Court of Criminal Appeal

Hon. Madame Justice Dr. Consuelo Scerri Herrera, LL.D., Dip Matr., (Can)

Appeal Nr. 461/2017

The Police
Inspector Maria Stella Attard

Vs

Maxine-Rose Zammit

Today, 13th September, 2018

The Court,

Having seen the charges brought against appellant Maxine-Rose Zammit, holder of Maltese Identity Card Nr. 554913L, in the Court of Magistrates (Malta) as a Court of Criminal Judicature, with having:

On the 4th November, 2016 around 11:30am., whilst using vehicle IBZ-119 whilst in Vjal il-25 ta' Novembru, Zejtun:

1. Whilst driving a motor vehicle, turned about in the opposite direction in the same street or road (U-turn) (L.S. 65.05 Art. 2 (II A (b)))
2. Whilst driving a motor vehicle, drove in a negligent manner (Kap 65 Artiklu 15 (1)(a),(3))'

Having seen the judgement delivered by the Court of Magistrates (Malta) on the 31st October, 2017, the Court found the accused guilty of all accusations brought against her and condemns the accused to pay a fine for the amount of two hundred euro. Furthermore, for that time only the Court does not suspend the licence.

Having seen the application of defendant Maxine Rose Zammit filed on the 10th November, 2017 prays this Honourable Court so that the exponent is presenting this humble appeal from the judgment given on the 31 of October 2017, the Court of Magistrates (Malta) as a Court of Criminal Judicature (Traffic Sitting) in the case of 'The Police vs Maxine Rose Zammit' and humbly prays this honourable Court of Criminal Appeal to:

1. Expunge the police report from the records of the proceedings;
2. Revoke the appealed judgment in its entirety;

That the grounds of appeal of defendant consist of the following:

First Ground of Appeal: Evidence presented during final oral submissions

1. That after the prosecution brought forward it's evidence as well as its sole witness, the accused was asked by the court if she wished to take the witness stand. Considering the contradictory evidence presented by the prosecution, considering also that in the appellant's opinion the prosecution had not proved its case prima facie, and the beyond reasonable doubt standard of proof in criminal proceedings was not met, the accused chose to use her right at law to remain silent and declared that she would not be presenting evidence;

2. The court was requested to proceed to hearing the final oral submissions of the prosecution and defence;

3. That the prosecution after commencing its final submissions decided to present a police report during final oral submissions. This police report had not yet been presented to the court, nor a copy of which given to the accused or her legal counsel;

4. That considering that the report was being presented at a drastically late stage after the accused had already declared that her evidence could be considered closed, the representative of the accused contested the presentation of the report and requested it to be expunged from the records of the proceedings. This request was refused by the Court which requested the parties to continue with their oral submissions. In light of this the legal representative of the accused requested the court to verbalise that the report had been presented at a late stage of the proceedings when no further evidence could be presented;

5. That in the Court sentence it is stated:

'The Court notes further that **police report was exhibited** after the prosecution has already produced their witness and **after the accused chose not the give evidence.**' [*emphasis added by the appellant*]

6. That the accused had no opportunity to scrutinise the police report nor was the accused at that late stage of proceedings capable of contesting the report;

7. That this is in direct violation of the accused right to a fair hearing and the emerging principle of equality of arms;

8. That the court in its sentence clearly gave primary importance to the police report presented when in the opinion of the accused this report should be expunged from the

record of the proceedings. Moreover, the police report was not confirmed on oath and does not satisfy the best evidence rule;

Second Ground of Appeal: That the incident was caused through no fault of the accused

9. That the prosecution, during the time wherein it was entitled to bring forward evidence, solely presented an affidavit of the police officer called to the scene and the witness of Mr. Anastasio who was driving the motorcycle that crashed into the accused;

10. That during his examination Mr. Anastasio gave conflicting statements as to where he had struck the vehicle with his motorcycle yet stated that he had crashed into the rear of the vehicle;

