



Court of Criminal Appeal

Hon. Mrs. Justice Dr. Consuelo Scerri Herrera

Appeal Nr: 44 / 2019

The Police

Inspector Priscilla Caruana Lee

Vs

Joseph Feliazoo

Today the, 16th May, 2019,

The Court,

Having seen the charges brought against Joseph Feliazoo holder of Passport Number A3586884A, before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having:

On the 10th of April 2018 at around 13:45hrs at the Police Headquarters, Pjazza San Kalcidonju, Floriana;

1. Assaulted or resisted by violence or active force not amounting to public violence, CO165 Dennis Thornton and CO177 Matthew Cilia, persons lawfully charged with a public duty when in the execution of the law or of a lawful order issued by a competent authority and this in breach of article 96 of Chapter 9 of the Laws of Malta;
2. Reviled, threatened or caused bodily harm to CO165 Dennis Thornton and CO177 Matthew Cilia persons lawfully charged with a public duty, while in

act of discharging their duty or because of having discharged such duty, or with intent to intimidate or unduly influence them in the discharge of such duty and this in breach of article 95 of Chapter 9 of the Laws of Malta;

3. Caused injuries of a slight nature on CO165 Dennis Thornton and CO177 Matthew Cilia as certified by Dr. Gabriel Borg MD reg. number 5807 from Floriana Health Centre and this in breach of article 221 of Chapter 9 of the Laws of Malta;
4. Disobeyed the lawful orders of Insp. Darren Buhagiar, CO165 Dennis Thornton and CO177 Matthew Cilia, any authority or of any person entrusted with a public service, or hinders or obstructs such person in the exercise of his duties, or otherwise unduly interferes with the exercise of such duties, either by preventing other persons from doing what they are lawfully enjoined or allowed to do, or frustrating or undoing what has been lawfully done by other persons, or in any other manner whatsoever, and this in breach of Article 338(ee) of Chapter 9 of the Laws of Malta.
4. And also wilfully disturbed the public good order or the public peace and this in breach of article 338 (dd) of Chapter 9 of the Laws of Malta.

In case of guilt Joseph Feilazoo is to be treated as a recidivist, after having been found guilty by a decision of the courts of Malta, which decision has become res judicata and cannot be changed.

The Court was humbly requested, if it deems it expedient, in addition to the punishment applicable to the offence, apply the provisions of Art 383 of the Criminal Code to provide for the safety of CO165 Dennis Thornton and CO177 Matthew Cilia.

Having seen the judgement meted by the Court of Magistrates (Malta) as a Court of Criminal Judicature proffered on the 5th February, 2019 whereby the Court for the

reasons expounded above and after having seen articles 96(a), 95, 221, 338(ee), 338(dd), 49, 50 and 383 of the Criminal Code, the Court found the accused guilty of all charges brought against him and condemned the accused to two (2) years imprisonment¹ and a fine of five thousand euros (€5,000).

After having seen article 383 of Chapter 9 of the Laws of Malta in order to provide for the safety of CO165 Dennis Thornton and CO177 Matthew Cilia ordered the offender to enter into his own recognizance in the sum of two thousand euros (€2000) for a period of one year from today.

By application of article 533 of Chapter 9 of the Laws of Malta Joseph Feilazoo was ordered to pay the expenses related to the appointment of Dr Mario Scerri as expert in these proceedings, upon receipt from the Registrar of the Criminal Court and Tribunals.

Finally, the Court declared him an illegal immigrant in terms of sections 5 (2) (d) and 14 of Chapter 217 of the Laws of Malta and ordered the Principal Immigration Officer to use his powers provided by the Law, for his immediate deportation from these islands after serving his sentence.

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 appeal application presented by Joseph Feliuzoo in the registry of this Court on the 14th February, 2019 whereby this Court was requested to reform the appealed judgment pronounced by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 5th February 2019, in the case in the aforementioned

¹ from which the period of time he had spent in prison till today should be deducted

names, to the effect that whilst confirming the appealed judgement in so far as it found the exponent to have contravened the provisions of Article 338(ee) of the Criminal Code (Chapter 9 of the Laws of Malta) and therefore guilty of the fourth (4th) charge, and therefore reforming the punishment to be handed down to the exponent in consequence thereof, revokes the remaining part of the same judgment by finding the exponent not guilty of the first (1st), second (2nd), third (3rd) and fifth (5th) charges brought against him, and consequently acquits and liberates him in respect thereof.

Having seen the grounds for appeal by Joseph Feliazoo:

That the aggravation suffered by the exponent is clear and manifest, and consists in the fact that on the basis of all the evidence produced before it as well as on the basis of all the circumstances of the case as unfolded before it, the Honorable Court of Magistrates (Malta) as a Court of Criminal Judicature ought only to have found the exponent guilty of the fourth (4th) charge which was proffered against him, and therefore ought to have only applied the corresponding punishment applicable to persons who infringe the provisions of Article 338(ee) of the Criminal Code (Chapter 9 of the Laws of Malta) and ought to have acquitted and liberated him from all the remaining charges.

