



Court of Criminal Appeal

Hon. Ms. Justice Dr. Consuelo Scerri Herrera LL.D.

Appeal number: 145/ 2018

The Police

Inspector Nicholas Vella

Vs

John Eric Fenech

Today the 27th November, 2018

The Court,

Having seen the charges brought against John Eric Fenech holder of identity card number 412500L, before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having:

In the Maltese Islands in Mosta on the 31st July 2014 at around 7:30pm:

1. Without the intent to kill or to put the life of Anthony Sammut in manifest jeopardy, caused grievous bodily harm on the person of Anthony Sammut, a person who attained the age of sixty years, as certified by Dr. Leonard Farrugia from Mater Dei Hospital.

Having seen the judgment meted by the Court of Magistrates (Malta) as a Court of Criminal Judicature proffered on the 15th of March, 2018 whereby the Court, having seen the Articles 17, 31, 214, 215, 218, 222A(1), 382A, 383, 384, 385, 386 and 533 of Chapter 9 of the Laws of Malta;

This Court found the accused guilty as charged and condemned him to one year imprisonment suspended for two years in terms of Article 28A of Chapter 9 of the Laws of Malta.

The Court explained in clear words the terms of the judgment to the accused.

Having seen the appeal application presented by John Eric Fenech in the registry of this Court on the 27th of March 2018 whereby this Court was requested to cancel, revoke and reverse the judgement delivered on the 15th March 2018 by the Court of Magistrates (Malta) as a Court of Criminal Judicature in the names The Police vs. John Eric Fenech by virtue of which the appellant was found guilty as charged and was condemned to one year imprisonment suspended to two years in terms of Article 28A of Cap. 9 of the Laws of Malta, and to consequently acquit the appellant John Eric Fenech of all charges, guilt and punishment.

Having seen the acts of the proceedings;

Having seen the updated conduct sheet of the appellant, presented by the prosecution as requested by this Court.

Having seen the grounds for appeal of John Eric Fenech:

1. FIRST GRIEVANCE

1.1. That preliminarily it must be pointed out that in terms of Article 382 of the Criminal Code (Chapter 9 of the Laws of Malta), a judgement delivered by a Court of Magistrates as a Court of Criminal Judicature against the accused, shall state the facts of which the accused has been found guilty, shall award punishment and shall quote the article of this Code or of any other law creating the offence. While this same article does not state that the Court of Magistrates as a Court of Criminal Judicature should motivate, give reasons and on what evidence submitted it is

basing its reasons for which it is finding against or for the accused, it is normal practice that the First Honourable Court in its judgement refers to the evidence submitted before it, and examines the same evidence in order to justify the reasoning that it consequently applies when delivering judgement against or for the accused.

1.2. That in this present case, the Court while referring generally to evidence regarding the collision between the motorcycle and the van driven by the accused and the victim respectively, and whilst correctly concluding that the same collision was caused by the victim's "*ill timed, if not reckless manoeuvre*", failed to refer to all the other evidence submitted before it in connection with the actual charge that the accused was being judged for and relative to the grievous injuries sustained by the victim Anthony Sammut and to indicate what of all the copious evidence brought before it, first as a Court of Criminal Inquiry, then subsequently as a Court of Criminal Judicature, justified its decision in stating that it was the accused who caused the grievous injuries in question to the victim and in consequently dismissing the argument put forward by the defence that the accused never hit Anthony Sammut;

1.3. That as this Honourable Court can itself attest, the only reference that the First Honourable Court makes in its somewhat concise judgement is that "*The Court however fails to understand how those injuries came about on that day out of thin air. They were obviously caused by severe blows to Sammut's groin and the Court has no other option but to dismiss the defence put forward by the accused.*" Such assertion is far from the truth, as the evidence produced before it clearly shows that the Court should have accepted the defence raised by the accused and not dismiss it as it did in its judgement of the 15th March 2018;

2. SECOND GRIEVANCE

2.1. That the appellant contends that the First Honourable Court, in delivering judgement against the appellant, completely disregarded the evidence produced

before it which clearly points to the fact that there are serious doubts regarding the commission of the crime by the accused John Eric Fenech. In criminal proceedings, the evidence produced before the Court delivering judgement must be such that the Court must be convinced of the accused's guilt **beyond any reasonable doubt**, and it is the prosecution that must prove the guilt of the accused beyond such reasonable doubt and not the accused that must prove his innocence. In the case at hand, it is clear from the evidence produced before the First Honourable Court that this level of proof beyond reasonable doubt was never attained, and hence the First Court could never find the appellant guilty of the charges brought against him. Yet, this notwithstanding, the Court ignored all that evidence produced before it that clearly militates in favour of the accused John Eric Fenech and that should have left no doubt in the First Court's mind that John Eric Fenech did not commit the crime with which he is being charged.

2.2. That as is going to be made clear in the following paragraphs, there was substantial evidence produced before the First Honourable Court to which the First Honourable Court does not even refer in its judgement, which clearly attacks the credibility of the version of events given by the victim Anthony Sammut as to how he sustained his injuries and what or who caused them, apart from the fact that there are serious doubts as to the credibility of the same victim in the various versions and conflicting details that he gave both at the time of the incident, and further during the course of the proceedings against the accused.

2.3. That preliminarily it is being pointed out that in the acts of the proceedings before the First Honourable Court, the following testimonies were heard - the victim Anthony Sammut, the accused John Eric Fenech, the neighbour and photographer Stefan Aquilina, Doctors from Mater Dei Hospital - Dr. Moses Camilleri, Dr. Leonard Farrugia and Profs. Karl German who examined the appellant and the parte civile after the accident, Dr. Mario Scerri the medical expert appointed by the First Court on the 29th January 2015 to examine the injuries sustained by the parte civile, Police Officers who attended to the accident in question PC 1289 Andre Cassar

Bonaci, PC 616 Spiteri (the testimony of Police Officer PS 455 Emmanuel Sammut was expunged from the acts of the proceedings in a hearing held before the Court of Magistrates as a Court of Criminal Judicature on the 11th May 2017 after the same police officer did not submit himself to cross-examination), none of who assisted to the actual collision and alleged assault, Prosecuting Officer Inspector Nicholas Vella, and Stephen Cachia from Transport Malta who gave evidence about the ownership of the vehicles involved in the collision. Additionally documentary evidence consisting principally of photographs submitted by the accused as well as the *parte civile*, the police full accident report entered into by the Police on the 31st July 2014 at the time of the accident were also produced as evidence;

A. Photo of Lesions Allegedly Suffered by Anthony Sammut further to the incidents of the 31st July 2014

2.4.1. That in the humble opinion of the appellant, the clearest piece of evidence which militates in favour of the accused and his acquittal from the crime with which he is being charged, but which the First Honourable Court clearly did not even take into consideration is the photo (Dok. AS1 at fol. 26 of the proceedings) of the injuries allegedly sustained by the victim in the incident of the 31st July 2014 and presented as evidence at fol. 26 before the First Honourable Court and the testimonies relating to the same photo submitted before the same Court;

2.4.2. That in his examination-in-chief of the 29th January 2015, Anthony Sammut presented the said photograph (Dok. AS1) which depicts the injuries sustained by Anthony Sammut to his groin area. Thereafter on the 2nd July 2015, a certain Stefan Aquilina who identified himself as Anthony Sammut's neighbour gave evidence before the First Court in which he confirmed this photo and also testified that this photo presented by Mr. Sammut and found at fol. 26 of the proceedings was taken by him on the specific request of Anthony Sammut (fol. 108). Stefan Aquilina is very clear in his evidence when he states without any hesitation that he took the photo on the 5th August 2014 specifically at 09.06 hrs on the same day (fol. 107). This means

that the photo in question attesting to the injuries of Anthony Sammut was taken **FIVE (5) DAYS AFTER the accident and alleged assault of the 31st July 2014.**

2.4.3. That the photo exhibited by the victim and confirmed as having been taken by Mr. Aquilina was also presented by Anthony Sammut to the medico-legal expert appointed by the court, Dr. Mario Scerri, and the same Dr. Scerri in his report presented in court actually includes this same photo given to him by Anthony Sammut (fol. 38 of the proceedings). Erroneously, Dr. Mario Scerri in his report submits that the photo was taken five days after Anthony Sammut was discharged, when it is clear from the direct testimony of the photographer Stefan Aquilina, as already stated above, that the photo was taken on the 5th August 2014, that is five days after the incidents of the 31st July 2014 and two days after his discharge from hospital;

2.4.4. That Dr. Mario Scerri in his examination-in-chief of the 26th February 2015 when presenting the said medico-legal report drawn up by him testifies with reference to this photo which he states to have included in his report that *“It still shows massive bruising, turning grey conceding with the date of friction which was about ten days before”* (fol. 29) – hence he is indicating this injury as being approximately a ten-day old injury.

2.4.5. That in his cross-examination of the 2nd June 2016, Dr. Mario Scerri clearly insists that the conclusions resulting from the report he submitted before the First Honourable Court are based on the photo of the lesions allegedly suffered by the victim as he was not involved initially when the victim was admitted in the hospital on the 1st August 2014 with the injuries sustained – in this regard, the appellant refers this Honourable Court to the following extracts from the testimony in cross-examination tendered by Dr. Mario Scerri on the 2nd June 2016:

“Dr. Sarah Sultana: All I want to know is on what fact in the sense was it just what Anthony Sammut told you (the photo) or were there other things that you actually looked at in order to arrive to your observations and conclusions please?”

Witness: I examined the photos....” (Fol 2 paragraphs 1 and 2 of his testimony of the 02.06.2016);

and

“Witness:...What I am telling you is that I am judging my conclusions on this photo. This also indicates clearly.

Dr. Sarah Sultana: On the Photo!

Witness: Yes, but I can't see I mean I have to direct myself and I directed myself according to this photo.” (fol. 6 paras. 3-5 of his testimony of the 02.06.2016)

and

“Witness: The genital areas are affected.... If this photo was a true representation of what actually happened jgifieri if this photo is not a fake photo I am judging on this photo because remember I did not examine the patient at that time but from this photo yes definitely I do not agree with what the doctor said that the lesions on the...” (fol. 11 para. 3 of his testimony of the 02.06.2016)

2.4.6 That additionally, in his cross-examination, expert Dr. Mario Scerri confirms what he had stated in his examination-in-chief, that is that the photo on which he insists several times that he based his conclusions, was symptomatic of an injury that was caused around ten days before the same photo taken - *“Yes it was about around ten days because greenish bruises after about six days they become green and then to subside completely I would have expected it to have lasted a lot, a long time.”* (fol. 9 para. 3 of the same testimony) and further *“I would say that this had been about eight days to ten days, I agree to that”* (fol. 10 para. 5 of the same testimony);

2.4.7. That therefore it is clear from the evidence produced that the injuries sustained by the victim on the basis of the photo presented by the same victim and which was also the basis of the conclusions made by the medico-legal expert, were around 8 to 10 days old. The photo however was taken 5 days after the accident of the 31st July 2014 as submitted above, and therefore if the injuries were 8-10 days old as stated and confirmed by the medico-legal expert, this effectively means that the

injuries were sustained around the 26-28 July 2014, that is clearly **BEFORE** the incident of the 31st July 2014.