11. That under cross-examination the witness was asked the speed at which he was going and the distance kept from the vehicle. That from the replies provided as well as the fact that an accident took place it is abundantly clear that Mr Anastasio was not keeping the distance required under the Highway Code and failed to keep a proper look out;

12. "Fil-kawza deciza mill-Qorti ta' l-Appell fil-15 ta' Jannar, 2002 fl-ismijiet **Micallef St John vs Spiteri et** intqal;

*"Il-Qorti ta' l-appell fil-kaz in kwistjoni (**James Attard vs Alfred Desira** deciza fil-21 ta' Mejju, 1986) ghamlet riferenza ghas-sentenza moghtija f'kazijiet Inglizi kwotati f'Charlesworth, Law of Negligence, fosthom **Tart vs Chitty** fejn il-Qorti ta' l-appell Ingliza iddecidiet li meta persuna li kienet qed issuq mutur dahlet fil-parti ta' wara truck li kien wieqaf ikkonkludiet illi l-fatti "pointed out to one solution only; either the plaintiff was not keeping a proper look at in which case he was guilty of negligence, or if he was keeping a look out he was going too quickly or for some other reason had not his motor cycle under such proper control that he was able to avoid the collision".*

L-istess fil-kawza ***Baker vs Longhurst*** *il-Qorti iddecidiet li l-attur li kien qed isuq motor cycle u habat ma' ziemel u karettun li ma kellhomx dawl kellu jkun "riding at such a pace as to be able to pull up within the limits of his vision and he must either have been going too fast or not keeping a proper look out." Diversi sentenzi tal-Qrati taghna mxew fuq l-istess principju."*

[…]

Dan premess din il-Qorti tixtieq tosserva li wahda mill-aqwa regoli li ghandhom jigu osservati biex jigu evitati incidenti, hija dik tal-"*proper look out*" billi kull sewwieq irid joqghod attent il-hin kollu ghal dak li qed jigri quddiemu u madwaru u inoltre jrid, kif jinghad fil-paragrafu 107 tal-Highway Code "*Never drive at such a speed that you cannot pull up within the distance that you can see to be clear*."[1]

And

Illi kif gie gustament ritenut f'sentenza ohra tal-Qorti tal-Appell Kriminali (Sede Inferjuri) f'sentenza moghtija fil-21 ta' Mejju 1960 fl-ismijiet **il-Pulizija vs Anthony Spiteri:** "Driver ta' karozza ghandu inegabbilment, fost ohrajn, zewg doveri: wiehed, dak li jzomm a *proper lookout* ghall-vejikoli, *pedestrians*, u *road-users* ohra; l-iehor, dak illi waqt is-sewqan hu jkun f'posizzjoni tali li jkollu f'kull hin kontroll sewwa tal-vejikolu." Il-Qorti osservat "ma ghandux jintesa illi l-accidenti stradali huma ta' spiss kwistjoni ta' disattenzjoni ta' *split second* u l-kontingenzi tat-traffiku jistghu jkunu subitanei u inaspettati.[2]

13. That the witness was also asked if he could see cars in front of the accused's' vehicle to which he replied that he could not recall. Moreover, importantly, the witness

[1] Court of Appeal (Superior), Emanuel Cutajar v. Najwa Abdul Hafid, 1070/2002/1, 1 February 2008

[2] Court of Magistrates (Malta) as a Court of Criminal Judicature, 644/2012, Police v. Dulton Magri, 24 October 2017

confirmed that the accused's vehicle had not been moved before the police arrived at the scene;

14. That the police officer had stated in his affidavit that no sketch was made as the vehicles where moved but this does not result from the proof presented by the prosecution and is in direct conflict with the statement of their primary witness;

15. That it appears that the police gave primary importance to what was told to them by Mr Anastasio, an older Maltese man, who stated that the accused had done a U-Turn. It is evident that the police failed to take photographs or make a sketch because they could not reconcile the events as stated by Mr Anastasio with the fact that the accused's car was correctly situated in the appropriate lane and facing the proper direction. Moreover, as emerges from the affidavit of the police officer, the accused was in an agitated state due to being subject to verbal harassment by third parties and thereby Mr Anastasio's statement was given more importance. In fact, no charges were issued against Mr Anastasio although his driving was in clear violation of the Highway code;