In fact, the Court of Magistrates (Malta) as a Court of Criminal Judicature completely failed to take cognisance of the particular facts of the case as outlined above, as well as of all the submissions which the exponent put forward before that same Court in his **Note of Submissions** filed on the 30th November 2018, and to which (for the avoidance of unnecessary repetition) full reference is hereby being made.

Although the Court of Magistrates (Malta) as a Court of Criminal Judicature made some attempt to chastise the Immigration Authorities for the horrendous manner in which they treated (or rather virtually completely disregarded) the exponent, in

spite of the fact that he has been incarcerated at the Corradino Correctional Facility for the past ten (10) years, only seemingly taking an interest in his case just days prior to what was meant to have been his effective release from incarceration, yet this was just an attempt at lip service because the Court gave no real consideration to the effect such conduct had upon the mental state of the accused.

In fact it is hereby submitted that the conduct of the Police vis-à-vis the exponent was such as to cause temporary insanity in the mind of the accused whilst in the office of Inspector Darren Buhagiar, leading him to outrightly declare that he would not spend another single day in deprivation of his liberty and thereby to expose himself to the charge of having refused to obey the “legitimate” orders of Inspector Darren Buhagiar. This mental state of temporary insanity on the part of the exponent suffices to exonerate him from all criminal responsibility even though in this appeal (and as was also his position before the Court of Magistrates (Malta) as a Court of Criminal Judicature), in view of the legal maxim *ignorantia legis neminem excusat* the exponent is prepared to concede that he did in fact disobey a legitimate order of Inspector Buhagiar who, having declared him to be an illegal immigrant as so entitled to do according to law, had every right in *stricto juris* to order his detention.

It is also submitted that once the exponent had completed his term of incarceration as was imposed upon him by the Criminal Court, the exponent was fully entitled to regain his liberty and was to have been immediately released from detention. Correctional Officers CO165 Dennis Thornton and CO177 Matthew Cilia no longer had any legitimate jurisdiction or authority to exercise over him; and the actions of the aforementioned Correctional Officers in forcibly escorting the exponent to the office of Inspector Darren Buhagiar at the Police General Headquarters in Floriana amounted to unlawful arrest even because the exponent had up to that time not been declared to be an illegal immigrant and he had not been served with any Removal Order by the competent Authority. Furthermore, the Correctional Officers concerned had no authority to give any orders to the exponent within Inspector Buhagiar’s office, even though the exponent submits that no such orders were given to him by

them (if at all orders were only given to the Correctional Officers by Inspector Buhagiar). They are Correctional Officers, not members of the Police Force; and they exercise their authority over inmates only within the confines of the Corradino Correctional Facility.

The Court of Magistrates (Malta) as a Court of Criminal Judicature also failed to appreciate that the exponent did not assault or commit any acts of violence whatsoever in regard to Inspector Darren Buhagiar himself (or in regard to any other Police Officer), even though it was the very Inspector Buhagiar (and not the aforementioned Correctional Officers) who had just declared the exponent to be an illegal immigrant and who had ordered his detention. The importance of this in evaluating the evidence of the case cannot be underestimated, because it clearly lends credibility to the contention of the exponent that he did not adopt any violent stance whatsoever; but on the contrary it was the aforementioned Correctional Officers themselves who found the opportunity of having another go at a former inmate by exercising what can at best be described as excessive violence over his person in an attempt to compel him to submit to Inspector Buhagiar's orders.

In a bid to paint the blackest possible picture of the exponent, the Court of Magistrates (Malta) as a Court of Criminal Judicature maintained that :

"To get an impression of the level of his aggressiveness, suffice to refer to the CCTV footage taken from the cameras inside the CID yard at 13.56.54 hours and 13.57 hours wherein after the accused was escorted out of the office and placed in the detention van, the detention van is seen swaying from one side to another. He was still being aggressive notwithstanding he had just been placed in the van. This does not given an indication of a "mere verbal resistance". "

Quite apart from the fact that very conveniently no CCTV footage is available to show what really happened inside Inspector Buhagiar's office, it is extremely worrying to see a Court of Justice make such observations in regard to the exponent

who had just been physically manhandled by the aforementioned Correctional Officers, felled down to the floor, administered pepper spray to his face, handcuffed and bundled out and into the detention van. Inside that van the exponent was not being aggressive, but was gasping for breath, fighting for his very life ! The Court of Magistrates (Malta) as a Court of Criminal Judicature ought to have properly born in mind the facts, including the fact that an ambulance had to be called for a medical team to attend to the exponent who was also taken to Hospital. Why would the Police Authorities call in an ambulance if all was fine with the exponent ?