2.4.8. That this evidence by itself should have left absolutely no doubt in the First Court that the accused could **NOT** be found guilty of having caused grievous injuries to the groin area of the victim when the injuries clearly Pre-dated the incident of the 31st July 2014. This evidence was also brought to the attention of the Court in the final oral submissions to the case, however the First Court disregarded this evidence tendered before it completely, and this to the serious prejudice of the accused. Instead the First Court proceeded to remark that *“it fails to understand how those injuries came about on that day out of thin air”*, which is completely wrong when considering the fact that it is clear that those injuries came about before the day of the incident, and this remark in itself is a clear attestation of the fact that the First Honourable Court completely disregarded the evidence submitted before it in arriving to its conclusions. Faced with these doubts, the Court should have been left with no other option but to acquit the appellant;

B. Various Inconsistencies in the Testimony of Anthony Sammut

2.5.1. That the victim Anthony Sammut testified in the proceedings before the First Honourable Court on the 29th January 2015 (at fols 20-25 of the proceedings) that following the collision between the motorcycle driven by the appellant and the van driven by the victim, the appellant John Eric Fenech kicked him 4-5 times in the genitals (fol.23). In this regard, the appellant refers this Honourable Court to the Police Report entered that same day of the accident of the 31st July 2014 where the alleged victim, a tempo vergine, gave his statement of facts to the police from the Mosta Police Station that *“Hekk kif qam mill-art u konna t-tnejn bil-wieqfa fit-triq qabad itini bla hniena. **Bid-daqqiet jiena waqajt ma' l-art u rega' qabad jaghtini bis-sieq fil-parti genitali tieghi”*** (fol 13). No police officer that gave evidence before the First Honourable Court attested that Anthony Sammut was at any time on the floor when they arrived on the scene of the crime.

2.5.2. That photos presented by the appellant at fol. 142 of the proceedings, which photos as stated by the same appellant were taken by him with his mobile phone on site soon after the accident happened, clearly show Anthony Sammut on his feet, walking around, talking with the police on the ground and also next to the police vehicle speaking with the police officers in the patrol vehicle depicted in the same photos. In fact Anthony Sammut in cross-examination of the 21st April 2016 recognized the photos and claimed that what is depicted in those photos happened a few minutes after the accident when the Rapid Intervention Unit arrived on the scene. Furthermore, John Eric Fenech in his testimony of the 8th June 2017, clearly states that *“Anthony Sammut was walking around the scene of the accident and when these patrol cars stopped to ask what was going on he went over and chatted with them and this is obviously after the accident because they could see Mr. Sammut’s van in the middle of the road and my motorcycle on the side close across the curb.”* (fol. 6 of his testimony of the 08.06.2017)

2.5.3. That however when Anthony Sammut was faced with these photos and questioned as to his initial driver’s statement that he had fallen to the floor with the blows that he had received from the appellant, not only does he retract his driver’s statement given precisely at the time of the accident, but claims that he never even told the police that he had fallen to the floor - *“I never said that I fell down. Never.”*; *“I didn’t tell the police I fell”* (fol. 5 of his testimony in cross-examination of the 21st April 2016), implying that the police invented his driver’s statement when they took it down on the scene of the accident, and yet there is no evidence to suggest that the police officers invented parts of the statement given by the accused. This conflict in the version of events as they happened clearly point to the lack of credibility of the same victim. A contrariu sensu, if on the other hand, the victim is to be believed when he insists under oath that the part of the driver’s statement which reads *“Bid-daqqiet jien waqajt ma’ l-art..”* was never said by the victim to the police on the scene of the accident and that therefore the police just invented that statement, then one questions whether the other statements made by the same victim to the police at the

time of the incident, that the appellant started assaulting the victim “*bla hniena*”, and kicked him in his genital areas, and his subsequent testimonies in this regard, was also a fabrication and in fact the appellant, as was contended in the case, never did to the victim that which the victim had been alleging all along. These doubts clearly put the matter of proof beyond reasonable doubt into serious question;

2.6.1. That the victim Anthony Sammut testifies in cross examination of the 21st April 2016 that as a result of the kicks received to his genitals he was in a lot of pain – “*I was in pain yes in a lot of pain because my testicles were as big as that*” (fol. 4 of the same testimony of the 21st April 2016) ; “*Another thing, you said you were in pain, in a lot of pain because of the blows five kicks to the groin. I was in pain yes*”. (fol. 6 of the same testimony of the 21st April 2016). Furthermore Profs Karl German under whose care the victim was in Mater Dei when he was admitted to hospital between the 1st August 2014 and the 3rd August 2014, at fol. 87 of the proceedings on a direct question of the prosecuting officer whether the injury sustained by the victim causes a lot of pain, on the 2nd July 2015 testifies that “*At the time of injury, anyone who sustains trauma to the genitals, is going to be in excruciating pain. Most men here, has experienced by being kicked football at some time, in their lives and you understand that the pain can be significant.*”

2.6.2. That the appellant once again refers this Honourable Court to the photos exhibited by him at fol. 142 of the proceedings – in those photos, the appellant is seen walking around on the site of the accident and chatting with police officers, and this after having allegedly sustained 4-5 kicks in his groin area, which as Profs Karl German states would have caused excruciating pain, one would presume that if the victim was in the pain that he describes, this would have seriously caused the victim to crouch and bend over and not allow him to walk around like nothing ever happened, and hence it is hard to believe that the victim was in the pain that he claimed he was in in these proceedings. It must also be pointed out that Anthony Sammut when faced with these photos which do not indicate any element of pain sustained by him, in an attempt to justify the unjustifiable, once again retracts his

previous version and suddenly conveniently states that the pain started coming slowly – “*the pain wasn’t quickly it came slowly alright and my testicles they started to inflame getting bigger, bigger and bigger all the time.*”; “*I did not say I was not in pain. The pain was coming*”; “*I was feeling pain coming*”(fol. 7 of the his testimony of the 21.04.2016);

2.6.3. That the thesis of the appellant that the victim Anthony Sammut was not in pain as he alleged before the First Honourable Court finds further comfort in the testimony given by the first officer on site, PC 1289 Andre Cassar Bonaci from the Traffic Section who was requested to assist to a collision and not to any argument between the parties concerned, where he clearly states that Anthony Sammut was walking normally, he did not complain of any pain and that he did not even request any medical assistance from him.

“When I arrived, he was sitting on a bench, but then he was walking normally, he walked to his van and back.

Without any problems whatsoever

No.

Did he complain of any pain anywhere?

No he didn’t complain, my main concern was that Mr. Fenech was injured, he was in pain so I stayed next to Mr. Fenech

So you could see that Mr. Fenech was injured and was in pain, whereas Mr. Sammut did not complain of any pain at all?

No.

Did he require any medical assistance? Or did he request for any medical assistance?

No.” (fol 3 of PC 1289 Andre Cassar Bonaci’s testimony of the 26th October 2017)

2.6.4. That PC 1289 Andre Cassar Bonaci testified at fols 54-58 on the 26th February 2015 and in cross-examination on the 26th October 2017, that Anthony Sammut did not even approach him to talk to him and tell him that he had been assaulted, which

is very strange, as one would have expected a person allegedly kicked 4-5 times in his groin area and allegedly in a lot of pain as he claimed, to immediately inform the first officer on site of such assault, and it was only well into the police officer's presence on site that third parties, not even the victim, informed the police that the victim had allegedly been beaten but the same officer states in cross-examination he didn't know who they were as they left. One must keep in mind that the victim knew the drill as he himself stated he was a police sergeant, was in the force for 33 years (at fol. 21) and hence knows exactly what to do in similar situations, and yet he failed to inform the first officer on site of the assault, injuries and pain. All this evidence which was clearly disregarded by the First Honourable Court puts once again the credibility of the victim Anthony Sammut into serious doubt,

2.7.1. That doubts as to the credibility of the victim Anthony Sammut also result insofar as the medical treatment he received or subjected himself to on the date of the incident is concerned. It results from the acts of the proceedings that an ambulance was called to take John Eric Fenech to hospital, and no ambulance was called for Anthony Sammut - surely if he was assaulted as alleged and was in the pain he alleged to be in, he would have been taken to hospital immediately by ambulance, but as already pointed out Anthony Sammut never asked for medical assistance nor complained of any pain.

2.7.2. That Anthony Sammut testified that the sergeant who went on the site of the accident told the victim to go to the health centre or to see a doctor (fol. 23) - according to the police accident report at fol. 15 of the acts, it is stated that *"ghaldaqstant dan (Anthony sammut) gie mehud b'karozza privata mill-familjari tieghu c-centru tas-sahha tal-Mosta ghal trattament li sofra mid-daqqiet li hu qal li qala' minghand Fenech."* Anthony Sammut further testified that allegedly the doctor who examined him at Mosta Health Centre told him that he should urgently go to Mater Dei, yet he also testified that he was not taken by ambulance to Mater Dei from Mosta Health Centre in spite of the urgency but his son who was with him took him to hospital (fol. 23). The prosecution failed to bring the doctor from Mosta Health Centre

forward to give evidence in this respect, or to present a medical certificate from the doctor at Mosta Health Centre who allegedly examined him and referred Anthony Sammut to Mater Dei; furthermore, one would surely have expected Anthony Sammut's son, who Anthony Sammut said accompanied him both to Mosta Health Centre and Mater Dei, to come forward and testify to corroborate his father's version of events, and yet not even Anthony Sammut's son was brought forward by the prosecution as a witness in these proceedings. This therefore raises serious doubts as to the veracity of that alleged by the victim Anthony Sammut in this sense.

2.7.3. Additionally, it results from the records of the proceedings that Anthony Sammut was examined in Mater Dei by Dr. Leonard Farrugia on the 1st August 2014 at 2.00am, that is over six hours from the accident of the 31st July 2014 – the victim claims he waited for six hours in the Emergency Department (fol. 23), but there is no evidence to attest to this – as stated not even Anthony Sammut's family members were brought forward to testify – and hence anything could have happened to Anthony Sammut in the absence of the appellant and independent of the appellant in this length of time of 6 hours from the accident to the examination of the said Anthony Sammut in Mater Dei;

2.8. That the victim alleges that he was assaulted in such a bad manner that two men even stopped to restrain the appellant – however, this was just the assertion of the appellant, as it clearly results from the acts of the proceedings that no witnesses were brought forward by the prosecution to corroborate this version of events as alleged by the same victim. The First Honourable Court however, in its judgement stated that *“He (John Eric Fenech) was visibly agitated and angry, as was reported by passer-bys, so much so that he assaulted Sammut. Sammut sustained serious injuries to his groin region”* – with all due respect to the First Honourable Court, the facts as stated by that Court were facts reported by the victim, and were in no way corroborated by evidence in the acts of the proceedings. No passer-bys were brought forward by the prosecution to attest to the facts being referred to by the First Honourable Court in its submissions, nor were any reports filed by passer-bys relative to the same

incident produced or even referred to and hence the Court could never arrive to the conclusion that the agitation and anger of the appellant was reported by passer-bys and it was such that it resulted in Anthony Sammut being assaulted by the appellant;

2.9. That on the other hand, John Eric Fenech tendered clear-cut and consistent evidence when he testified in these proceedings on the 8th June 2017 and even at the initial stages of the investigation when he was interrogated by the Police, twelve days after the incident of the 31st July 2014. John Eric Fenech denied that he ever kicked or assaulted Anthony Sammut as is being alleged in these proceedings and never faltered once in his version of events - John Eric Fenech states clearly that the only thing that he did on that day was to shout at Anthony Sammut to go away and to leave him alone because he was in pain after the accident caused by Anthony Sammut nothing else and denies frankly and clearly even under cross-examination that he ever assaulted Anthony Sammut kicking him in the pelvic area. There is no doubt that John Eric Fenech is much more credible as to the version of events as they happened, and thus there was no reason why the First Honourable Court, even on the basis of the serious lack of credibility of the victim and evidence attacking the credibility of the same victim, should have disregarded the credibility of the accused.

