

In the Court of Magistrates (Malta)
as a Court of Court of Criminal Judicature

Magistrate Dr Aaron M. Bugeja M.A. Law, LL.D. (melit)

Il-Pulizija

vs

Carmela Cutajar

The Court after seeing the charges issued against Carmela Cutajar holder of identity card number 1049347M whereby she was charged with having :

1. On the 9th February 2011 in these Islands made a false affidavit, whether in Malta or outside Malta, knowing that such affidavit is required or intended for any civil proceedings in Malta and this in breach of Article 106(3) of the Criminal Code;
2. On the same date, time, place and circumstances made a false oath before a judge, magistrate or any other officer authorized by law to administer oaths, Notary Frances Spiteri and this in breach of Article 108 of the Criminal Code;
3. On the 11th July 2013 in these Islands made a false affidavit, whether in Malta or outside Malta, knowing that such affidavit is required or

intended for any civil proceedings in Malta and this in breach of Article 106(3) of the Criminal Code;

4. On the same date, time, place and circumstances mentioned in the third charge, made a false oath before a judge, magistrate or any other officer authorized by law to administer oaths, Deputy Registrar Marisa Bugeja and this in breach of Article 108 of the Criminal Code;

The Court was also requested to apply the punishment of interdiction in terms of Article 109(1)(2) of the Criminal Code in case that it finds the accused guilty.

Having analysed the documents that were exhibited and all the records of the proceedings;

Having seen that during the sitting of the 1st December 2014 the charges were duly translated to the benefit of the accused from the Maltese to the English language and the Prosecuting Officer confirmed the charges on oath.

Having seen that during the examination of the accused in terms of Article 392 and 370(4) of the Criminal Code the accused declared that she found no objection to her case being dealt with summarily.

Having also seen that the Attorney General declared by means of a note exhibited at fol 2 that he granted his consent to this case being dealt with summarily;

Having seen that the accused, in reply to the question posed by the Court in terms of Article 392(1)(b) of the Criminal Code, declared that she was not guilty;

Having heard all the witnesses produced and seen the records of the proceedings;

Having heard the final oral submissions of the Prosecuting Officer and of the Legal Counsel to the accused and the parte civile;

Considers the following : -

A. Charges numbers 1 and 3.

These charges refer to the crime of perjury in civil proceedings in terms of Article 106(3) of the Criminal Code. The elements of this crime that are : -

1. testimony given in a civil or criminal cause;
2. an oath administered lawfully by a competent authority;
3. the falsity of this testimony in some material particular;

4. the criminal intent to swear falsely.

1. Testimony given in a civil or criminal cause.

In order for the crime of perjury in civil proceedings to take place, a person must give false testimony during a civil cause. Any other false swearing may fall under extra-judicial perjury. In the case of false swearing before a court of law, there have to be contentious proceedings, that lead to a decision by the same court.

In *Il-Pulizija vs Abdellatif Marsouki Hachemi Beya Bent* decided by the Court of Criminal Appeal on the 22nd October 2001 it was held that :

Tezisti distinzjoni bejn ir-reat ta' spergur (testimonjanza falza jew 'legal perjury') u r-reat ta' gurament falz ('extra judicial perjury'). Bazikament, id-differenza hi li min jixhed falz waqt kawza (ai termini ta' l-Artikoli 104{1} u 105) ma jitqiesx mil-ligi li dak l-agir tieghu jikkostitwixxi biss 'gurament falz', sic et simpliciter, izda jikkostitwixxi 'spergur', cioe', falza testimonjanza; mentre min jiehu gurament falz f'dawk l-okkazzjonijiet l-ohra li mhumieq waqt kawza (ai termini ta' l-Artikolu 108 {1} tal-Kap.9), hemm ikun qed jiehu gurament falz, izda ma jkunx qed jikkommetti d-delitt aktar serju ta' spergur fi-kontest ta' l-imsemmija Artikoli 104 (1) u 105. Sabiex ikun hemm ir-reat ta' spergur ix-xhieda falza trid tkun inghatat fi proceduri fejn hemm persuna akkuzata. Irid mela jkun hemm necessarjament 'a criminal charge to be answered'. Ghalhekk fost l-elementi mehtiega sabiex jissussisti dan ir-reat ta' spergur taht l-Artikoli