The Court of Magistrates (Malta) as a Court of Criminal Judicature took pains to enunciate the situations in which Police Officers (note not Correctional Officers) are entitled to use force; citing from the **European Code of Police Ethics** and also from the **Key Principles Governing the Use of Force of the English Police Force**. However, no effort is made by the Court to analyse and more importantly apply those principles to the particular case. Had the Court done so, then it would undoubtedly have found that the Correctional Officers concerned, even if they were at all entitled (as Correctional Officers operating outside the precincts of prison) to use force themselves, that the level of force to which they resorted was outrageously excessive and disproportionate when simply confronting a person who considered himself to be within his rights to refuse to obey an order given by Inspector Buhagiar which he considered to be illegitimate.

Finally it is to be appreciated, even in this context, that the exponent was alone, and grossly outnumbered by the Police Officers and Correctional Officers both within, as well as close by and outside Inspector Buhagiar's office. The exponent was literally surrounded on all fronts, and was certainly not on home ground. This fact alone both lends to the credibility of his own version of the events as they unfolded as well as places the Correctional Officers concerned, being in an obviously advantageous position vis-à-vis the exponent, in a more onerous position of justifying their conduct towards the exponent; and also because the record of the exponent during his lengthy period of incarceration at the Corradino Correctional Facility was

impeccable and there was no record produced of the exponent having ever been involved in any violent incident throughout his detention there.

Considered;

A copy of a page of the passport, a copy of the residence card of Valencia, the conviction sheet and statement of the accused were presented before the First Court. Medical certificates regarding Dennis Thornton and Matthew Cilia were also presented. The current incident report was also filed.

Inspector Darren Buhagiar testified on the nineteenth (19th) of April of the year two thousand and eighteen (2018) and explained that he was informed by CCF that a Nigerian national named Joseph Frilazoo was going to be released on the tenth (10th) of April of the year two thousand and eighteen (2018). CCF were informed that they need to bring the subject to the Immigration section to evaluate his immigration position. Since the witness was on duty, when he was brought to his office, he told him to sit down and started explaining the situation. He informed him that since the accused had a Spanish residence card, he informed him that he received communication from the Spanish Embassy in Malta who told him that Joseph Frilazoo is no longer accepted in Spain. He had to tell him this information and told him that a removal order and a return decision is going to be issued against him because Spain will not accept his arrival in Spain. As soon as he told him that he was going to end up in detention *'he started getting aggressive, being angry, he could not accept the fact that he is going to be detained again because he told me that he did ten (10) years in prison and he was getting frustrated about that and when I saw that he was not listening to my instructions that he was not abiding by them there were two (2) officers from the Corradino Facilities two (2) SRT Officials and I spoke with one of them and I told him that we need to do something there. And then I gave him the last instruction, I told him he needs to comply with the instructions for his sake and he didn't comply, he kept on insisting that I will not do one day in detention, I did ten (10) years in prison'*. The witness explained that *'he said and he told me as well that if you send me to Nigeria with escorts*

they will go to Nigeria but they will not come back to Malta.' The witness continued explaining that *'The two (2) officers tried to restrain him, they ended up on the floor at some point, they tried to cuff him, initially they couldn't cuff him because he kept resisting and he is a strong person and they had to use other means of restraint, they had to use the pepper spray as well and in the end they cuffed him, they managed to cuff him.'* The witness stated that members of his office and WPC 138 Alexia Grech, SM Michael Borg were present in the office and other persons from other officers from the Immigration tried to give a hand during the hand cuffing procedure and then they managed to get him out from the office hand cuffed and he was put inside the van. He kept shouting because he was seemingly hurt, the witness assumes that it is because of the pepper spray. The medical assistance was brought to him as soon as he was inside the van, he called the ambulance which came to the police headquarters to assist him and was later taken to hospital for further medical care. He recognised the accused in Court.

In cross-examination, asked whether the accused assaulted the police before or after the pepper spray he replied that *'I cannot say if it was before or after the pepper spray but yes later I was informed that he bit the hands of two (2) of the SRT Officers, because they were directed to the Health Clinic to do a certificate, but I cannot say if it was before or after.'* He stated that he did not see him biting since during the scuffle he could not see exactly what was happening.

Doctor Gabriel Borg declared by means of an affidavit that the certificate was issued by him on 10th April 2018 at the Floriana Health Centre when he examined Matthew Cilia with identity card number 498881(M). He explained that the content of the certificate provides *'Superficial swelling over the mandible on the left', '2 puncture wounds over the base of the right thumb and an abrasion over the dorsum of the hand, allegedly bitten by a Nigerian immigrant', and that 'Patient denies any further injuries'.* The nature of the injuries is slight unless complications arise. A copy of the medical certificate is filed at folio 27.

Another affidavit of **Doctor Gabriel Borg** was filed regarding the examination held on 10th April 2018 at the Floriana Health Centre on Dennis Thornton with identity card number 62178(M). He declared that the contents of the certificate is '*Swelling of the Right Periorbital Area*', '*1cm laceration on the knuckle*', and '*Patient denies any further injuries*'. The nature of the injuries are slight unless complications arise. A copy of this certificate was filed at folio 29.