Considered;

That according to the police report filed at folio 9 et sequitur the appellant John Eric Fenech stated that *'I was coming from the direction of naxxar and on turning in triq id-difiza civili the van came out abruptly without stopping and same dashed on the rear of my motorcycle with the consequence that I lost control of the steering wheel and went on the ground. I also have to state that during this incident I suffered injuries and considerable damage to the motorcycle.'*

The parte civile Anthony Sammut according to the police report a tempo vergine stated *'Jien kont qed insuq fi triq id-difiza civili u hekk kif wasalt fil-kantuniera biex indur fi*

triq il-fortizza nghid li l-mutur ma rajtux gej minn fuq in-naha tax-xellug tieghi u hekk kif hrigt ghalkemm ilqattu daqsxejn fuq wara, dan waqa' mal-art. Hekk kif qam mill-art u konna t-tnejn bilwieqfa. fit-triq qabad itini bla hniena. Bid-daqqiet jien waqajt mal-art u rega' qabad jghatini bis-sieq fil-parti genitali tieghi. Nghid ukoll li dan kien accident zghir hafna fil-fatt fil-vann m'ghandix hsara.'

The Police in the report indicated that on thirty first (31st) of July of the year two thousand and seventeen (2017) at around 19:55hrs the district police received a call from the control room regarding a collision between a vehicle and a motorcycle '*fit-triq tal-pont tal-mosta*' where the motorcycle driver was injured. Police went on site in Triq id-Difiza Civili corner with Triq il-Fortizza tal-Mosta where it resulted that the motorcyclist John Eric Fenech had just had an accident with a van driven by Anthony Sammut '*fejn dan l-istess impatt kien wegga*'. An ambulance was called on site and took Mr Fenech to hospital for further treatment. Since a lot of oil came out of the motorcycle CPD came on site where AROS Godfrey Cordina and Frederick Sammut threw debris to avoid another accident.

From further investigations carried out by the District Police PS 455 E. Sammut and PC616 R. Spiteri, while the version of Anthony Sammut of van EAQ 924 was being taken, it resulted that Anthony Sammut is blind from the left eye and apart from the version he gave as laid down in the report, he stated that he was assaulted by the motorcyclist John Eric Fenech.

He was taken by a private vehicle to the Mosta health centre for treatment in view of the assault he said he suffered from Mr Fenech. While details of John Eric Fenech were being taken he was calling him '*fucken stupid bastard*' and before the traffic Policeman PC1289 A. Bonaci stated '*I like to kill him*'. Charges were to be issued.

The birth certificate of the appellant, conviction sheet and statement were also exhibited.

Anthony Sammut testified in the sitting of the twenty ninth (29th) of January of the year two thousand and fifteen (2015). He explained that while driving a Mitsubishi van on the last day of July from Paul street Mosta to Santa Margerita, he stopped on the stop sign, looked on the left and right and did not see anyone coming. He explained that was coming out of the bridge into the road and wanted to go to the right towards Mosta centre. He went out slowly explaining that he does not drive fast and when he went out on the road about thirty feet he saw a man with a motorbike passing in front of his van, shaking the steering of the motorbike and he kept on driving the bike onto the witness' right and fell. The witness stopped and in his words he *'started shouting, screaming, I was terrified...'* He explained that he got out of the van in order to help the motorcyclist get up. He explains that he was a police surgeant and in the Police Force for thirty (30) years. He went out to help and says that the other man started swearing at him in English. He explained that when he, referring to the motorcyclist got up, he started offending him, told him to calm down and *'he told me you didn't hear my horn, I told him I didn't even see you coming. I didn't hear any horns, I didn't hit him with my van'* The witness confirmed that he had already come out of the bridge onto the main road, turned to his right and proceeded to Mosta centre and that the motorcycle came out from the left coming from the direction of Naxxar San Pawl tat-Targa and overtook from the inside lane. He explained that the motorcycle fell about twenty feet on the right, the other lane while the witness travelled a distance of about thirty (30) feet from the stop sign.

He explained that *'After that he got up and I went out to see what happened to him, he got up and started shouting and offending me in English and I told him to calm down, I told him I didn't see him coming and he started kicking me in my genitals. I told him that I am a sick man and that I am an old man, he told me I don't give a damn, he kicked me about four or five times.'* He explained that two men stopped and grabbed him, one told him that it was not the way to settle things and that *'afterward this man let him away because he wanted to keep hitting me, I avoided him many times but he was mad.'* He explained that these two men disappeared.

He said that after the sergeant took the report, an ambulance came and took the other driver to hospital and the sergeant told him to go to a doctor or go to the clinic in Mosta. He explains that he went to the clinic in Mosta and the doctor told him to go to hospital urgently since his genitals were swelling. His son took him to hospital and after six (6) hours at the hospital he was called in and seen by a doctor who was shocked and called another two doctors, cardiologists and took an ultrasound and it resulted that he had a '*tore genital*'. He said that it was swollen and that from the ultrasound it resulted that he had internal bleeding and took him to a ward afterward and that they wanted to operate him in the morning. He explains that in the morning Mr. German came with five (5) doctors and asked '*who did this to you? Did you fell on the floor? I told him no, when he kicked you he said you didn't fall on the floor? I said no. This man he said, is out of his senses, an animal...*' The parte civile Anthony Sammut explained he told him that in view that he is sixty seven (67) years old and might get an infection and bad results it is better not to be operated. He told him to stay in hospital and that he would be better after a month. He explained that he was not operated because he has no intention of having any children at his age, kept him there for some investigations and sent him home after five (5) days. He explained that he had to stay for more than a month at home in bed since he used to faint when he tries to get up. He also stated that he became stable after a month and a half. Asked if he is suffering from any injuries or anything regarding the accident, he replied that at the moment he is not feeling anything but has to go for another ultrasound. He exhibited a photo marked as Dok AS1 and a 'patients certification form' marked as Dok AS2.

During the sitting dated the twenty ninth (29th) of January of the year two thousand and fifteen (2015), the Court appointed Dr Mario Scerri M.D. and authorised him to review the medical file of the witness Anthony Sammut, in arriving at the extent of the injury sustained by him.

On the twenty sixth (26th) of February of the year two thousand and fifteen (2015) **Dr. Mario Scerri** testified and explained that he was by Court order dated the

twenty ninth (29th) of January of the year two thousand and fifteen (2015) instructed to examine Anthony Sammut regarding the injury sustained. He met Mr Sammut on the eighteenth (18th) of January of the year two thousand and fifteen (2015) who alleged that on the thirty first (31st) of July of the year two thousand and fourteen (2014) he was involved in a motorcycle accident. He explained that during the accident Mr Sammut was allegedly driving his car which according to him did not collide with the motorcycle but the motorcyclist for some reason or another fell off his bike. He explained that an argument broke up and Mr Sammut was allegedly kicked various times in his genital areas *'by the defendant'*. He explained that *'Mr. Sammut who has a past history of a ischemic heart disease had to be immediately hospitalized due to massive swelling and excruciating pain. Investigations revealed that he sustained swelling in the cover of his right testicle with gross testicular swelling accompanied by massive bruising extending to the proximity of his legs.'* He explained that Mr Sammut showed him a photo *'taken five days after being discharged, ten days after the incident'* which is included in his report. He says that it still shows massive bruising, turning grey conceding with the date of friction which was about ten days before. He explains that it is definitely an injury of grievous nature brought to trauma to the scrotum accompanied by excruciating pain which could have easily triggered a sudden death especially in an elderly man with previous cardiological problems. He explained that such injury most often decreases fertility since Mr Sammut was a high risk patient, he was treated conservatively and he still complains of occasional testicular pain and his right testicle is still tendered on palpation. He explained that *'severe blows to delicate areas which produce pain increases vagal and produces cardiac arrest especially in pre-disposed subject like this patient who was a sixty-seven years old with previous heart disease, he was lucky that he didn't die. I mean the swelling was massive, the damage was large and he's still not comfortable, I mean if you touch his right testicle it is still painful.'*

Asked whether he will suffer any permanent disability, Mr Scerri replied that *'Obviously an injury like this will decrease his fertility but this is not a real problem although you have to mention it because of his age and I spoke to him and he is not keep of*

having more children. I does decrees fertility. In the long term I mean he can be subject to, as well as he had a hydro seal as well as I didn't mention but it is mentioned in his medical notes. It is fluid around the testicles. Yes he might occasionally suffer from recur ration of pain and infection which is called orchitis and pain. In fact he is sill in pain and when you palpate his right testicle he's tender to the touch.' Asked if Mr Sammut might still be suffering from the injury suffered on that day he replied that he might and he might not. He explained that *'there is a tendency that he might have recurrent orchitis.'*

Asked in cross-examination whether the injuries were so substantial in view that he stated that the injuries could have caused death he replied yes. He was asked to confirm that the parte civile was not in danger of dying as a result of injuries and replied that he would not agree since *'An injury like this would tear off the tunica beguine which is the covering of the testicle. This is sustained by direct severe blunts trauma. Yes that would put a person in danger of loss of life'*. He syates that it can prdocue sudden death. He confirmed that nobody can determine if the injury will persist in he future but *'in a year's time, two year's time, three year's time he presents with sudden orchitis'*. He confirms that nobody can be sure and that *'What I'm sure of is that he is still in pain and his right testicle is tender to the touch.'* The witness exibited the report drawn up by him and marked as Doc MS1.

Dr. Leonard Farrugia also testified on the twenty sixth (26th) of February of the year two thousand and fifteen (2015) and after being shown document AS2 at folio 27, he explained that it is a document he wrote after examining Anthony Sammut a few hours after the incident in question. He explained that on examining he noted the scrotum to be swollen and showing signs of a collection of blood in the scrotum at which point he tried to examine by palpation and this resulted in tenderness and he could not examine further because the patient *'was in quite severe pain.'* He requested an ultrasound to be able to better visualize and assess what had happened internally and the ultrasound showed a small tear in the *'tunica begonia'* which is the covering of the right tesicle. He explained that *'With associated testicular contusion which is a bruise of the testicle and possible right humerogic hydro steel which is a collection of blood*

resulting in this incident.' He explained that he called a urologist who is the specialist of male genitals and the patient was admitted to hospital and was followed up in the urological ward. He classified it as grievous and that there was internal injury associated with bleeding which to his knowledge would be a grievous offence. Asked if from what he suffered will keep on persisting, he answered that it depends on further management.

In cross-examination he explained that he examined Mr Sammut around one to two hours after the accident. Asked if he followed up the examination he answered no since he is a doctor at emergency and that his contribution was restricted to an assessment at the emergency department.