104 (1) u 105 tal-Kap. 9, necessarjament tali xhieda falza trid tkun giet moghtija fil-kors ta' proceduri kriminali fejn hemm persuna akkuzata b'reat u fejn irid jigi dterminat jekk dik il-persuna hiex kriminalment responsabbli jew le ghal dak li hi akkuzata bih.

The elements of the crime of perjury are essentially the same for both criminal and civil proceedings. It is the measure of the punishment awardable that changes. If the false evidence is given in any other non-contentious proceedings, such as before an inquiring Magistrate, then there is no crime of perjury; in that case there may result the lesser crime of false swearing.

This position has been confirmed time and again by Maltese Courts. Thus in the case *Il-Pulizija vs Ruth-Mary Baldacchino* decided by the Court of Criminal Appeal on the 26th May 2016 it was held that :-

Illi l-azzjoni penali ghar-reat ta'l-ispergur a tenur ta'l-artikolu 106 tal-Kodici Kriminali u cioe' r-reat hekk ismejjah *judicial jew legal perjury*, jipotizza t-tehid ta' gurament falz fil-kors ta' kawza pendenti quddiem Qorti. Illi l-artikolu 106 jitkellem dwar l-ispergur fil-kawzi civili li jipotizza tlett istanzi ta' spergur fi proceduri civili u cioe' l-ispergur mix-xhud, l-ispergur minn persuna li hija parti fil-kawza civili u l- affidavit falz.

The Prosecution proved that there were some sort of "proceedings" before the Land Registrar relating to two tenements situated in Senglea that are at the basis of the facts that gave rise to this case. These proceedings before the Land Registrar (the nature of which still remained nebulous during the course of this case) do not qualify as civil proceedings in terms of this law

and jurisprudence abovementioned. Therefore the Prosecution failed to prove beyond a reasonable doubt that the affidavits in question were “required or intended for any civil proceedings in Malta” in line with the above judicial pronouncement. Consequently once that this first element has not been satisfied, it is pointless for this Court to delve in the other elements of this crime. The accused is going to be acquitted from these two charges.

B. Charges number 2 and 4

By means of these two charges, the Prosecution claims that the accused committed the crime of false swearing on two separate occasions :-

- (a) on the 9th February 2011 when the accused allegedly took a false oath before Notary Frances Spiteri;
- (b) on the 13th July 2013 when the accused allegedly took a false oath before Deputy Registrar Marisa Bugeja.

The crime of false swearing deals with the situation where a person makes statements on oath that eventually result to be false which statements are lodged other than by a witness or a party to proceedings or an accused or a referee in a civil or criminal cause or an interpreter in judicial proceedings.

The elements of this crime are similar to the elements of the crime of perjury. They are :

- a. the false statement;
- b. made intentionally;
- c. on oath;
- d. before a person authorized by law to administer oaths.

The mental element in this case is the consciousness of the agent of perverting the truth by his declaration. The material element is the false statement on oath. This oath has to be administered lawfully by a person authorized to administer oaths. This article sanctions assertory oaths and not promissory oaths. An assertory oath is such that affirms or denies a fact.