PS 39 Jean Paul testified by means of an affidavit in the Maltese language where he declared that on 10th April 2018 at around 15:30hrs he was a second watch in the Valletta police station when two members of the SRT Dennis Thornton CO 164 and Matthew Cilia CO177 came to report that they had just been assaulted by a Nigerian in the CID yard at the Police Floriana Head Quarters. This happened between 13:45hrs and 14:00hrs. A report with number 1/A/1342/2018 was drawn up. He declared that the person who assaulted these two officials is Joseph Feilazzo with Nigerian passport A3586884A born on 15th December 1975. The investigation subsequently took place by Inspector Priscilla Caruana Lee.²

A true copy of the judgment delivered by the Criminal Court in the names 'The Republic of Malta v. Joseph Feilazzo'³ was presented and marked as AM3. The Current Incident Report was also presented and marked as AM4.

CO 177 Matthew Cilia testified on nineteenth (19th) April of the year two thousand and eighteen (2018) in the Maltese language. He explained that on 10th April 2018 at around 1:15 he was on overtime from 8:00 till 5:00, he had an order so that he and CO 165 Dennis Thornton escort at the CID⁴ to assist before Inspector Derrin Buhagiar for deportation. They arrived at 1:45, gave the documents to the inspector

² The affidavit provides that the report is attached however no report is attached to the affidavit. A translation of the report is however found at fol 91 et sequitur.

³ Decided on 23rd February, 2010 (Bill of Indictment 43/2009)

⁴ The words used by the witness were 'immorru skorta s-CID'

which contained money and things of passports that had been kept at the records office. The accused set in front of the Inspector and spoke to the inspector regarding the deportation and was in some circumstances refusing the deportation and was not accepting some things he wanted. He changed his attitude in front of the Inspector and was saying that he does not agree, that he is not going to the detention since he would kill the police and officials of the SRT and of the detention and would not take him to the detention centre. The inspector told him that from his end he cannot tell him anything else, both the witness and his colleague CO 165 spoke to him so that he walks towards the direction of the van so that he could go to the Detention Centre. He explained that *'X'hin missejtu qalli :Tmissnix ghax inweggikom. Min hemm Dennis Thorton qallu : Ejja ha nimxu u huwa refa' jdejh, x'hin refa' jdejh intlaqat ta' hlajn il- leminija u ntlqat Dennis Thorton, spiccajna ma l-art biex ahna nkunu nistghu nimmanettjawh u wzajna certu forrza minima f' dan l-ufficcju li kien hemm l-Ispettur Derrin Buhagiar.'* He explained that it was difficult for them to restrain him since he is well built. After giving him the verbal warning that they are going to use gas, he insisted for three times and while he was restraining him, the accused bit part of his right hand. After giving the verbal warning and the pepper spray was used, he was controlled, hand cuffs were used and took him to the direction of the van that was in the yard of the CID. From then on, he reduced his attitude and behaviour and entered into the van of the detention.

The witness recognised the accused in Court and confirmed the certificate he presented to the police. Asked why it was difficult to hand cuff him, he explained that as SRT they used the necessary minimal force with him and as soon as he was on the floor he was aggressive and then used the verbal warning three (3) times for the spray to be used. He confirmed that the accused was very aggressive, such that Dennis Thornton 165 had his face hit and the witness was bitten so that he is not handcuffed.

In cross-examination, he stated that the bite took place before the use of the pepper spray. He confirmed that they were seen by a doctor.

CO 165 Dennis Thornton⁵ testified in the Maltese language on nineteenth (19th) April of the year two thousand and eighteen (2018). He explained that on 10th April he went with Frilazoo to the CID yard at inspector Derrin Buhagiar. They arrived and took him to the office and the witness went out next to the van. After some time, about fifteen (15) minutes, Mr Buhagiar told him that they need their assistance since he is refusing to go to the detention, explaining '*qalli : Ghandna bzonn l-assistenza taghkom, qalli : ghax dan qed jirrifjuta li jmur id-detention, qalli : gej bil- paroli. Ghidtlu : All right. Jien dhalt gewwa ghax siehbi kien gewwa diga, gie s-sur Frilazoo u l- Ispettur rega beda jfehmu li jrid imur li jrid imur u biex jiffirma xi haga ta' l-appell imbaghad jiddeciedu minn hemm, qallu :Id-detention jiena mhux ha mmur, qallu : ghal l- ebda raguni. Morna jiena u siehbi CO 177 ippruvajna nkellmuh bil- kelma t-tajba, kif missejniehu jdejh hekk gholla jdejh u hadni hawn u qabad jirrezisti.'* He explained '*Hadni taht ghajnejja u qabad jirrezisti. Qbadnieh minn idejh, spiccajna ma l- art, bdejna nghidulu biex jieqaf u hu ma riedx jaf. Wara ftit hin gidem lil CO 177 f' idu. Qalli : Dan gidimni. Avzah tliet darbiet li ha juza l- pepper spray jekk mhux ha jcedi biex nimmanettjawh u baqa' jirrezisti u wzajna l- pepper spray, imbaghad irnexxielna nimmanettjawh, erfajnieh u dahhalnieh gol- van tad-detention.'* He confirmed the certificate in the acts and aslo indicated the accused in Court. He confirmed that the date was the tenth (10th) of April of the year two thousand and eighteen (2018) at around 1:45 in the CID Yard, but they were in the office of Mr Buhagiar.