PS455 Emanuel Cassar gave evidence on twenty sixth (26th) of February of the year two thousand and fifteen (2015) but his testimony was expunged from the acts as ordered by the Court in the sitting dated eleventh (11th) May of the year two thousand and seventeen (2017). This appellate Court will therefore not take into consideration this testimony.

PC 1289 Andre Cassar Bonaci testified on the twenty sixth (26th) of February of the year two thousand and fifteen (2015) who explained that on 31st July 2014 at around half past seven in the evening he was called on the police radio and informed that there was a collision between vehicles on the Mosta bridge and that there were some injured persons. He went on site where he found the motorcycle on the floor and an injured person, who appeared to be injured next to the motorcycle. He stayed near the injured person, asked if he wanted medical assistance and he repeated that he did not want any medical assistance but as time passed his hands started swelling up, was in pain and appeared angry considering he had just been hit by a car which *'was understandable'* and eventually called an ambulance to come. He explained that *'Whilst we were waiting for the ambulance Mr John Eric Fenech was angry because he was hurt and by the condition of his bike, it ended up on the floor and he told me that he had a good day that day and it ended up in a bad way. At that moment I didn't realize that these*

two people who collided had an argument between themselves. I didn't realize because the other person was sitting down on the other side of the bridge and there were people around him. Eventually one person came over and said listen it's not good that this man beats up an old man and I told him I wasn't aware of this. In the mean time whilst knowing that he is being angry he kept saying I feel like killing him, I feel like killing him. I stayed with the person until the ambulance came, made sure that he left with the ambulance and put his motorcycle by the side.'

He confirmed that he was the first police officer on site and that the surgeant that filed the report came afterwards. Asked whether upon his arrival on the spot, the parties were speaking to eachother he replied that '*No the gentlemen sitting down there was sitting down on the pavement on the floor on the left side if the bridge as you go towards St. Paul's Bay and the other gentlemen was sititng down on the other side on the bridge, I believe there was a bench on the other side if the brigde going to sort of Naxxar and there were some people with him. The other gentlemen I only spoke to him for a few seconds so that he removes his van fom the way.*' He explained that '*It was maybe then after ten, fifteen minutes that somebody came from the other side, people that knew the other gentlemen and informed me that there was an argument between them. I wasn't present in the argument.*' Asked whether apart from John Eric Fenech, if any other persons suffered any injuries, he replied '*No because nobody came and told me. When I was told, maybe it was my mistake, from the way I saw the collision, it was a pickup van and a motorcycle I just assumed that it was the person on the floor that was injured because he was on the motorcycle.*' He explained that '*It transpired later on when the person came and told me that, listen this gentlemen has beaten up the older person*'.

Asked about how the appellant was feeling, he explained that Mr John Eric Fenech '*was angry because somebody hit him, hit his motorcycle and ended up on the floor and he was angry because he was injured, he was hurt and because of the damage tat his motorcycle sustained. I stayed all the time next to him because whilst at htta same time two sons of the other gentlemen arrived on the side and I was more interested if something happened because somebody informed his sons, that listen your father had been beaten up and that something would had happended. All I did was told them listen go and watch your father on the other*

side, I'll stay next to the gentlemen.' Asked if the appellant was able to walk and use his feet, he replied that he stood up and walked to the ambulance.

In cross-examination he explained that when he arrived on site, Mr Fenech was sitting down on the pavement on the floor, behind the crash barrier. He confirmed that Mr Fenech was very upset and in a state of shock because of what had just happened which is understandable. Asked that whatever he might have said was simply of being upset at the state of shock, he replied that he cannot comment about that, stating with reference to the appellant that he uttered the words but does not know if he meant it or not.

Stephen Cachia on behalf of Transport Malta testified on the twenty first (21st) of May of the year two thousand and fifteen (2015) and explained that one of the two vehicles with registration number JEF 400 is a motorcycle of Lifan make, black in colour and registered in the name of John Eric Fenech bearing identity card number 412500L which has been registered on his name since 2nd September 2010. Regarding vehicle with registration number EAQ 924 he stated that according to their records it is a Mitsubishi L 200, silver in colour and registered on Anthony Sammut bearing identity card number 653347M which has been registered in his name since 1st October 1997. He exhibited the relative documents and marked them as Doc SC1.

PC 616 Spiteri testified on the twenty first (21st) of May of the year two thousand and fifteen (2015) and explained that on the thirty first (31st) of July of the year two thousand and fourteen (2014) at 19.55hrs he was informed from the control room that a traffic accident had just occurred in Triq id-Difiza, corner with Triq il-Fortizza tal-Mosta, Mosta. He explained that upon this information he as a divisional driver went with PS 455 on site where he found a collision between a van with registration number EAQ 924 and a motorcycle JEF 400. He explained that *'The driver of the van, Anthony Sammut, began to complain and alleged with us that he was beaten up in his genital parts by the driver of the motorcycle John Eric Fenech. In the mean time John Eric*

Fenech began to complain that he injured his left hand knuckles. He explained that the ambulance came on site and whilst PS 455 was taking the version of John Eric Fenech, he heard John Eric Fenech twice saying to PS 455 referring to Anthony Sammut *'I would like to kill him'*. He confirmed that he heard him directly.

In cross-examination he confirmed that when he arrived on the scene of the accident, the accident had already happened. He confirmed that he only knows what John Eric Fenech and Anthony Sammut told him. He stated that the accused injured his left hand knuckles and confirmed that was in extreme pain from his fall from the motorcycle as a result of the collision. He confirmed that the appellant was in a state of shock because of the pain he had been through and because of the trauma of the accident.

Inspector Nicholas Vella also testified on the twenty first (21st) of May of the year two thousand and fifteen (2015) and explained that on the thirty first (31st) of July of the year two thousand and fourteen (2014) Police were informed to assist to a traffic accident which occurred between a motorcycle JEF 400 driven by Mr John Eric Fenech ID 412500L and a van EAQ 924 driven by Anthony Sammut 653347M. He explained that an ambulance was called on site and took Mr Fenech to Mater Dei since he was complaining of pain mostly in this hands. Mr Sammut was also complaining of pain in his genital parts which allegedly was caused by kicks from Mr Fenech. He testified tat both parties were certified to have grievous injuries. While on site the police officer said that Mr Fenech was threatening Mr Sammut after the incident happened. On the twefth (12th) of August of the year two thousand and fourteen (2014) Mr Fenech was called at the Inspector's office and after consulting with Dr Sarah Sultana he released a statement found at folio 6. He confirmed that he recognised his signature and that of Mr Fenech who signed the declaration where he declares that he does not remember most of the instances. He presented an extract of the personal details of Mr. Anthony Sammut marked as Doc

NV1 and wished to add the attribute of article 222A to the charge sheet ¹which he states is being added at fol 1.

On the second (2nd) of July of the year two thousand and fifteen (2015), **Professor Karl German** testified regarding the injured party Anthony Sammut with identity card number 653347M. He explained that Mr Sammut was admitted to Mater Dei as an emergency on the first (1st) of August of the year two thousand and fourteen (2014) at 1:30am. He explained that the doctor's note states that he is a 67 year old gentleman, who sustained direct blunt trauma, he was kicked repeatedly in the groin and the scrotum. He explained that there were no other significant injuries in particular the groin and the penis were normal, so the only abnormality that was picked up was that the scrotum and the area where the testicles are was severely bruised. He explained that Mr Sammut underwent an urgent ultrasound scan to look at the extent of the injury- the left testicle was found to be normal, the right testicle sustained a tear of the outside capsule of the testicle. He said that it was documented to be a small tear and associated with the tear there was bleeding and significant amount of bleeding and bruising around the testicle. He explained that the intention was to take him to the operating theatre to explore it, to see the extent of the injury visibly with testicle exposed but he saw the patient that same morning and decided that on a balance of risk, the patient was sixty seven (67) years old, had ischaemic heart disease so had problems with his heart and had two (2) heart stents and angioplastics. He explained that *'on balance, we felt that the injury he has was such that would heal normally. It might take a little longer to heal, but it would heal normally.'* He explained to the patient that when one explores the testicles, there is always the potential risk of getting an infection with the risk of needing to remove the testicle. He was discharged from hospital on the third (3rd) of August with a follow up ultrasound in September two thousand and fourteen (2014). He states that there was some residual swelling but no significant abnormality, in his words *'things were settling down.'* He explained that Mr Sammut was seen at Outpatients in February

¹ Testimony at folio 78 reads 'chart sheet'.

two thousand and fifteen (2015) and discharged from further regular view because the situation settled down.

Asked whether the injuries suffered caused a permanent disability, he replied no. Asked if he has all the functions as before the incident, he replied that '*...the testicles, are basically involved in two (2) processes. One (1) is fertility, which at age sixty seven (67) was not an issue for him. And the other issue, is the production of the male hormone. The male hormone is there to provide libido or sexual interest and also sexual performance. Erections, etc. To be honest, even if one (1) of the testicles had been removed, because of trauma, the other testicle, would be more than able with both of those issues. Both of fertility and also of male sexual function. But, according to the ultrasound seen, the testicle that had been damaged was not in any way, permanently a problem and things resolved. So, there is no permanent disability.*'

Asked if the injury causes a lot of pain, he replied that '*At the time of injury, anyone who sustains trauma to the genitals, is going to be in excruciating pain....After injury, there is always the possibility of having residual discomfort, so severe pain, I think is very unlikely. But to have a residual discomfort in that testicle, is always a possibility, in a long term.*' Asked if over a period of time he replied '*Potentially yes.*' He explained that '*Testicular discomfort is very, very common in most men, even without a history of injury or trauma.*' Asked whether the pain he suffered and the ischaemic heart disease would lead to other problems he replied that it is difficult to answer that.

In cross examination he replied that he classifies the injury as being mild to moderate. He explained that '*If he had severe trauma, then the testicle would have needed to be explored regardless of his history of heart disease.*' He explained that the trauma detected on the ultrasound scan was reported as being a small tear explaining that '*the testicle itself, was still intact. And that the outside skin, of the testicle had been torn, but to a small degree, so, it is minor to moderate trauma.*' He exhibited the case summary marked as Doc KG1.

Doctor Moses Camilleri testified on the second (2nd) of July of the year two thousand and fifteen (2015) who states that he examined Mr John Eric Fenech on thirty first (31st) of July of the year two thousand and fourteen (2014) at 21:50 in the Emergency Department in Mater Dei Hospital. He explained that the appellant had been allegedly run over by a car while driving a motorcycle. He presented with injuries to both hands, abrasions to the left leg and pain in the right wrist. X rays showed a fracture of a bone of the second finger in the left hand. In view of these findings, his injuries were described as being grievous because of the fracture. He exhibited documents marked as MC 1.

Stefan Aquilina also testified on the second (2nd) of July of the year two thousand and fifteen (2015) and after being shown photographs exhibited as Dok AS 1 at folio 26 confirmed that he took the photograph on the fifth (5th) of August two thousand and fourteen (2014) at 9:06am. He stated that he is his neighbour and asked by the Court whether he explained what happened to him, he replied '*It was an accident.*' He confirmed that he had been discharged from hospital and was asked if he minds taking the photographs. Asked by the Court if he remembers the name of the person, he replied Anthony Sammut.

