibility of the incident solely on appellant Roberts and not apportioning any contributory negligence on the part of the victim, Busuttil, was not correct, as the Court of Magistrates should have also considered that Busuttil was seriously not observing the regulations by driving on the wrong side of the track."

With reference to the first Court's observation that the argument raised by appellant that he did not have a clear view of the track as these were partially hidden by the trees "actually strengthened the position of the prosecution in this case", appellant submits that the first Court failed to note that whilst he was on the correct side of the track, the victim, who was driving the sulky on the wrong side of the track, had a similar problem of visibility and, notwithstanding this and the fact that a car had just passed him raising a dust cloud, he chose to continue racing his horse-driven sulky at racing speed on the wrong side. Appellant says that the first Court also failed to take note of the fact that the spot where the accident had actually occurred was subject to yet another accident, between two horses, just two weeks later, as a result of which, all the trees were cut down and alterations made to the track so as to ensure clear visibility on the bend.

Appellant also refers to the first Court's comment that since appellant's view was somehow obstructed or rendered unclear, he should have slowed down to an extent to allow him to proceed safely. According to appellant, even had he been at a standstill, the accident would have just as much occurred as Busuttil was driving on the wrong side of the track. Furthermore, appellant maintains that the first Court's presumption that his speed was excessive is incorrect as it disregarded his claims that he was driving at around 30 k.p.h. and seems to have reached such a presumption on the basis that after impact his vehicle managed to glide nineteen meters across the track. Appellant, however, observes that a cursory look at

rule 281 of the Malta highway Code clearly shows that the distances contemplated for a normal car to stop “on a dry road” are well within the description of the speed being driven by appellant as overall stopping distance if driven at 32 k.p.h. is 12 meters whilst if driven at 50 k.p.h. the distance is 23 meters. “This is being stated”, says appellant, “as the road was a ‘dusty, wide tract of land’, as the Court described it, thus skidding of the vehicle as a result of the vehicle was expected to occur.”

This Court has carefully examined the evidence produced before the first Court and the appealed judgement.

First of all this Court observes that consideration has to be given only to admissible evidence. Now, in its judgement the first Court refers twice to the police report (Dok. JV1). In commenting on the fact that the race track where the accident occurred was not a public road and that any motorized vehicle driven on the track had to be driven with extreme caution and diligence, it went on to say that a vehicle could only be driven “after having obtained authorization from the Malta Racing Club (vide Dok JV1 at fol. 27)”. In so referring to the police report, the Court was accepting as a fact what, according to the report, was stated to the Police by the Chairman of the Malta Racing Club, Dr. Matthew Brincat. Neither Dr. Brincat nor any member of the Malta Racing Club was produced as a witness, and therefore the first Court could not accept as a fact what was essentially hearsay evidence.

Later on in its judgement the first Court refers to assertions made by third parties in the police report that appellant and another person appeared to be racing against each other, stating, however, that “it was not established as a fact”. Again, none of these third parties were produced to give evidence and what any third parties may have told the Police in this respect also remains hearsay evidence. Indeed, the first Court should have completely disregarded what such third parties may have said.

Now, the evidence shows that appellant works at the Malta Golf Club and that at the time the only way for staff and delivery persons to reach the premises was by driving along the race track. The victim, Anthony Busuttil, alleges that the accident occurred on his side of the track, that there were two vehicles racing adjacent to each other and that appellant crashed into him. However, the evidence shows that the accident occurred on appellant's side of the track, not on Busuttil's side. This is evidenced by the point of impact as shown on the police sketch and by photo number four (4) exhibited by appellant. Indeed the first Court stated clearly in its judgement that appellant was "keeping to his left". This means that the sulky partially invaded the left-hand side of the track when manouvering the bend in the track.

This is not to say that appellant can be exempted from all responsibility. Indeed, from the evidence tendered by appellant himself it results that a lot of dust had been kicked up on the track by another staff member, Mario Vella, who had left just before appellant driving a pick-up truck. Appellant says: "So as I drive down the track the dust is getting more and more so I'm just about to approach a bit of a bend so I decided to slow down a little bit and that's when the accident happened, a horse came out of nowhere...." And on being asked whether he did anything to avoid the horse, he replied: "Split second it was over. You didn't even see him coming through the dust. Nothing at all." It is quite obvious that what appellant should have done was to allow the dust to settle before proceeding. By driving on he was putting himself in a self-inflicted incapacity of not being able to take any evasive action as he was unable to see clearly through the dust cloud. Moreover, from the evidence given by Mario Vella it appears that there were many horses making use of the track, which made it all the more incumbent on appellant to take all necessary precautions, including – as from the wheel marks apparent in the said photo number four (4), appellant was clearly not hugging his left-hand side – keeping even more to his left. Consequently, in view of Anthony Busuttil's contributory negligence, this Court will be varying the punishment inflicted by the first Court.

Regarding appellant's last grievance, there is no doubt that he is completely right in stating that once a prison sentence has been meted out, article 24 of Chapter 446 of the Laws of Malta is inapplicable. That article is applicable only in respect of measures adopted by the Courts under the Probation Act, i.e. the said Chapter 446.

For these reasons:

The Court reforms the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 28th October 2010 in the names **The Police v. Andrew Stephen Roberts**, revokes it insofar as it condemned appellant the said Andrew Stephen Roberts to imprisonment for a term of one year and insofar as it ordered him to pay Anthony Busuttill by way of damages the sum of three thousand, three hundred and fifty euros (€3,350) in terms of article 24 of Chapter 446 of the Laws of Malta, and instead condemns him to a period of imprisonment of four months, which sentence, in terms of article 28A of Chapter 9 of the Laws of Malta, shall not take effect unless, during a period of one year from today, he commits another offence punishable with imprisonment. Furthermore, in terms of article 28H of Chapter 9 of the Laws of Malta, orders that appellant pay Anthony Busuttill by way of compensation the sum of one thousand five hundred euros (€1,500) and this within three months from today – this without prejudice to any other claims which the said Anthony Busuttill may have. This Court explained to appellant in ordinary language his liability under article 28B if during the operational period he commits an offence punishable. This Court further draws the Registrar's attention to his duties in terms of subarticle (8) of article 28A of Chapter 9 of the Laws of Malta.

< Final Judgement >

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