PS 435 David D'Amato testified in the Maltese language on third (3rd) May of the year two thousand and eighteen (2018) who explained that on 10th April 2018 at around 1:00 he was in his office of Inspector Mario Haber and that the office of Mr Darren Buhagiar is two (2) doors away. The office is in the Depot yard. He went out near the door and heard a lot of noise coming from the office of Mr Daren Buhagiar. When he went to have a look and entered into the office of Mr Darren Buhagiar he explained that he found a person on the floor facing down and two SRT members on

⁵ The transcript reads 'Thornton'

their knees on the floor trying to cuff the accused. In this words *'sibt persuna mixhuta ma l- art wiccha l- isfel u zewg (2) membri ta' l- SRT gharkuptejhom ma l-art, kif stajt nifhem dak il-hin, qed jippruvaw jimmanitjaw lil din il- persuna li jiena qiegħed nagħraf fl-Awla.'* At that moment he smelled pepper spray and realised that it was used and during this commotion he could realise that they were trying to handcuff him from behind. He was aggressive, *'beda jxejjer saqajh, beda jxejjer idejh u dak il- hin tlabt biex jagħtuni t-Tie-clips, dak il- hin iddecidejt illi nimmanittjah minn saqajh.'* He and his colleague Sargent Nigel managed to tie his legs after difficulties they had since the accused is well built. He then assisted one of them, Dennis Thornton and managed to handcuff him. After handcuffing him, they took him to the van of the Detention Services. Asked about other types of violence, he said that he was seeing him from behind, that the person was shaking his hand and refusing to be handcuffed, and saw Dennis and if not mistaken Cilia trying to handcuff him and he at that time decided to tie⁶ his legs to reduce the aggressiveness.

Dr Marisa Mifsud testified on third (3rd) May of the year two thousand and eighteen (2018) in the English language. She declared that she was appointed by the Court to interpret from Maltese to English the testimonies of Dennis Thornton and Matthew Cilia. Copies of these translations were filed.

SM 739 M. Borg testified by means of an affidavit in the Maltese language. He declared that on 10th April 2018 at around 1:30 in the afternoon, Joseph Feilazzo was brought from prison to the office of Inspector Darren Buhagiar of immigration. He was spoken to by the same inspector and was given a removal order (*ordni ta' tnehhija*) so that he can be sent to Nigeria and it was explained to him that he will be kept at the detention centre of Safi until procedures are carried out. When he heard this, Feilazzo started objecting and stated that whatever happens he was not ready to be locked in detention. The two SRTs that were present asked Feilazzo to go in the detention vehicle but he started resisting. SRT immediately tried to handcuff him but

⁶ The words used by the witness were *'nimmanittjalu saqajh'*

he continued resisting and ended up on the floor. Feilazzo underneath and two SRTs on him to handcuff him. He also declared that '*wara li ssaraw mhux hazin inghata l' pepper spray u rnexxillhom fi ftit tal-hin wara.*' He explained that this person was escorted out of the office and put in the van of the detention. In this incident, SRTs complained that they had suffered some injuries in their hands and went to the Floriana health centre for care. Since Feilazzo was saying that he couldn't breathe properly, an ambulance was called where a medical team took him to Mater Dei Hospital. The witness went with him to hospital together with a member of the detention in the same ambulance. After some time, the police from Valletta came and he gave them the hand over to continue investigating the case.

WPC138 A. Grech testified by means of an affidavit in the Maltese language whereby she declared that on 10th April 2018 at around 13:30hrs she was at work in the immigration office at the depot. She observed Inspector Darren Buhagiar speaking to a person who was identified as Joseph Feilazzo from Nigeria who had just finished a sentence at the Cordin Correctional Facility. Inspector Buhagiar started explaining the procedure to this Nigerian. As soon as Joseph Feilazzo got to know that he was going to the detention centre, he started opposing. He was saying that if they take him to Nigeria escorted, those escorted would not return back to Malta. Two officials from the Correctional Facility of Cordin and also a detention official were present in the office. He said that he was not going in any manner and stood up from his chair. The inspector again tried to explain to Feilazzo that this was a normal procedure for all foreigners but he continued saying that he will not go to the detention centre.