The Prosecution in the sitting dated second (2nd) of July of the year two thousand and fifteen (2015) exhibited a birth certificate of the parte civile and in terms of the note of the Attorney General dated the twenty third (23rd) of June of the year two thousand and fifteen (2015) where the Attorney General also requested '*...to add and specify that the grievous bodily harm was committed on a person who has attained the age of sixty years in accordance with article 222A of the Criminal Code;*' the prosecution declared that it is '*exhibitig a new charge in relatin to the request in the Attorney General's note, indicated as one (1)..*'.

Anthony Sammut testified in cross-examination on twenty first (21st) of April of the year two thousand and sixteen (2016) and confirmed that the location of the accident

as show in the photographs while stating that the sketch does not reflect where the van was. He confirmed that the photo shows the main road where the accident happened. He explained that he was turning onto the left hand side and did not see anybody coming, he turned slowly on the right because there were no other cars passing. He said that when he saw Mr Fenech he was passing in front and does not know how he did not hit him, stating *'he passed in front, he lost control of the motorcycle doing like that, and he fell twenty feet or thirty feet on the right hand side of mine.'* He says that he did not hit him. He states that the motorcycle had his rear lamp broken, he fell on the right hand side with the motorcycle. He states that he heard him screaming and went quickly to see and that *'He was screaming because the bike fell on him and he hit his hands, his knuckles here on the floor when he fell.'* He stated that Mr Fenech kicked him five (5) times and did not fall on the floor and that Dr German had asked him if he fell on the ground. He confirms that he was in a lot of pain. Asked why when he gave his version of facts on the scene of the accident he actually said that he fell on the floor as a result of the bruise, questioned as to what the truth is, he stated that he did not fall and that he never said that he fell down. He was not aware that it was written in the report. He states that Mr Fenech was wearing *'white shoes tough shoes they were working shoes I think.'* Upon a suggestion that the shoes were tennis shoes he answered *'I don't think they were sports shoes no they were not sports shoes alright?'*

Asked about three photos showing him standing up, he stated that the photo was taken when the police came. He explains that they asked him to *'come near Mr Fenech and I said no and I went and sat on the bench. I did not move from the bench until the Sergeant came and spoke to me because the pain wasn't quickly it came slowly alright and my testicles they started to inflame getting bigger, bigger and bigger all the time.'* Regarding the photo, he states that *'I did not say I was not in pain. The pain was coming.'* He states that he was asked by to go where Mr Fenech was. Asked *'But you were not in pain at that point'* he replied *'Then I started trembling and I went to sit on the bench.'* Asked why he did not tell the police who arrived on the scene that he was hit and it was only after the people who were around him that told them many minutes after, he

answered that he had told the police that he was hit by Mr Fenech five (5) times, he told them many times. He also explained that '*L-incident kien diga' gara u waqfu n-nies kien hemm wiehed tal-insurance waqaf izommu u iehor u bdew jghidulu danmhux suppost dan huwa accident mhux kif qed taghmel int...'*. He explained that he did not go to hospital with the ambulance because they did not want him to go together in one ambulance. Asked to confirm that he did not go immediately to the hospital, he answered '*I was more grievous than him because he had only his knuckles hit on the floor and he had nothing else. I was more grievous, the Sergeant told me go bring me a certificate, he didn't tell me to go to hospital. I went to the clinic in Mosta and when I showed the doctor what I had he nearly fainted and he told me go to hospital right now, and I went to hospital.'*

Six (6) photos were presented by the defence at folio 142.

Dr Mario Scerri testified in cross examination on the second (2nd) of June of the year two thousand and sixteen (2016) and explained that through the Court decree dated the twenty ninth (29th) of January of the year two thousand and fifteen (2015) he was ordered to examine Anthony Sammut to examine the injuries sustained. He states that he examined Mr Sammut on the eighteenth (18th) of February. He explains that Mr Sammut showed him some photos which were taken at the time of the incident. Dr Scerri states that he warned him about the medical legal examination. He states that Mr Sammut explained that an argument arose. Dr Scerri explained that '*I examined the photos, he still complained at the time of the examination of pain in his groin, he said he was hospitalised, he said he was operated and I examined his groin. He had a tell at that time in his Tunica albuginea which is the covering of the testicle and he remained relatively well except for occasional pain in his groin.'* He stated that he saw the medical report of the victim and what he stated originally still holds and confirms that '*this by definition was a lesion of a grievous nature and it could have easily resulted in sudden instantaneous death due to a severe blow on the testicles which is a life threatening situation.'* He confirmed that he examined the photo Mr Sammut gave him. Asked if he confirms that the photo was taken a couple of days after, he replied yes and that the examination took place on eighteenth (18th) of February. He confirmed that he

saw the photo he gave him and medical reports. He confirmed that Mr Sammut was hospitalised some seven hours or eight hours later and that he felt he had to go to hospital because he had severe pain and since he used to suffer from cardiological problems. The witness explains that he was not involved initially. He explained that he concluded that he was immediately hospitalised and suffering from excruciating pain from what Mr Sammut told him and from the photos. He explains that a blow to the testicle is potentially fatal, explaining that *'a blow on this sensitive part is very fatal.'* He explained that *'there was no cardiac arrest because let us say that the patient was lucky in this sense'*. He explained that he is judging his conclusions on the photo and explained that the *'marks on the groin are due to extravasation of blood because of rupturing of blood vessels due to severe blow in the testicles. That is understandable.'* He confirms that he saw the medical reports when drawing up the report. The defense counsel explained that the report states that no abnormality detected in the groin and penis. After viewing the discharge letter he stated that the doctor is not correct.

Dr Mario Scerri explained that he does not agree with what the doctor said because NAD means no abnormality detected. He stated that *'hematoma was yes a direct blow to the testicles.'* Asked about the age of the injury in the photo he answered that *'The lesion is violet turning into green so this has been taken some days after. I cannot commit myself to how many days before because the healing of bruises depends on the constitution of the person, it depends whether he was taking aspirin and probably he might have been taking aspirin although I never found it documented because certain drugs which you take and your metabolic process accelerates or decelerates the healing but that was some days duration because it is violet and turning into green.'* Asked *'You told us that it was around ten days when you gave evidence before this court.'* he replied *'Yes it was at around ten days because greenish bruises after about six days they become green and then to subside completely I would have expected it to have lasted a lot, a long time.'* He explained that *'This is a typical bruise caused by extravasation.'* Asked if the marks on the groin was an injury caused by a safety belt, he replied that he does not agree *'because this is part and parcel of the same seeping of the blood.'* He explained that *'One cannot predict the channels of seeping of blood when it gravitates due to breakages of blood vessels.'* and that *'the blow was mostly on*

the right testicle and I would not have been surprised. I would not have been surprised to see a clear area of non bruising and another bruise above the patella...' Asked to confirm that a proper indication in medical or medico legal cannot be given as to the age of an injury based simply on the colour that it has turned, he replied that *'Yes you can roughly but not one hundred percent sure. A bruise which is violet is almost certainly to be very fresh, then it changes colour and after about four days or five days you start having some green (green predominates and violet starts diminishing) and then green is the dominant and then it starts turning into brown. The aging turns upon the constitution of the individual. I would say that this had been about eight days to ten days I agree to that.'* Asked whether *'Eight days to ten days since the injury had been sustained correct?'* He replied *'Yes, but you cannot be one hundred percent correct as my..., the surest way of knowing the duration of a lesion is to be there physically present when it was inflicted.'*

Asked about observations made when the victim was examined by doctors he stated that *'They made their observations not on the photographs but they made their observations on what they found in front of them of the actual injury sustained. But we remember that bruises as I said and I repeat extend and gravitate and it means that if you see a bruise today your might examine the patient tomorrow and you see it larger and that is due to the continuous extravasation of blood..'*

He explained that the genital areas are affected, referring to the discharge letter he stated that *'I do not agree with what he said because if this photo was a true representation of what actually happened jigifieri if this photo is not a fake photo I am judging on this photo because remember I did not examine the patient at that time but from this photo yes definitely I do not agree with what the doctor said that lesions on the penis and the testicles are NAD which means no abnormalities detected because the picture speaks for itself.'*

He stated that once the condition is stable then it is stable. The life threatening situation would be in that period of time when the patient received a severe blow so severe that pain would have a proved *'a... inhibition and sudden death.'*

Medical reports regarding Emanuel Sammt with identity card number 42258(M) were filed. Dr Joseph Spiteri gave evidence which according to a note in pencil on the Court minute dated ninth (9th) of March of the year two thousand and seventeen (2017) was not recorded. The First Court in its sitting dated eleventh (11th) May of the year two thousand and seventeen (2017) ordered that the testimony of PC 455 Emanuel Sammut be struck off from these proceedings.

The appellant **John Eric Fenech** testified on the eight (8th) of June of the year two thousand and seventeen (2017) who regarding the accident that took place on the thirty first (31st) of July of the year two thousand and fourteen (2014) stated that it was about half past seven in the evening so it was still very good daylight and visibility. He explained that he was coming down towards Mosta from the direction of Naxxar and wanted to turn right to go over the bridge to go towards tat-Targa area. He was on the motorcycle with headlines on, indicated and as he was coming down the road he saw the truck at the junction and he started to pull out. He explains that the van was on the side road, he was coming from the direction of tat-Targa and came over the bridge and he was going to come on the main road to turn right to go towards Mosta. He confirmed that he was going to cross his path and that *'as I was on the main road it is clearly marked there was a stop line there so he came up to get that line and then started procede to pull out infront of me. I sounded my horn...'* The accused confirmed that he was coming from his left and that he could see that the other person was manouvering to turn onto his right hand side. He explained that *'I ended up sounding my horn continuously and having to try and excelerate and to try and get away from him but unfortunately his, the corner of his van caught the back of my bike.'* He gave an explanation of the damages the bike sustained and stated that the worst injuries he sustained were his hands, explaining that *'As I went down I tired to cushion the blow with my hands resulting in a broken bone and severe sprains in the left hands and severe sprains in the right hands, also, so sustained injuries, scratches to my right leg.'* He presented a number of photos marked as Dok JEF1, Dok JEF2 and Dok. JEF3.

He explained that he was on the ground since he was thrown on the road managing to get out under from his motorbike which was quite heavy stating that if he had not done that, the injuries would have been much worse, that he would have sustained burns from the engine which would have been vested on his leg. He states that he was in extreme pain, physically shocked and was not happy at all. Asked if he at any time approached or addressed Mr Sammut, he replied '*Approach Mr. Sammut no. Address him only to tell him to go away and leave me alone.*' Stating that he was in pain, the man knocked him down and he did not want him to come anywhere near him, '*he'd only hurt me once and I wansn't going to let him come near me so. He did walk towards me s o idid shout at him "go away leve me alone"*'. Asked where Mr Sammut was, he replied '*Mr. Sammut stood on the road close to the side of his van.*' He explained '*I shouted at him. I didn't kick him, I didn't touch him, at no point I didn't see him use or *dopple of* in pain or fall on the ground. He didn't even cry out in pain so no I've got no idea why he's saying this.*' He stated that he was wearing trainers, soft canvas trainers making reference to photos which he exhibited and marked as Dok JEF 3. Reference was made to photos that were exhibited in April of last year showing the van driven by Mr Sammut and the motorbike.