In *Il-Pulizija vs Vincent Grima et*, decided by the Court of Criminal Appeal on the 24th June 1998, it was held that :

Fil-kaz ta' l-artikolu 108 (1) tal-Kodici Kriminali, li jtkellem dwar li wiehed "jahlef il-falz quddiem magistrat jew quddiem ufficjal iehor li jkollu s-setgha b'ligi li jaghti l-gurament", dak li trid tipprova l-prosekuzzjoni hu li min amministra l-gurament kellu s-setgha bil-ligi li jaghmel hekk. Fin-nuqqas ta' xi disposizzjoni ta' ligi li tipprovdi li persuna partikolari - jew persuna li tokkupa xi kariga partikolari - ghandha tali setgha, din is-setgha tinghata permezz ta' warrant mahrug taht l-artikolu 3 tal-Kap. 79 tal-Ligijiet ta' Malta. Dan il-warrant ma jammontax ghal ligi izda huwa fakulta' moghtija lil persuna partikolari li tamministra l-guramenti; u ghalhekk trid issir il-prova ta' din il-fakolta' hekk moghtija.

In this particular case the Prosecution did not bring evidence to prove that Notary Frances Spiteri and Deputy Registrar Marisa Bugeja are in possession of such a warrant; however given that the persons administering the oath in this case were a Notary and Court Deputy Registrar, this evidence was not necessary due to the particular nature of their respective profession. This is also being stated in the light of the case *Il-Pulizija vs Joseph Zammit* decided by the Court of Criminal Appeal on the 26th March 2015 where it was held that : -

L-artikolu 108(1) tal-Kap 9 jghid testwalment “Kull min, f’kull kaz iehor mhux imsemmi fl-artikoli ta’ qabel ta’dan is-sub artiklu, jahlef il-falz quddiem Imhallef, Magistrat jew quddiem ufficcjat iehor li jkollu s-setgha bil-ligi illi jaghti gurament jehel ...”. L-artikoli ta’ qabel jirreferu ghal spergur f’kawzi kriminali, spergur f’kawzi kriminali ohra, spergur f’kawzi civili u spergur minn perit jew interpretu. Ghalhekk dan l-artikolu 108 jeskludi dawn is-sitwazzjonijiet u b’mod generiku jirreferi biss “f’kull kaz iehor ...”. Din tfisser kwalunkwe cirkostanza ohra fejn persuna tiehu gurament ghal xi raguni jew ohra, basta dan il-gurament jittiehed quddiem Imhallef jew Magistrat jew “quddiem ufficcjat iehor li jkollu s-setgha b’ligi illi jaghti gurament.” Ma hemmx dubbju illi nutar pubbliku Malti huwa ufficcjat illi ghandu s-setgha illi jaghti gurament u l-appellant volontarjament mar ghandha u uza s-servizzi taghha biex ha dak l-affidavit. Il-kwistjoni jekk l-affidavit kienx ordnat minn xi Qorti jew wahda mill-qrati ta’ Malta taghmel differenza ghall-fini tal-piena peress illi l-artikolu 108(1)(a) jippreskrivi certa piena fil-kaz illi l-affidavit ikun hekk ordnat u s-sub artikolu (b) jippreskrivi piena ohra jekk il-gurament ma jkunx hekk mehtieg jew ordnat. Ghalhekk dan il-kaz jaqa’ nettament taht dan is-sub artikolu (b).

The Prosecution managed to prove beyond a reasonable doubt that the accused indeed made a sworn declaration, before an officer who is by law

empowered to administer oaths. In truth, the Defence does not contest these two elements.

However the issue in this case stems from the fact that the Prosecution witness and parte civile Carmel Cutajar claims that when the accused confirmed these two affidavits on oath (copies of which were exhibited at folios 45 and 45 of the proceedings), she took a false oath as he claims that these affidavits contain false statements. On the other hand Defence claims that the accused made no intentional false statements and reiterated that in these two affidavits she recounted the facts that happened and that she perceived through her senses. The Defence concedes that in her second affidavit she elaborated more on the facts than she did in the first affidavit. However Defence claims that in so doing she was not making an intentional false statement on oath.

As seen above, the Prosecution is bound to prove beyond a reasonable doubt that (1) the statement made by the witness was false and (2) that this was done intentionally. Therefore Prosecution has to prove that the accused, intentionally and on oath :

- a. affirmed what is false; or
- b. denied what is true; or
- c. failed to disclose, wholly or partly facts of the case or facts that she knew about the case.