16. That the prosecution is bound at law to present all evidence, that which shows guilt and also that which shows innocence. The prosecution failed to present any circumstantial evidence notwithstanding its importance in traffic collisions and its status as a *prova regina* in such proceedings;

17. That the failure of the police to take photographs or make a sketch greatly prejudiced the ability of the accused to present proof;

18. That, in light of the above, the prosecution failed to satisfy the beyond reasonable doubt standard of proof and that doubt should favour the accused;

'[…] *the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him*.'[3]

19. That this notwithstanding, due to the courts seemingly adverse reaction to the choice of the accused to remain silent, the accused feels obliged to justify her choice. Firstly, it must be noted that the right to remain silent includes the right to respect the will of the accused[4];

20. That the accused is presumed innocent until proven guilty through adequate proof of his own admission;

tal-Artikolu 40 Subinciz 5 tal-Kostituzzjoni ta' Malta, li jiddisponi s-segwenti:

"*every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty...*"

Dan il-principju gie wkoll sanat fis-sentenza moghtija minn Sir Augustus Bartolo fl-ismijiet Il-**Pulizija v Michele Borg et** (deciza mill-Qorti tal-Appell Kriminali nhar it-13 ta' Mejju, 1936) fejn intqal:-

[3] Case of Barbera, Messegue and Jabardo v. Spain (Application no. 10590/83)

[4] Case of Saunders vs United Kingdom (Application no. 19187/91) (Para 69)

"illi skond il-principju u s-sistema tal-ligi u procedura penali taghna imfassla fuq dak ta' l-Ingilterra u li huma strettament d'ordine pubblico; 'the accused is presumed innocent until proved guilty.' "

U issa ghalhekk wiehed jistaqsi xi tfisser verament presunzjoni tal-innocenza? Din tfisser li l-akkuzati ma jridu jippruvaw xejn dwar l-innocenza taghhom - hija l-Prosekuzzjoni li trid tipprova l-htija taghhom. Ghalhekk peress li hija l-Prosekuzzjoni li allegat il-htija tal-imputati, l-onus generali tal-prova, u cioe' tal-prova tal-htija, tistrieh fuq il-Prosekuzzjoni, li ghandha ghalhekk tipprova kull element tar-reat partikolari sabiex tasal ghal din l-istess konkluzjoni.[5]

21. That moreover, as already stated the prosecution only presented one witness who was at the scene, the person who most has interest in the accused being given blame for the incident, without presenting any other proof which would corroborate his statements. Ugwalment fil-kawza bl-ismijiet **Pulizija v James Abela** deciza wkoll mill-Qorti tal-Appell fil-ħdax (11) ta' Lulju elfejn u tnejn (2002) gie ddikjarat illi:

"....F'materja ta' incidenti stradali il-provi indizjarji hafna drabi jista' jkunu siewja ferm u xi drabi jistghu anki ikunu siewja ferm aktar minn dawk okulari li, kulltant jistghu ikunu biss soggettivi u kulltant, ***u x'aktarx iva milli le, ikunu kuluriti b' dak li jissejjah "esprit de voiture".*** *Umbaghad fejn ma jkunx hemm xhieda okulari li jistghu jiddeskrivu jew jispjegaw dak li gara, dawn il-provi indizjarji, jistghu facilment u minghajr bzonn ta' hafna tigbid, jaghtu stampa cara tad-dinamika tal-incident.[6] [emphasis of the appellant]*

[5] Court of Magistrates (Gozo) as a Court of Criminal Judicature, 71/2008, Police vs Paul Xerri et, 7 February 2017.
[6] Court of Magistrates (Malta) as a Court of Criminal Judicature, 644/2012, Police vs Dulton Magri, 24 October 2017.