Upon the Court's questioning, he confirmed that he himself had already started doing the manouver to cross over the bridge when his motorbike got clipped by the van. He recognised the van from the photos. He stated that he took the photos with his phone. He remembers Mr Sammut '*walking around the scene of the accident and when these patrol cars stopped to ask what was going on he went over and chatted with them and this is obviously after the accident because they could see Mr. Sammut's van in the middle of the road and my motorcycle on the side close across the curb.*' He explained that he himself was taken by ambulance and that Mr Sammut did not join him and he was not aware if any ambulance has been called for him. He was made aware of the allegations some twelve (12) days after the accident when he was called in at the Police station at Mosta. At that point, he was totally unaware of what had supposedly or allegedly happened to Mr Sammut. Asked whethr he ever crossed paths with Mr. Sammut after the accident till the present day he stated that he does

not know Mr Sammut and that the only time he saw Mr Sammut was when he appeared in Court.

In cross-examination, he stated that he does not agree with Mr Sammut's deposition on how the injuries were made. He does not remember saying that he wanted to kill him. He remembers falling from the bike and Mr Sammut coming towards him. Questioned regarding his statement taken on twelve (12) August of the year two thousand and fourteen (2014), whether when he stated that *'I think that he did try to hit me with a fist'* is still valid, he replied *'Yes it is. With my apologies, because i was still wearing my crush helmet the fist hit the visor so I wasn't actually struck and so that part of the incident inthe accident sort of slipped my mind so I was not put by this.'* He confirmed that he was in a state of shock, asked if it is possible that Mr Sammut approached him to assist him, replied that he does not know what was in his mind and that *'What was in my mind was that I didn't want him anywhere near me which is why I shouted at him to go away and leave me alone.'* He denies hitting him and did not see anyone else hit Mr Sammut on the scene. He does not recall Mr Sammut being hospitalised but he was told about it but does not know when he was in hospital.

According to the Court minute dated the second (2nd) of June of the year two thousand and sixteen (2016) PC 1289 Andre Cassar Bonaci gave evidence in cross-examination. The Court understands that **PC 1289² Andre Cassar Bonaci** testified again in cross examination on the twenty sixth (26th) of October of the year two thousand and seventeen (2017) in view that the previous cross-examination was not transcribed. He confirmed that when he arrived o site there was no argument between the parties. Asked *'When you say you were the first officer on sight, did Mr. Anthony Sammut actually approach you and tell you what had happened?'* he replied No. He explained that *'..I was made aware by third parties that were present but I never spoke to Mr. Anthony Sammut.'* The van remained on the road whilst he was there because of the sketch that had to be made. Asked if he took note of who these third parties were, he replied that he did not since they told him that there was an argument and

² Heading in testimony dated 26th October 2017 reads 'PS1289'

they just left. Asked to confirm whether he recognises the man in folio 142 as Mr Sammut he replied '*From the back no.*' Asked whether he could identify the police car and police officers on site if they came after he answered no. Asked about Mr Sammut he stated that '*When I arrived he was sitting on a bench, but then he was walking normally, he walked to his van and back.*' Asked '*Without any problems whatsoever*', he replied '*No*'. Asked if Mr Sammut complained of any pain, he replied that he did not complain and that the witness' main concern was that Mr Fenech was injured, he was in pain so he stayed next to Mr Fenech. Asked if he required or request any medical assistance he replied '*To me no.*'. He does not know what shoes the appellant was wearing.

Considered;

That the following are the facts in brief:

1. On the thirty first (31st) of July of the year two thousand and fourteen (2014) at around 7:30pm, the appellant John Eric Fenech was driving his motorcycle from Naxxar towards Mosta along Triq il-Fortizza, Mosta;
2. That while turning to the right of the junction onto the Mosta bridge, the parte civile Anthony Sammut who was driving his van exiting the Mosta bridge, manouvered right out of the junction towards Mosta centre onto the same path of the appellant leading to the appellant's loss of control with the appellant falling to the ground together with his motorcycle³;
3. That Anthony Sammut sustained injuries as well as damages to his motorcycle;
4. The appellant alledgedly got up from under his motorcycle and assaulted Anthony Sammut of sixty seven (67) years of age causing him injuries;
5. The appellant was taken by ambulance to hospital while Anthony Sammut went to the Mosta clinic and then to hospital;
6. Charges were filed against the appellant.

³ The appellant in his testimony dated 8th June 2017 explains that the front part of the van caught the back appellant's motorcycle

That the first ground of appeal provides that the First Court in its decision failed to refer to all evidence submitted before it in connection with the actual charge and to indicate what of all the evidence brought before it justified its decision. The appellant states that the only reference the Court makes is that '*The Court however fails to understand how those injuries came about on that day out of thin air. They were obviously caused by severe blows to Sammut's groin and the Court has no other option but to dismiss the defence put forward by the accused.*' As the appellant rightly submitted article 382 of Chapter 9 of the Laws of Malta does not put an obligation on the Court to motivate, give reasons and to indicate on what evidence submitted it is basing its reasons for finding in favour or against the accused.

The Court refers to the judgment in the names **'Il-Pulizija Vs Carmel Polidano'**⁴, where it was considered:

'Jiġifieri għall-validita` huwa sufficjenti illi sentenza mogħtija mill-Qorti tal-Maġistrati ssemmi l-fatti (ossia l-imputazzjonijiet) li tagħhom persuna tkun instabet hatja, il-piena u l-artikoli li jikkontempaw ir- reati li tagħhom persuna tkun instabet hatja. Minn dan l- Ewwel Qorti ma tippekkax fis-sentenza appellata peress illi tikkontjeni dawn l-elementi kollha. Imbagħad l-artikolu 662(2) jipprovdni: "Kull deċiżjoni tal-Qorti tal-Appell Kriminali u tal-Qorti Kriminali li biha tiġi deċiża kwistjoni ta' liġi, għandu jkun fiha qabel kollox ir-raġunijiet li jkunu wasslu l-qorti għal dik id-deċiżjoni". Jiġifieri sentenza tal-Qorti tal-Maġistrati li ma ssemmix ir- raġunijiet li wassluha għad-deċiżjoni tagħha ma titqiesx nulla. Naturalment huwa dejjem rakkomandabbli li jissemmew almenu minimu ta' raġunijiet, iżda n-nuqqas tagħhom ma jwassalx għan-nullita` tas-sentenza.'

The Court while agreeing with the appellant that the decision of the First Court is not detailed, is rejecting the first ground of appeal on the basis that motivation or

⁴ Decided by the Court of Criminal Appeal on 11th December, 2013 (Criminal Appeal number: 338/2013)

reasoning upon which a decision finds in favour or against the accused is not a requisite under article 382 of Chapter 9 of the laws of Malta. The appellant does not agree with the first Court's reasoning when it stated that '*The Court however fails to understand how those injuries came about on that day out of thin air. They were obviously caused by severe blows to Sammut's groin and the Court has no other option but to dismiss the defence put forward by the accused.*', the Court will therefore be examining the appellant's defence as laid down in the second ground of appeal;

Considered,

That the second ground of appeal provides that the First Court completely disregarded the evidence produced before it which according to the appellant clearly points to the fact that there are serious doubts regarding the commission of the crime by the appellant. The appellant submits that the Court before delivering judgment must be convinced of the accused's guilt beyond any reasonable doubt and that it is the prosecution that must prove the guilt of the accused beyond reasonable doubt and not the accused that must prove his innocence. The appellant provides that the level of proof beyond reasonable doubt was never attained and that the Court ignored all evidence produced which according to the appellant militates in favour of the accused and which should have left no doubt in the First Court's mind that the appellant did not commit the crime with which he is being charged.

As has been established, the Court of Criminal Appeal does not disturb the First Court's conclusions unless it is satisfied that the First Court could not legally and reasonably arrive to the conclusion it arrived at. In the decision in the names '**The Police (Supt. Pio Pisani) vs. David Rigglesford**'⁵, the Court considered that:

'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

⁵ Decided by the Court of Criminal Appeal on 31st May 2007 (Criminal Appeal number: 6/2007)

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 :“**Ir-Republika ta’ Malta vs. George Azzopardi**”⁶; “**Il-Pulizija vs. Carmel sive Chalmer Pace**”⁷; “**Il-Pulizija vs. Anthony Zammit**”⁸ and others.)

This Court also refers to what was held by LORD CHIEF JUSTICE WIDGERY in “**R. v. Cooper**”⁹ (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.”¹⁰

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.

⁶ Decided on the 14th February, 1989

⁷ Decided on the 31st May, 1991

⁸ Decided on the 31st May 1991

⁹ ([1969] 1 QB 276)

¹⁰ (Confer also : BLACKSTONE’S CRIMINAL PRACTICE (1991) , p. 1392)

In Criminal Appeal : “Ir-Republika ta’ Malta vs. Ivan Gatt”, decided on the 1 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.’ (References and details of the quoted judgments as cited in **'The Police (Supt. Pio Pisani) vs. David Rigglesford'** are found in the footnotes)*

Considered,

That the appellant in his appeal submitted that the clearest piece of evidence which militates in favour of the appellant is the photograph marked as Dok.AS1 which depicts the injuries sustained by Anthony Sammut to his groin area. Stefan Saliba testified on the second (2nd) July of the year two thousand and fifteen (2015) and explained that he was asked to take the photo exhibited at folio 26 and marked as Dok AS1 which he says was taken on the fifth (5th) of August of the year two thousand and fourteen (2014) at 9:06am. Asked whether Anthony Sammut explained what happened he replied that *'It was an accident.'*

Dr Mario Scerri in the report filed at folio 34 and marked as Dok MS1 on the other hand explained that *'Mr. Sammut was eventually discharged from hospital on the 3rd of August 2014 and five days after being discharged he had his lesions photographed by Stefan Aquilina who is a private photographer. 'He describes with reference to the photo marked as Photo no.1 in the report as showing 'bruising was violet turning green in colour;'*

Dr Mario Scerri in cross-examination on the second (2nd) of June of the year two thousand and sixteen (2016) was asked about the age of the injury in the photo and replied *'The legion is violet turning into green so this has been taken some days after. I cannot commit myself to how many days before because the healing of bruises depends on the constitution of the person, it depends whether he was taking aspirin and probably he might have been taking aspirin although I never found it documented because certain drugs which you take and your metabolic process accelerates or decelerates the healing but that was some days duration because it is violet and turning into green.'* Asked *'You told us that it was around ten days when you gave evidence before this court.'*, he replied *'Yes it was about around ten days because greenish bruises after about six days they become green and then to subside completely I would have expected it to have lasted a lot, a long time.'* Questioned:

Dr Sarah Sultana: Would you also tend to agree with me that you cannot give any proper indication in medical or medico legally as to the age of an injury based simply on the colour that it has turned?

Witness: Yes you can roughly but not one hundred percent sure. A bruise which is violet is almost certainly to be very fresh, then it changes colour and after about four days or five days you start having some green (green predominates and violet starts diminishing) and then green is the dominance and then it starts turning into brown. The aging turns upon the constitution of the individual. I would say this had been about eight days to ten days I agree to that.

Dr. Sarah Sultana: Eight days to ten days since the injury had been sustained correct?

Witness: Yes, but you cannot be one hundred percent correct as my..., the surest way of knowing the duration of a legion is to be there physically present when it was inflicted.'