At that moment the prison officials told him to get out and go in the detention van but Feilazzo continued not obeying this order and so the prison officials grabbed his hands to handcuff him but Feilazzo resisted the officials. Feilazzo continued resisting and the prison officials used minimum force for Feilazzo to be handcuffed but he continued to resist and bit the prison officials. After a few minutes she heard the prison officials warning Feilazzo to stop resisting since pepper spray was going

to be used. Feilazoo continued resisting and being aggressive and so pepper spray was used. After a few minutes and with the help of other police that came into the office because of the commotion, Joseph Feilazoo was handcuffed and escorted into the detention van. She observed that the prison officials had some blood on their hands. Feilazoo was complaining that he had pain in his chest⁷ and so an ambulance was called on site. He was escorted in Mater Dei Hospital for medical care while prison officials were requested to go to the clinic in Floriana to file a medical certificate was the injuries they suffered.

PS697 Nigel Apap testified by means of an affidavit in the Maltese language. He declared that on tenth (10th) of April of the year two thousand and eighteen (2018) at around 1:40pm, he went to the office of Inspector Darren Buhagiar with a file and noticed that Inspector Darren Buhagiar was speaking to a certain Joseph Feilazoo. This person was escorted by two officials of the Special Response Team of the Correctional Facility of Cordin. Wpc138 Alexia Grech and SM 739 Michael Borg were present in the office. He heard Inspector Darren Buhagiar explaining to Joseph Feilazoo that he was going to be given a removal order (Ordni tat-Tnehhija) from the Maltese territory and he was explaining what his rights were and told him that till he is sent to Nigeria he will have to stay at the detention. When he heard this, Joseph Feilazoo started being angry and replied that he was not going to the detention and neither back in his country since he had cases which were still to be decided. When he heard this, Inspector Darren Buhagair took note of Court and informed hm that he would be informing the authorities of the detention services to that he could attend Court sittings. However he continued insisted that he did not want to be sent to the detention and was angry. The prison officials were asking him to calm down and to leave quietly and go in the van of the detention services. He was opposing and was angry and at one moment he made a commotion and the prison officials ended up on the floor with Joseph Feilazoo who continued resisting to be handcuffed and at one moment heard the officials warning Joseph Feilazoo that they

⁷ The words used in the affidavit was 'ugiegh f'qalbu'

were going to use pepper spray if he continued resistng. He ignored them and so they had no other way but to use pepper spray. He was very aggressive with the prison officials such that the witness was trying to hold him and he pushed him several times.

The officials then managed to handcuff him but he continued being aggrgesive and was also giving blows with his feet⁸ so they also had to tie his legs. Then they took him out and put him in the van of the detention services. He noticed that the prison officials had some injuries in their hands.

A pendrive with CCTV footages of the yard was filed at folio 64.

Dr Mario Scerri testified on eighteen (18th) May of the year two thousand and eighteen (2018) who stated that he examined Joseph Feilazoo on the 13th April 2018 who alleged that on the 10th April whilst at the Immigration Police Office he was assaulted by members of the SRT. As a result of this alleged assault, he sustained bruises on the face which were a result of blunt trauma, haematoma on the left mastoid process behind the ear and being the result also of blunt trauma and he had some abrasions on the left forearm which were produced by handcuffs. There was a fracture on the left radial head which was caused by blunt trauma. This fracture is of a grievous nature per durata. Dr Scerri explained that he might have fallen and hit it or he might have been hit on it or in direct force applied to the forearm and the radial head was fractured.

The medicolegal report drawn up by Dr Mario Scerri was exhibieted at folio 69 et sequitur.

Dr Marisa Mifsud who testified on eighteenth (18th) of May of the year two thousand and eighteen (2018) presented a translation of the testimony of PS 435

⁸ The words used in this affidavit were 'jaghti bis-sieq'

David D'Amato, two affidavits of Dr Gabriel Borg, the affidavit of PS 39 Jean Paul Zahra and two current incident reports, one of which with a further update.

The **accused Joseph Feilazoo** testified on the second (2nd) of July of the year two thousand and eighteen (2018). He stated that on the 10th of April at 1:00 in the afternoon the prison authority called him and told him that Inspector Darren Buhaggiar wanted him in the Depot. He testified that they arrived after 1:00 and when he went inside the office he saw sergeant Major Mike Borg and the accused told them they he had been waiting for them because they came and spoke to him on the 1st April where they asked him what kind of document he has and when he was going to be released and he had told them on the tenth (10th) of April. During that time he was an inmate at the CCF. They went to talk to him and asked him what document he had in his possession so that he could be released on the 10th of April since he had served his prison sentence. He confirmed that he has a pending case. They took a copy of his document and let him know what was going to happen concerning his release. He told them that it is important for him to know before he serves the sentence to see whether he should look for an apartment in Malta.