22. That the prosecution failed to respect the general rule in criminal proceedings to produce the fullest and most satisfactory proof available. Indeed, not a single piece of independent proof was presented by the prosecution and the proof presented was challenged under cross examination, creating a reasonable doubt as to the guilt or innocence of the accused;

23. That the only thing that emerges from the facts of the case, is Mr Anastasio's negligence and his disregard to follow the provisions of the Highway Code. Namely but not exclusively:

158. '*Do not drive too close to the vehicle ahead and drive at such a speed that you can pull up in good time if the vehicle ahead makes a sudden move and slows down or stops. The only safe rule is to never get closer than the overall stopping distance (see typical stopping distances and the 2 second rule under General Advice)*

159. *Allow at least a two second gap between you and the vehicle ahead on fast roads. Double this at least on wet roads, and increase it even further if there is mud on the road.*

160. *Remember, large vehicles and motorcycles need a greater distance than cars to stop'.*

[…]

219. The 2 second rule *Adapt your speed to keep two seconds travelling distance behind the vehicle ahead. This may be arrived at by using a pole or other fixed marker as a reference point and counting one hundred and one, one hundred and two before your vehicle reaches the reference marker.*

[…]

278. *Never drive at such a speed that you cannot pull up within the distance that you can see to be clear. Remember that your visibility is reduced at corners and over the crests of hills, and that your braking distance is greater downhill or when the road is wet or slippery.*

279. *You should:*

• *leave enough space between you and the vehicle in front so that you can pull up safely if it suddenly slows down or stops. The safe rule is never to get closer than the overall stopping distance (see Typical Stopping Distance diagram on page 69).*

• *allow at least a two-second gap between you and the vehicle in front on roads carrying fast traffic. The gap should be at least doubled on wet roads and increased still further on muddy roads.*

• *remember, large vehicles and motorcycles need a greater distance to stop.*

281. *Shortest Stopping Distances - in metres*

Kmh	*Thinking distance (metres)*	*Braking stopping distance (metres)*	*Overall*
32	*6*	*6*	*12*
50	*9*	*14*	*23*
64	*12*	*24*	*36*
80	*15*	*38*	*53*
94	*18*	*55*	*73*
110	*21*	*75*	*96*

24. That thereby the prosecution fell far short of presenting a 'formidable case' against the accused and the little evidential value which may be awarded to the statement of the witness called for no answer due to its conflicting nature. Indeed, the prosecution failed to reach a prima facie consideration of guilt through the evidence presented;

Third Ground of Appeal: No proof of signage

25. That the accused was found guilty of doing a U-turn and violating SL 65.05 Artiklu 2 (II A (b));

26. That it is evident from the above mentioned provision that the law requires a sign to be found in the street;

27. That for the accused to be found guilty of this accusation the prosecution needed to prove (1) that there was a U-Turn sign (2) that the accused did a U-Turn. Neither of these requirements was satisfied and the prosecution presented no proof of the existence of such a sign in 'Hamsa u Ghoxrin ta' Novembru Vjal il-';

28. That the court could never have found the accused guilty of the accusation brought against her without being presented with proof of the existence of such a sign;

Having seen the records of the case.

Having seen the updated conviction sheet of the defendant and heard the parties out forward their oral final pleadings during the sitting of the 4th September 2018.

Now therefore duly considers the following,

The appellant felt aggrieved in the first instance to what the court of first instance stated with regards to the appellant namely that the accused chose not to give her version of facts, then proceeded to take cognizance of the police incident report exhibited in these proceedings after the prosecution had already declared it had no more evidence to bring forward so much so that the appellant declared that she was not going to give her evidence. The court then went on to say that the appellant chose not to give her version of events.

Therefore, the court will be addressing this cardinal procedural issue first.

It must be pointed out from the very on set that an accused person is presumed innocent until the moment a judgment I given declaring guilt. The accused has every right to remain silent not to incriminate herself. The accused has right to contest contradict and bring forward her evidence if it feels that this is necessary to contradict the evidence brought forward but the prosecution though she is not obliged to do so and as was pointed out rightly so by the appellant she can rest her case on the evidence brought forward by the prosecution. It is the duty of the prosecution to prove that the accused/appellant is guilty beyond reasonable doubt and the appellant has not duty to disprove anything.