The appellant submits that in view that according to the conclusions made by the medico-legal expert, the injuries sustained were around eight (8) to ten (10) days old it means that the injuries were sustained around the twenty six (26) - twenty eight (28) July of two thousand and fourteen (2014), before the incident of the thirty first (31st) of July of two thousand and fourteen (2014). The appellant submits that the First Court's remark that *'it fails to understand how those injuries came about on that day*

out of thin air' is according to the appellant completely wrong when considering the fact that it is clear that those injuries came about before the date of the incident and that it had no other option but to acquit the appellant. This Court does not agree with the appellant in this regard, even though the expert in his report stated that the photo was taken five (5) days after discharge from third (3rd) of August of the year two thousand and fourteen (2014), and in his testimony dated twenty sixth (26th) of February of the year two thousand and fifteen (2015) states that '*Mr. Sammut showed me a photo which was taken five days after being discharged, ten days after the incident, this is included in my report and I have a copy of it. It still shows massive bruising, turning grey conceding with the date of friction which was about ten day before.*', Mr Mario Scerri as evidenced by the above excerpts from his testimony in cross examination on the second (2nd) of June of the year two thousand and sixteen (2016) makes it clear that the estimated duration of the age of the injuries based on a photo is not a definite one, in that he states that one cannot be a hundred percent correct and that it depends on the persons metabolic process. Moreover, Dr Mario Scerri was never asked directly to exclude the possibility of the photo being taken five (5) days after the incident in question.

This Court therefore does not agree with the appellant in stating that this should have left the First Court no other option but to acquit the appellant.

Considered;

That the appellant also submits that there were various inconsistencies in the testimony of the parte civile Anthony Sammut. The appellant makes reference to what the parte civile Anthony Sammut stated *a tempo vergine* and what he according to the appellant retracted during his testimony. In his statement *a tempo vergine*, Anthony Sammut states that '*Jien kont qed insuq fi triq id-difiza civili u hekk kif wasalt fil-kantuniera biex indur fi triq il-fortizza nghid li l-mutur ma rajtux gej minn fuq innaha tax-xellug tieghi u hekk kif hrigt ghalkemm ilqattu dasxejn fuq wara, dan waqa' mal-art. Hekk kif qam mill-art u konna t-tnejn bilwiefqa fit-triq qabad itini bla hniena. Bid-daqqiet jien waqajt malart u rega' qabad jghatini bis-sieq fil-parti genitali tieghi. Nghid ukoll li dan kien accident zghir hafna fil-fatt fil-vann m'ghandix hsara.'*

In his testimony dated twenty ninth (29th) of January of the year two thousand and fifteen (2015) the parte civile explained that after he approached the appellant to help him get up '*After that he got up and I went out to see what happened to him, he got up and started shouting and offending me in English and I told him to calm down, I told him I didn't see him coming and he started kicking me in my genitals. I told him that I am a sick man and that I am an old man, he told me I don't give a damn, he kicked me about four or five times.*' In his same testimony he explained that Mr German asked him '*Did you fell on the floor? I told him no, when he kicked you he said you didn't fall on the floor? I said no.*' In cross examination dated twenty first (21st) of April of the year two thousand and sixteen (2016) asked if he remained standing all the time or whether he fell on the floor, he replied '*No I was lucky I did not fall on the floor.*' Asked about the statement he gave to the police were he stated that he fell, he replied that he did not fall and that he never said that he fell, stating '*I didn't tell the police I fell.*' He was not aware that it was written in the report. The appellant submits that the parte civile is not credible and that one questions whether his statement and other testimonies were a fabrication.

No police officer testified that Mr Sammut was at any time on the floor or anything to the effect, taking also into account that the police were not present during the alleegd assault and arrived after, meaning that the police had to report what they were informed by the parte civile, appellant and passersby but did not witness directly the alleged assault. This Court also notes that while the parte civile in his statement given a tempo vergine as shown at folio 13 states that with reference to the collision '*ilqattu daqsxejn fuq wara, dan waqa' mal-art*', during his testimony in cross-examination dated the twenty first (21st) of April of the year two thousand and sixteen (2016) denies hitting the motorcyle and states that '*I did not hit his motorbike*'.

Considered;

That the appellant also makes reference to the fact that the parte civile was walking around and talking to the police as stated by the appellant during his testimony and

as evidenced in photos submitted. PC 1289 Andre Cassar Bonaci on the twenty sixth (26th) of February of the year two thousand and fifteen (2015) testified that he was not present during the 'argument' and that *'It was maybe then after ten, fifteen minutes that somebody came from the other side, people that knew the other gentleman and informed me that there was an argument between them.'* Asked if he knew if any other persons apart from the appellant was injured he replied *'No because nobody came and told me. When I was told, maybe it was my mistake, from the way I saw the collision, it was a pickup van and a motorcycle I just assumed that it was the person on the floor that was injured because he was on the motorcycle.'* Anthony Sammut in cross examination on twenty first (21st) of April of the year two thousand and sixteen (2016) when asked *'Another thing, you said you were in pain, in a lot of pain because of the blows five kicks to the groin.'* he replied *'I was in pain yes.'* Asked to comment about photos where he does not seem to be in pain he stated that the photo is taken when the police came and asked *'at that time if they came only a few minutes after the accident you must have been still in pain correct?'* replied *'They asked me to come near Mr Fenech and I said no and I went and sat on the bench. I did not move from the bench until the Sergeant came and spoke to me because the pain wasn't quickly it came slowly alright and my testicle they started to inflame getting bigger, bigger and bigger all the time.'* Asked *'..and you were saying that in that photo you were not in pain over there.'* replied *'I did not say I was not in pain. The pain was coming.'* Asked *'What if I suggest that the photos show differently?'* he replied *'I was feeling pain coming.'* Asked about other photos that *'you were not not in pain at that point'* he replied *'Then I started trembling and I went to sit on the bench'*

That the appellant submits that the thesis of the appellant that the parte civile was not in pain as he alleged finds further comfort in the testimony given by the first officer on site PC 1289¹¹ Andre Cassar Bonaci who in cross examination on the twenty sixth (26th) of October of the year two thousand and seventeen (2017) when asked:

Pros: No, am I correct in saying that Mr. Sammut was actually walking at the time, on the

¹¹ Testimony given on the twenty sixth (26th) of October of the year two thousand and seventeen (2017) in cross-examination reads 'PS1289'

day of the accident, he was walking normally?

Xhud: No

Pros: He was walking normally.

Xhud: When I arrived he was sitting on a bench, but then he was walking normally, he walked to his van and back.

Pros: Without any problems whatsoever.

Xhud: No.

Pros: Did he complain of any pain anywhere?

Xhud: No he didn't complain, my main concern was that Mr. Fenech was injured, he was in pain so I stayed next to Mr. Fenech.

Pros: So you could see that Mr. Fenech was injured and was in pain, whereas Mr. Sammut didn't complain of any pain at all?

Xhud: No.

Pros: Did he require any medical assistance? Or did he request for any medical assistance?

Xhud: To me no.' ¹²

During his testimony given on the twenty sixth (26th) of February of the year two thousand and fifteen (2015) when asked 'When you were on site it didn't transpired to you that any other persons where injured?' he replied 'It transpired later on when the person came and told me that, listen this gentlemen has beaten up the older person'. He also explained that 'I stayed all the time next to him because whilst at that same time two sons of the other gentlemen arrived on the side and I was more interested if something happened because somebody informed his sons, that listen your father had been beaten up and that something would had happened.'

¹² The Court understands that since this was testimony in cross-examination, questions were being made by the defence counsel not by the prosecution as indicated.

PC 616 Spiteri in his testimony dated the twenty first (21st) of May of the year two thousand and fifteen (2015) stated that '*I, as a divisional driver went with PS 455 on site where we found a collision between a van, registration number EAQ 924 and a motorcycle JEF 400. The driver of the van, Anthony Sammut, began to complain and alleged with us that he was beaten up in his genital parts by the driver of the motorcycle John Eric Fenech..*' Parte Civile Anthony Sammut in cross-examination on the twenty first (21st) of April of the year two thousand and sixteen (2016) said that he told the police that he was hit by Mr Fenech five (5) times. Upon being questioned '*But the police said otherwise. So you are telling me you told the police who arrived there that you were hit.*' He replied '*Yes ofcourse. Many times I told them.*'

Dr Leonard Farrugia in his testimony dated twenty sixth (26th) of February of the year two thousand and fifteen (2015) states that '*On examining him I noted the scrotum to be swollen and showing signs of a collection of blood in the scrotum at which point I tried to examine by palpation and this resulted in tenderness and I couldn't examine further because the patient was in quite severe pain.*' Mr Karl German in his testimony dated second (2nd) July of the year two thousand and fifteen (2015) states that '*At the time of injury, anyone who sustains trauma to the genitals, is going to be in excruciating pain. Most men here, has experienced by being kicked football at some time, in their lives and you understand that the pain can be significant. After injury, there is always the possibility of having residual discomfort, so severe pain, I think is very unlikely. But to have residual discomfort in that testicle, is always a possibility, in a long term.*' The appellant gives the impression that a person who alleges to have been assaulted in the manner the parte civile described would not be able to walk a few moments after. The Court expert however was never asked to answer as to whether this was possible or whether the parte civile as seen in the photos could have walked a few moments after being assaulted in the manner described. It is this Court's opinion, that it cannot interpret the photos filed by the appellant at folio 142 as meaning that the parte civile fabricated the allegation of assault.

Considered,

That the appellant also submits that doubts as the credibility of the parte civile Anthony Sammut also result insofar as the medical treatment he received or subjected himself to on the date of the incident is concerned. This in view that he was not taken by ambulance and that the prosecution failed to summon the Doctor from Mosta Health Centre to testify and neither did it present a medical certificate from the doctor of the Mosta Health Centre. Anthony Sammut in his testimony dated twenty ninth (29th) of January of the year two thousand and fifteen (2015) when asked whether he went to any health centre replied '*Yes afterward when the sergeant made the report, an ambulance came, the ambulance took him to hospital and the sergeant came to me and told me go to a doctor or go to the clinic in Mosta. I went to the clinic in Mosta and when the doctor saw me at the clinic, oh my god he said, you have to go to hospital urgently because my genital were all swelling.*'

The accident report at folio 15 provides that '*Ghaldaqstant dan gie mehud b'karozza privata mill-familjari tieghu c-centru tas-sahha tal-mosta ghal trattament li sofra mid-daqqiet li hu qal li qala' minghand Fenech.*' According to the patients certification form marked as Dok AS 2 at folio 27, Anthony Sammut was examined in Casualty at Mater Dei Hospital on the first (1st) of August of the year two thousand and fourteen (2014) at 2:00am. Dr Leonard Farrugia in the sitting held on the twenty sixth (26th) of February of the year two thousand and fifteen (2015) asked in cross-examination if he examined Anthony Sammut on the thirty first (31st) of July of two thousand and fourteen (2014) and how soon after, he stated that '*Around one to two hours if I remember well*'