He testified that they said that they will get back to him before he finishes the sentence. They asked him if he knew anybody in Malta and he said yes and gave them the name and telephone number of a person. Nobody went to see him or give him an answer but on the ninth (9th), the Social Worker called him and gave him an address where he was to stay in Malta. The Social Worker is Louise Sammut. He stated that '*She is working with this Sir Jack in the Social Worker office.*' On the tenth (10th) the police told him that he will be leaving from the prrison around seven o'clock in the evening. He told him that he has contacted the Spanish government and said that they do not want him. Then he asked who he contacted and said the Spanish embassy in Malta. The accused told him that the Spanish embassy in Malta is there for those who hold a Spanish passport. He explaiend that when he took him to the office, Inspector Buhaggiar told him that he had spoken to the Spanish embassy. He told him that he did not have any proof of document from the embassy

and replied no. He said that they told him that they were going to send him to Nigeria and he told him ok. The accused asked if he had a flight ticket and they said no. He confirmed that the inspector explained that he was going to be deported. He gave him the removal order and explained *'I tell him if he issued the remove order why ... in Malta if you have already the Court order? He said he can do whatever as he wishes. I tell him ok. After he issued the remove order, he sign it and give me the copy. Then I gave him the copy of the Court's sitting I have which will be in Malta and then he said that I have to go to detention centre.'*

He told him that he did not want to go there and if he wanted to deport him, he should deport him. He did not want to go to the detention centre because he finished his sentence and he entered the country with a valid document, European legal document. He is not an 'illegal' immigrant in Malta so he should not see why he wanted to send him to the detention centre. Sergeant Borg and one lady and an officer including sir Matthew Cilia were in the room. Sir Matthew Cilia was in the room standing when he was talking to him and Major Michael Borg. There were also two officers. They told him that he must go there and he told them that he is not going there as he not an illegal immigrant. Then the officer wanted to get involved and the accused told him *'the prison has nothing to do with this office, why you want to get involved?'* He says that he insisted and he can do what he wishes. He explained *'He tell me to go to the van and I refused and then one of them, Dennis Thornton went on my back and grabbed me from the back.'* He testified that Sir Matthew and Dennis Thornton started pushing him to go in the van. He refused and then Dennis Thornton grabbed him from the back and put him in the front and started hitting him and after they put pepper spray. When they put pepper spray on him, he could not see, he could not breath. He was shouting with a painful voice and during that incident he could not believe what is happening for that moment because everything seems strange for him. He explained that *'when they were kicking me, I was fighting, I couldn't breathe, I couldn't breathe. But one of them tried to ... mouth...'* He explained that one tried to cover his mouth when he was desperate for air. He does not know who it was. He explained that *'then I fear that my life is in danger in that moment because I couldn't*

breathe and was desperate for air from my mouth and one of them tried to cover my mouth. Mistakenly his finger came in my mouth and I closed my mouth. And after everything they put second pepper spray and ut in cuffs and put me in the van.' He confirmed that at one point one of the officers fingers ended up in your mmouth. This pepper spray was used twice. He explained *'First the pepper spray and kick me in the front and they on top of me and I couldn't move. One of them tried to cover my mouth.'* He could not breathe and could not see. Afterwards they put the second pepper spray, handcuffed him and *'threw'* him in the van. Then he passed out and did not know what is happening for that moment. When he woke up he was in the ambulance going to the hospital. He presented a medical certificate marked as Dok. JF1.

He testified that he knew Matthew Cilia and Dennis Thornton from prison. He had been escorted by Matthew Cilia before. They are SRT, prison officers. He testified that he had issues with them back in 2013 *'where I was in my - 2014 I was n my cell, I woke up early in the morning, I was in my cell and ... enter my cell and they wouldn't ... yelling to my face to give him my underwear.'* They were haressing him. On the 10th of April he was alone in the van that took him from CCF to Inspector Darren Buhagiar's office. He was accompanied by Sir Matthew aand Dennis.

He explained that when he was unconcious, they threw pepper spray and took him inside the van and they left. When he woke up he was in the ambulance, he does not know what happened. He states that *'this is a set up by the prison because it is well progammed because the authority'* Asked about an issue with Matthew Cilia and Dennis Thornton, he replied that Dennis Thornton was involved. He had filed a case against the authority because of the mistreatment, they are involved. One happened in 2010 and one in 2014. This is a Constittioonal Case and concerns these two officers. He said that in that case he brought an inmate who testified on his own behalf, then after the testimony they went back to prison, the authority put witness protection between him and the person who witnessed on his own behalf. They put witness protection between them. He confirmed that they were sent as escorts to the

office of the Inspector. He says that it is *'a set up because the officer who is contacting - Darren Buhagiar - he is the same officer who knew I have a case with them.'*

In cross-examination asked why he did not abide with their order he replied because he is not an 'illegal' immigrant in Malta. He came here with valid documents and they wanted to send him to the detention centre. He said that he was in prison for 10 years, if he knew that he would be deported, he had 10 years to look for all the necessary documents and when he tried to explain this to him, he was accused of threatening the police. He did not let him finish what he was saying. He complained that they had only sent someone to talk to him on 1st April. They had 10 days to get the necessary documents before deporting him. He did not seek asylum in Malta. He denied saying that he would hurt them if they touched him. He says *'it is a lie because they put pepper spray How can you bite somebody and then have time it doesn't make sense to me.'*

In examination in chief, asked what he did in order to resist, answered that he refused. They wanted to put him in handcuffs. He refused to put his hands together for them. They told him to go to the van and he told them that he is not going to the van. He confirmed that he refused by words.