The Court here makes reference to the address made by the learned judge in the trial by Jury in the names **Repubblika ta' Malta vs Martin Dimech** wherein he held that:

"Il-principju principali li johrog mill-prezunzjoni tal-innocenza huwa li la darba l-akkuzat huwa prezunt innocenti, l-akkuzat ma huwa obbligat jipprova xejn ….Dan ma jfissirx li jekk l-akkuzat jaghzel li jipprova xi haga, certi regoli ta' kif ghandhom isiru l-provi ma japplikawx anke ghall-akkuzat. Ma jfissirx hekk imma jfisser biss li l-akkuzat mhux obbligat li jipprova xejn u jfisser li l-piz tal-prova, jigifieri l-obbligu biex tipprova l-akkuza, jew f' dan il-kaz, l-akkuzi kontra l-akkuzat, bl-elementi kollha taghhom, bl-elementi kollha ta' kull akkuza, qieghed, mill-bidu sa l ahhar, fuq il-prosekuzzjoni …. U l-akkuzat ma ghandu ebda obbligu li jipprova xejn"[7].

Also, the appellant makes emphasis on the fact that it is the duty of the prosecution to prove every element of the crime and this beyond reasonable doubt as was clearly stated in the address delivered by the learned Judge in the jury against Godfey Lopez wherein he held the following:

[7] Application number 37/1996 Page2 u 3 of the transcripts of the address of the Judge

"*Il-process indizjarju huwa tezi tal-prosekuzzjoni li ghandha tipprova l-univocita` tal-prova, il-konsistenza tal-prova, u li tali provi flimkien iwasslu ghall-konkluzjoni wahda u unika. Hekk tkun ghamlet id-dmir li tipprova minghajr dubbju ragonevoli. Altrimenti tkun ghadha fil-probabilta`. Jigi sottomess li biex ikun [hemm] l-univocita` tal-prova, il-prosekuzzjoni trid turi li l-unika soluzzjoni possibbli tkun dik tat-tezi taghha, u ghalhekk huwa d-dmir taghha li teskludi possibilitajiet ohra. Jekk dawn il- possibilitajiet mhux eskluzi mill-prosekuzzjoni, allura tkun ghadha fl-ipotesi u mhux fil-prova minghajr dubbju ragonevoli*[8].

Therefore, the appellant is correct when in his appeal he states that the prosecution has to prove its case in the best way and is bound to bring forward all evidence against and in favour.

In this case there is no mention in any verbal that affidavit released by WPS 269 M Lia who investigated the report regarding the accident was presented in the acts of the proceedings. There is no mention of it in any verbal. This affidavit happens to be in the file of the proceedings but there is no mention of it anywhere. Though it appears that on the 31st October 2017 the alleged victim Joseph Anastasio gave evidence. Unfortunately, such evidence was not transcribed so the court has to rely on his evidence given viva voce in court before her only. This is the only evidence that that court has in relation to the charges brought forward against the accused. The court is discarding the police incident report and states that the first court should never have given any notice to it since it was presented after the police had concluded its evidence and the accused today appellant had declared that she was not testifying. Had this report been presented earlier in the proceedings the appellant might have chosen to testify so as to contradict or explain any fact mentioned in this report which was not true in its content according to her.

[8] In the address of the Jury in the names Ir-Repubblika ta Malta vs Godfrey Lopez Application numru 4/2000

Now what did the victim say during the sitting of the 23rd July 2018? He said he was driving a vehicle without mentioning the make or registration number, along Vjal il 25 ta' Novembru, Zejtun on a particular day which he did not identify either. He then said that at a moment in time the car which was being driven by the accused whom he recognized in court decided to make a U turn and he cashed into it, hitting her on the back part of the car. Asked by the Court how far he was from the appellant before he crashed he clearly stated that he was at very close a distance which he described in his evidence as being from the desk of the court to where he was standing being a distance of not more than five feet.