The Court notes that the clinical notes found at folio 95 are dated first (1st) of August of the year two thousand and fourteen (2014) at '01:30'. The clinical details of the case summary at folio 91 reads '*Mr Sammut is a 67 yo kc of IHD (stents inserted more than 1 year ago) sustained direct blunt trauma (kicked repeatedly) to scrotum. Patient was involved in a MVA, in which he collided with a motorcyclist who started kicking Mr Sammut and sustained multiple injuries to the groin.*' The clinical notes at folio 95 apart from other details provide '*Groins & penis NAD*', with the Court appointed expert Dr Mario Scerri declaring in his testimony in cross examination of the second (2nd) June of the

year two thousand and sixteen (2016) that '*I did not examine the patient at that time but from this photo yes definitely I do not agree with what the doctor said that lesions on the penis and the testicles are NAD which means no abnormalities detected because the picture speaks for itself.*'

In this Court's opinion, the fact that Anthony Sammut's son who allegedly took his father the parte civile to the Mosta Health Centre and the Doctor that examined the parte civile at the Mosta clinic were not summoned to testify or that the medical certificate issued by the doctor at the Mosta Health Centre was not presented before the First Court cannot be interpreted by this Court to mean that the charge was not proven beyond reasonable doubt. Sufficient evidence was brought before the First Court to confirm that the parte civile was examined in hospital in the early hours of the next day after as stated in the parte civile's testimony¹³ that he waiting for six (6) hours before he was called in. This appellant submits that '*anything could have happened to Anthony Sammut in the absence of the appellant and independent of the appellant in this length of time of 6 hours from the accident to the examination of the said Anthony Sammut in Mater Dei.*' This Court however notes that the Police report itself specifically provides at folio 15 of the proceedings that '*irrizulta li dan ir-ragel huwa ghama minn wahda minn ghajn x-xellugija u barra l-verzjoni li qal u kif inhu wkoll innizzel fir-rapport qal ukoll li safa' aggreddi miss-sewwieq tal-muttur John Eric Fenech.*' A tempo vergine the parte civile in his statement makes reference to the assault he suffered, which later on in his testimony states that he did not fall on the ground.

PC 1289 Andre Cassar Bonaci in his testimony dated twenty sixth (26th) of February of the year two thousand and fifteen (2015) stated that '*Eventually one person came over and said listen it's not good that this man beats up an old man and i told him I wasn't aware of this.*' which was not confirmed by who allegedly uttered the words since the passersby were not summoned to testify. However PC 1289 Andre Cassar Bonaci being the first police officer on site stated with reference to the appellant that '*In the mean time whilst knowing that he is being angry he kept saying I feel like killing him, I feel like killing him.*' He explained with reference to the appellant that '*He was angry*

¹³ In the sitting dated the 29th January 2015

because somebody hit him, hit his motorcycle and ended up on the floor and he was angry because he was injured, he was hurt and because of the damage that his motorcycle sustained.' Asked in cross-examination on the twenty sixth (26th) of February of the year two thousand and fifteen (2015) *'So whatever he might said at that point of time it was simply of being upset the state of shock, would you agree? He replied 'I cannot comment on that. He uttered those words, whether he meant it or no I don't know'. PC 616 Spiteri in the sitting dated the twenty first (21st) of May of the year two thousand and fifteen (2015) testified that 'The ambulance came on site and whilst PS 455 was having the version of John Eric Fenech, I heard him twice saying to PS 455, referring to Anthony Sammut, I would like to kill him' The Court asked 'You heard him directly?' and he replied 'Yes'.*

That contrary to what the appellant is stating, even though according to the first police officer on site the parte civile did not inform him that he had been assaulted by the appellant but that he was informed by passersby, the parte civile informed the other police officers that went on site as reflected in the testimony of PC 616 Spiteri and in the police report. Furthermore, the clinical notes in the case summary at folio 91 also reflects what the parte civile testified before the First Court.

Considered;

As examined in the judgment in the names **'The Police (Inspector Edel Mary Camilleri) vs Christopher Peckham'**¹⁴:

'That the following principles, as clearly outlined by the Constitutional Court in its judgement of the 1st. of April 2005 in the case The Republic of Malta vs. Gregory Robert Eyre et, must be applied:

“(i) it is for the Prosecution to prove the guilt of the accused beyond reasonable doubt; (ii) if the accused is called upon, either by law or by the need to rebut the evidence adduced against him by the Prosecution, to prove or disprove certain facts, he need only prove or disprove that fact or those facts on a balance of probabilities; (iii) if the accused proves on a balance of probabilities a fact that he has been called upon to prove, and if that fact is decisive as to the

¹⁴ Decided by the Court of Magistrates (Gozo) as a Court of Criminal Judicature on 20th April 2017 (Case Number: 233/2017)

question of guilt, then he is entitled to be acquitted; (iv) to determine whether the Prosecution has proved a fact beyond reasonable doubt or whether the accused has proved a fact on a balance of probabilities, account must be taken of all the evidence and of all the circumstances of the case; (v) before the accused can be found guilty, whoever has to judge must be satisfied beyond reasonable doubt, after weighing all the evidence, of the existence of both the material and the formal element of the offence."

That Lord Denning in the case *Miller vs. Minister of Pension* explained what constitutes "proof beyond a reasonable doubt". He stated:

"Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt, but nothing shall of that will suffice".

Considered;

The appellant on the other hand states that the appellant tendered clear-cut and consistent evidence when he testified on the eight (8th) of June of the year two thousand and seventeen (2017) and even at the initial stages of the investigation when interrogated by the police, twelve (12) days after the incident of the thirty first (31st) of July of the year two thousand and fourteen (2014). The appellant states that he denied that he ever kicked or assaulted the parte civile and that the only thing he did was to shout at Anthony Sammut to go away and to leave him alone because he was in pain. He claims in his appeal that he is more credible than the parte civile. The appellant during his testimony denied to have assaulted the parte civile, in that when asked 'Now Mr. Sammut alleged that you kicked him several times in his groin area, as a result to which result according to the Police he fell on the floor and you continued on the ground. What is your position on this?' replied 'I shouted at him. I didn't kick him, I didn't touch him, at no point I didn't see him use or *dopple of* in pain or fall on the ground. He didn't even cry out in pain so no I've got no idea why he's saying this.' Asked regarding the shoes he was wearing in view that the parte civile described them as 'tough shoes', he replied that he wore 'soft canvas trainers' and exhibited photographs

of the shoes in question. The appellant also denied saying that he wanted to kill him. He however remembers falling from the motorcycle, Mr Sammut coming towards him, that he was in a state of shock while denying kicking the parte civile. When asked about whether his allegation in the statement in that when he was asked whether Mr Sammut tried to use physical force against him he replied that *'I think that he did try to hit me with a fist'* is still valid, in cross examination stated *'Yes it is. With my apologies, because I was still wearing my crush helmet the fist hit the visor so I wasn't actually struck and so that part of the incident in the accident sort of slipped my mind so I was not put by this.'*

What in this Court's opinion is interesting is that in the statement of the appellant given on the twelfth (12th) August of the year two thousand and fourteen (2014) the appellant did not categorically deny assaulting Mr Sammut. When asked *'Did you try to hit him?'* he replied *'I really don't know since I was in a state of shock.'*, when asked *'Mr. Sammut sustained several injuries in his pelvic area. Do you know how these occurred?'* replied *'From my memory, no.'* Questioned *'So you are saying that you don't remember that allegedly you hit Mr. Sammut in his pelvic area several times by means of kicks?'* he replied *'No, I don't remember that. I was told that afterwards.'* Questioned *'I have been informed by Police officers on the scene that you kept insulting Mr. Sammut after the arrival of the Police. Is this true?'* Replied *'If they say it is, then its yes.'* Asked *'So you don't remember insulting Mr. Sammut?'* replied *'No not really.'* Asked *'What did you do after the incident?'* replied that *'What I remember is that I was very upset of the condition of my bike and I was taken to hospital by ambulance'.*

Further to the Court's considerations, the Court is of the view that the fact that the parte civile according to the statement had stated that when he fell to the ground the appellant continued kicking him and then during his testimony and also when asked in hospital by Professor German whether he fell, he replied and insisted that he did not fall to the ground, does not impinge on the parte civile's credibility. Neither does the fact that the first police officer that went on site who stated that the parte civile did not approach him to inform him about the assault but that third parties did. The

parte civile had informed the other police officers about the assault on site and had subsequently declared upon oath that he went to the Mosta Health Centre and then to hospital where he was admitted. The appellant states that the parte civile walked around and PC 1289 Andre' Cassar Bonaci also confirms that he was walking normally and did not complain of pain however the appellant did not question the Court appointed expert Mr Mario Scerri whether it would have been impossible for a person that claims to have been assaulted to be seen walking. The Court despite the differences from what the parte civile stated a tempo vergine, mainly when stating '*ilqattu daqsxejn fuq wara*' and that '*jien waqajt mal-art*' to what he then testified before the First Court when he states that he did not fall and did not hit the motorcycle as considered earlier on in this judgment do not mean that the parte civile is not credible. Moreover, the clinical notes in the case summary at folio 91 which reads that he '*...sustained direct blunt trauma (kicked repeatedly) to scrotum. Patient was involved in a MVA, in which he collided with a motorcyclist who started kicking Mr Sammut and sustained multiple injuries to the groin.*' reflect the parte civile's version of events as testified before the First Court.

As considered in the judgment in the names '**Il-Pulizija (Spt. Trevor Micallef) Vs Jonathan Micallef**¹⁵:

'Huwa minnu illi jista' jkollok sitwazzjoni fejn numru ta' xhieda qeghdin jaghtu verzjoni differenti minn ohrajn illi xehdu qabel. B'daqsekk ma jfissirx illi ghax hemm xhieda differenti bil-fors hemm konflitt li ghandha twassal ghal liberatorja. Fil-kawza "Pulizija vs Joseph Thorn" deciza mill-Qorti ta' l-Appell Kriminali fid-9 ta' Lulju 2003, il-Qorti qalet '... mhux kull konflitt fil-provi ghandu awtomatikament iwassal ghal liberazzjoni tal-persuna akkuzata. Imma l-Qorti f'kaz ta' konflitt ta' provi, trid tevalwa il-provi skond il-kriterji annuncjati fl-Artikolu 637 tal-Kap 9 u tasal ghal konkluzzjoni dwar lil min trid temmen u f'hiex trid temmen jew ma temminx (ara ukoll 'Repubblika ta' Malta vs. Dennis Pandolfino' 19 t' Ottubru 2006).'

¹⁵ Delivered by the Court of Criminal Appeal on 2nd February, 2012 (Criminal Appeal number: 436/2009)

In view of the evidence produced, this Court concludes that the First Court could legally and reasonably arrive at a decision of guilt. The First Court was in the best position to make an appreciation of the evidence brought before it since it heard all witnesses testify before it and could easily see the demeanour of each witness, most especially that of the parte civile and of the appellant.

The Court also notes the appellant did not appeal from the punishment of one (1) year imprisonment suspended for two (2) years in terms of article 28A of Chapter 9 of the Laws of Malta as ordered by the Court which in this Court's opinion considering the the parte civile's age is not excessive.

The Court is rejecting the appeal and confirming the judgment delivered by the Courts of Magistrates as a Court of Criminal Judicature in the above names on the fifteenth (15th) of March of the year two thousand and eighteen (2018).

The Court explained in clear words the terms of the judgment to the accused.

(ft) Consuelo Scerri Herrera

Judge

TRUE COPY

Franklin Calleja

Deputy Registrar