The Court analysed the testimony of all the witnesses produced in this case and noted that even when it tried to do its best to scrutinise their testimony through the criteria mentioned in Article 637 of the Criminal Code it could see that both the parte civile Carmel Cutajar and the accused were very clear in their depositions and felt very strongly about their respective points of view giving convincing, albeit divergent, testimony.

This divergence does not in itself mean that a witness is committing false swearing. In the case *Improved Design Limited vs Antoine Grima*, decided by the First Hall of the Civil Court on the 4th March 2004, it was stated that :

Bilkemm ghandu ghalfejn jinghad li b"falz" wiehed irid hawn jifhem "xi haga li ma taqbilx mas-sewwa" u mhux semplicement "xi haga li l-parti ma taqbilx maghha" jew li haddiehor jaraha b'mod iehor. Fi kliem iehor, biex jista' jintwera li nghad il-falz taht gurament irid jintwera li xi fatt imieri dak li nghad. Tali fatt irid jirrizulta mill-atti u mhux jissemma biss bhala argument. Li kieku kien hekk, u l-fehma li ma taqbilx kienet tista' titqies bhala "falz", kieku jista' tassew jinghad li ma tezistix kawza m qar wahda fejn ma jinghadx il-falz !"

Wise enough, Article 639(1) of the Criminal Code provides that :

639. (1) Notwithstanding the provisions of the last preceding article, a person may not be convicted of calumnious accusation, perjury or false swearing, solely upon the evidence of one witness contradicting the fact previously stated on oath by the person charged or accused; but such person charged or accused may be convicted on the evidence of a single witness, when such evidence is corroborated in some circumstance which is material to establish the alleged crime by any other proof duly adduced.

In this case the Prosecution rested its case principally on the testimony of Carmel Cutajar who staunchly claims that the accused's version of events as recounted in her affidavit are false in various material particulars. However according to Article 639(1) of the Criminal Code, this Court cannot convict the accused on the evidence of Carmel Cutajar's testimony alone. From the evidence produced, none of the witnesses could recount the substance of the conversation exchanged between the accused and Carmel Cutajar. Hence this issue principally revolves round the testimony of Carmel Cutajar and the accused.

Now according to Maltese Law abovementioned, the evidence of one witness alone may be sufficient to convict a person of the crime of perjury, provided that there are other circumstances pointing towards the guilt of this person. Hence in the case *Il-Pulizija vs Wigi Attard* the Criminal Court on the 24th April 1951, held that : -

Hadd ma jsita` jinstab hati ta` xhieda falza fuq ix-xhieda wehdiha ta` xhud wiehed biss li jikkontradici l-fatt li qabel ikun xehed l-imputat taht gurament; izda l-imputata jista` jigi misjub hati fuq ix-xhieda ta` xhud wiehed biss, jekk dik ix-xhieda tkun korroborata f'xi cirkustanza li tkun tiswa biex tistabbilixxi d-delitt allegat minn provi ohramigjubin skond il-ligi. Id-diportament tax-xhud waqt li jkun jixhed hu, bla dubju, ta` l-akbar importanza ghall-finijeit ta` l-attendibilita` tax-xhieda teighu. U d-dikajrazzjoni ta` terza persuna, li spontaneament tinkolpa ruhha minflok l-imputat, u "in kontradizzjoni tal-provi", ghandha tigi kunsidrata bl-akabar cirkospezzjoni."

Moreover, this was also echoed in the case decided by the Criminal Court in re *Il-Pulizija vs Antonio Zammit*” decided on the 2nd March 1957 where it was held that :

Imputazzjoni ta' spergur tista' tigi sostnuta fuq ix-xhieda ta' xhud wiehed biss, meta dan ix-xhud huwa korroborat f'xi cirkustanza li tkun tiswa biex tistabbilixxi d-delitt allegat minn provi ohra migjubin skond il-ligi.