The Court asked the witness whether he has seen any indicators that the appellant was going to turn and he said that he does not recall seeing anything. Asked if he had seen the appellant for a long distance before he stood silent.

These are the fact upon which this court has to decide the case.

It is a well established principle in our jurisprudence established by this court that in those cases of an appeal from a court of first instance as well as in those instanaces of an appeal from a verdict in the case of a Jury that this court as well as the Criminal court in its superior jurisdiction do not disturb the appreciation of facts carried out by the first court in evaluating the evidence brought forward before her upon which it based its judgment. In other words this court does not replace the discretion used by the first court but carries out a profound in depth examination of the same evidence brought before the first court to make sure that the decision it took based on those facts was correct and that the court was reasonable in taking the decision it took .However should the court of first instance could not have reached the conclusion it reached based on those same facts that this court steps in and for valid reasons to be indicated in its judgment revokes the decision taken by the first court reference is made to the case "**Il-Pulizija vs. Raymond**

Psaila et.[9]" ; "**Ir-Repubblika ta' Malta vs. George Azzopardi**[10]" ; "**Il-Pulizija vs. Carmel sive Chalmer Pace**[11]"; "**Il-Pulizija vs. Anthony Zammit**"[12] and others.

In addition this court also makes reference to what was said by LORD CHIEF JUSTICE WIDGERY in the case "**R. v. Cooper**"[13] namely that :- "*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 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*."[14]

In the appal judgment in the names : "**Ir-Republika ta' Malta vs. Ivan Gatt**"[15], decided on the 1st of Dicember, 1994 it was held that :- "*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 mill-gurati, il-funzjoni, anzi d-dover ta' din il-Qorti huwa li tirrispetta dik id-diskrezzjoni u dak l-apprezzament* "

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[9] Decided 12.5.1994

[10] Decided 14.2.1989

[11] Decided 31.5.1991

[12] Decided 31.05.1991

[13] ([1969] 1 QB 276)

[14] See also BLACKSTONE'S CRIMINAL PRACTICE (1991) , p. 1392

[15] Decided on the 1st December, 1994

Thus, once again the Court reiterates could the first court have found the appellant guilty of the charges brought forward against him in the light of these circumstances namely only on the version of events as given by the witness.

In the first case, the appellant was charged with having driven a motor bike along Vjal il-25 ta Novembru, Zejtun at about 11.30 a.m. when she decided to make 'U' turn in this game road. When he testified, he stated that he was driving behind the appellant when all of a sudden she turned to the left according to the manoeuvre he made in court. He never ever state that he carried go on the other carriage way opposite to the one that the appellant was driving on. Thus it could be that the appellant in fact was not doing a 'U' turn but turning left and unless there were white uninterrupted lines which from the acts of the proceedings were not proven. Thus, the court is not convinced that the appellant was in fact going to do a 'U' turn.

In the second place, the accused appellant was accused of careless driving. Now on a charge of careless driving the prosecution must prove that the appellant fell below the standard of driving of a reasonable prudent and competent driver faced with the situation in which he is placed. The test to be applied is an objective one. In this case the prosecution did not bring forward any evidence that the appellant was over speeding, or that she failed to indicate that she was going to turn. This is the duty of the prosecution to prove and not of the appellant to prove.

Thus the court states that it is not satisfied with the evidence brought forward for it does not appear from anywhere what was the driving of the appellant prior to the accident. Had the lower court not taken into consideration the affidavit of the police person if it did and discarded the police incident report it surely would not have reached the verdict it gave since not even evidence of the damage that the bike or car sustained was brought forward to confirm where the bike was hit.

In the light of the above circumstance, the court declares that it is upholding the appeal

revokes the judgment delivered on the 31st October 2017 and acquits the appellant of all charges and consequently of paying the fine imposed.

Consuelo Scerri Herrera
Judge