In *Il-Pulizija vs Frangisk Galea* decided by the Criminal Court on the 29th March 1952, it was also decided :

Ix-xhieda ta' xhud wiehed biss, li jmeri dak li xehed qabel taht gurament l-imputat, mhix bizzejjed skond il-ligi biex tikkonvinci lill-imputat bhala hati ta' spergur, jekk ma tkunx korroborata b'xi cirkustanza li tkun tiswa, biex tistabbilixxi d-delitt ta' spergur, ma provi ohra migjuba skond il-ligi. Certament hu mholli ghall-gudizzju tal-Qorti, fil-kaz partikulari li jkun, li tiddecidi jekk tkunx tista' torbot definitivament fuq ix-xhieda ghall-prova ta' dak li jkun xehed l-imputat; u huwa dejjem desiderabili li, f'kaz ta' spergur, ikun hemm in-notamenti tax-xhieda mehuda skond il-ligi u moqrija lix-xhud ghall-finijiet tal-konferma; ghax f'dak il-kaz ikun hemm prova mill-aqwa, li difficilment tista' tqarraq u thalli dubju.

In line with the above case law, the Court analysed the testimony of the other witnesses produced in this case too and could not miss the fact that their testimony does not really corroborate the testimony of Carmel Cutajar in some material circumstance on the basis of which this Court can convict the accused.

On the contrary when this Court analysed the testimony of the witnesses produced by the Prosecution, it noted various instances where their

respective testimony was conflicting in certain material particulars in relation to the recollection of the events that happened in their presence on the 4th February 2011 in and out of Vincenza Cutajar's room at the Zejtun Home for the Elderly. This does not mean that these witnesses whose testimony differs in some material particular are automatically taking a false oath. Otherwise, even Carmel Cutajar could be actionable for perjury when he stated at fol 31 that his wife remained out of his mother's room. Why? Because three other witnesses clearly claim that Joan Cutajar was present together with him in his mother's room. Joan Cutajar states that she was present together with her husband in his mother's room at fol 49 and 51. At fol 76 Monica Camilleri states that Joan Cutajar was also in the room together with them. At fol 148 the accused states that Joan Cutajar was in her mother in law's room too.

There are also other inconsistencies that can be traced throughout all the testimony of these witness when compared to the version of Carmel Cutajar. Thus when he recounts his mother's telephone call to his brother Gejtu, at fol 31 (and as reiterated in his cross examination at fol 130) Carmel Cutajar claims that his brother Gejtu told his mother that he could not call at her room there and then (qabeż Gejtu, qalha bħal issa ma nistax). Yet his sister Monica at fol 71 states that Gejtu told his mother that he was going to bring her the document and to wait for him there (U hu qalilha mela issa

ngiblek il-karta hemm hekk, stennewni hemm hekk). Another serious inconsistency. Again, who of them is telling a lie on oath?

Another material fact that is subject to another inconsistency is found at fol 32. Carmel Cutajar states that after that the accused handed over the document to his mother this document was handed over by his mother to his sister Monica. At fol 49 Joan Camilleri states that the accused handed over a document to Vincenza Cutajar and the latter handed over this document to Monica Camilleri. Monica Camilleri at fol 72 confirms that the accused handed over a paper to her mother Vincenza and the latter passed this paper to her because Vincenza was illiterate. Yet the accused consistently states that she handed over the paper to Vincenza and it was Carmel Cutajar who took this paper from his mother's hands (vide fol 148). Again does this mean that the accused is committing the crime of perjury?

At fol 148 the accused states that Joseph Camilleri alias Bobby, was together with his wife Monica in Vincenza's room. Yet all the other witnesses state that Joseph Camilleri was all the time outside this room.

Another interesting inconsistency relates to whether the accused and Carmel Cutajar started to talk to each other in Vincenza's room or outside this room. Carmel Cutajar states that after that the accused handed over the paper to his mother, and after Monica Camilleri asked the accused

where they had taken their mother that morning, he remained seated in the room while the accused moved out of the room. Both his mother and his sister Monica went out of the room together with the accused, stopped in front of his mother's bedroom door and continued talking loud. It was then that Carmel Cutajar went out of the room and told his mother and sister to go back to the room to avoid waking up other residents who might have been sleeping. It was then that he asked the accused whether he could speak to her and they had walked some twenty, twenty two feet when the accused asked him "what do you want Charlie?" (vide fol 32).

Joan Camilleri's recollection of this particular detail largely tally with those of her husband Carmel. Only that she slips on one important particular. At fol 50 she states as follows :

ir-ragel kien qiegħed bil-qegħda fuq is-sodda, ma kien qed jittellem xejn ir-ragel u jiena fuq is-siggu u r-ragel ħareġ biex idaħħal lil oħtu u lil ommu ġewwa għax kienet id-dar ta' l-anzjani biex ma joqgħodux jgħajjtu, imbagħad ir-ragel qalha lil Carmen "can I speak to you?" u Carmen qaltlu "what do you want" u ħarġu flimkien fil-kuritur. Daqshekk. Jiena rajthom jittelmu fil-kuritur.

Asked specifically whether she could hear their conversation, Joan Cutajar replied in the negative. It is interesting to note that Joan Cutajar states that she heard the accused asking her husband what do you want and it was then that they went out (ħarġu) together in the corridor. Went out from where? According to her husband this question was posed by the accused when they were already out of the room. So the question arises did this

conversation between the accused and Carmel Cutajar start while they were inside the room or in the corridor?

Monica Camilleri at fol 74 contradicts both Carmel Cutajar as well as his wife. She states that after that she asked the accused where did they take her mother in the morning, the accused turned towards the door (hence implying that she was still in her mother's room) and her brother Carmel told the accused that he wanted to speak to her. More interestingly and contradictory to Carmel's statement and that of his wife, Monica Camilleri states that she remained inside her mother's room together with her mother and it was Carmel and the accused that walked out of the room together. She states that the conversation between the accused and Carmel Cutajar was very brief and he returned back to his mother's room shortly after. Her husband in the meantime remained outside the room. She does not specify what the substance of their conversation was, despite her being so close to them.

Joseph Camilleri's testimony at fol 79 et seq too contradicts Carmel Cutajar's version of events on this episode. He too states that he remained outside the room. He saw the accused entering his mother in law's room and after a short while he saw the accused and Carmel coming out of the room and they passed in front of him and he heard Carmel asking the accused what she pretended from his mother's property and the accused

replied that she wanted her father's share. He did not hear anything else from their conversation.

The accused recounts, at fol 148, how in her aunt's room she felt uncomfortable and :

I felt there was a bit tension in the room and I wanted to leave and so I went rushing out and Charlie came behind me and kept asked me can I speak to you, can I speak to you and I ignored him.

From the above it is very clear that the Court cannot find guilt on the basis of this sort of contradictory and insufficient evidence. The Prosecution failed to prove the falsity of the statement beyond a reasonable doubt.

The parte civile claims also that the crime of false testimony was also committed on account of the fact that in the second affidavit the accused added details to the events that unfolded on the 4th February 2011 while leaving out an important detail : that she felt intimidated as was mentioned by her in her first affidavit.

The Court analysed both affidavits. It is true that the second affidavit includes more details than the first; however the Court finds that the details supplied in the second affidavit build on the facts that were already included in the first affidavit and do not contradict or change the substance

of what was stated in the first affidavit. The Court finds the accused's explanation for making the second affidavit more detailed as being, on a balance of probabilities, plausible.

The intention to swear falsely was not proved beyond a reasonable doubt and the Court cannot on the basis of the evidence supplied find the accused guilty.

Consequently the Court decides that for the reasons abovementioned, the Prosecution failed to prove its case beyond a reasonable doubt and therefore declares the accused not guilty and acquits her from the charges proffered against her.

Delivered today the 28th September 2016 at the Courts of Justice in Valletta, Malta.

Aaron M. Bugeja.