Dr Frances Dalli Bajjada testified on the twenty sixth (26th) of July of the year two thousand and eighteen (2018) and stated that she knows the accused as an inmate at Corradino Correctional Facility and saw him as a patient there. She examined the accused on 12th April 2018 and on 17th April 2018. She came because the accused was complaining of severe low back pain and told him that he had some injuries which were four (4) scratches over his right wrist, bruising over the back of the left wrist, bruising around the right ear, bruising around the left ear, bruising over the left side of the face, abrasion over the left side of the neck and abrasions over the left posterior of the left shoulder and a swollen painful right arm. He also had a fracture of his left elbow which had been seen earlier. This was at Mater Dei where he was examined earlier. The witness examined the accused at Corradino Facility. She

testified that she does not know with what the injuries are compatible with, she is not an expert at what causes injuries. She prescribed pain killers to the accused and confirmed that the certificate was issued by him on 12th April 2018. She confirmed that she also examined the accused on the 17th of April, she explained that there is an entry and copies of X Ray results which he took. There is one of the CT brain which they did at Mater Dei and X Rays report of the elbow and lower back and shoulders. He does not recall if he examined him again after 17th April.

Correctional services medical report sheets and patient results were filed at folio 133 et sequitur and marked as Doc FDB1.

Lara Bartolo testified on thirteen (13th) November of the year two thousand and eighteen (2018) where she confirmed that she was in an ambulance with Joseph Feilazoo on 10th April 2018 at around 3:00 where she was called on an ambulance at the lockup in Valletta because there was a man that had query seizures. This was underneath the police headquarters in Floriana. She found the accused in a van and he was restrained because it was alleged that he was aggressive. He had handcuffs behind his back and was found lying down in the van. She does not remember clearly whether the legs were also restrained. He could not move. They found him alert, conscious, was responding and was answering all the questions she asked. He was never unresponsive with them. She examined him and saw that he was breathing, he was responsive, had good circulation and his glucose level was fine. He was obeying commands so he was in a full mental caapacity, in fron of her he never had a fit and was always alert. She does not recall what van it was. It was not an ambulance but a van, then they transported him on their stretcher and then in the ambulance. They took him to Mater Dei Hospital Emergency Department and she then gave over to her colleagues. En route he complained most about his hands which were both in handcuffs so he was complaining about his right hand and they loosened the handcuffs because they were hurting him but no other injuries, he did not mention anything. He did not mention pepper spray or about his breathing. Her

colleagues the porter and driver were on the ambulance. They are called the emergency response. Her two colleagues helped her handle him into the ambulance.

Raymond Grech testified on thirteenth (13th) of November of the year two thousand and eighteen (2018) in the Maltese language and stated that he is an ambulance driver. He recognised the accused present in Court. He explained that Depot had called and found a van of the detention where they found the accused in and told them to take him to hospital and also told them to be careful because he bites and spits. He did not do anything to them. They found him *'qisu jiccaqlaq, jaghti, sibnieh bil- manetti.'* He thinks that his legs were also tied but does not remember exactly. They found him in good health condition. They took out the stretcher and put him in the ambulance with the stretcher. He explained that *'beda jaghti ghax ma riedx jiccaqlaq, ma riedx johrog minn gol-van ghal go l- istretcher u minn hemm u minn hawn hrignieh u tlaqna Mater Dei.'* The witness drove to the Depot and from the Depot to hospital.

Jesmond Galea testified in the Maltese language on thirteenth (13th) of November of the year two thousand and eighteen (2018). He stated that he is a first responder. He recognised the accused in Court and with reference to 10th April 2018 stated that they were called from Depot that outside the lockup of the Depot, the accused was in the van. He was handcuffed in a van. When they arrived on the spot they were first told to be careful because he bites and spits. In his words *'Ghoqdu attenti ghax jigdem u jobzoq.'* He did not do anything of this sort to them. He does not recall that the legs were also tied. He was found on his stomach facing down in handcuffs with his hands tied on the back. They did not speak to him, the nurse checked if he is complaining of pain and he was complaining that the handcuffs were tight so they loosened them. He did not see any injuries and took him to hospital. From then on, it is the medical team of hospital which takes over.

PC 814 Gordon Stanmore testified in the Maltese language on thirteenth (13th) of November of the year two thousand and eighteen (2018). He explained that he is a

constable in the immigration office of Darren Buhagiar. He identified the accused in Court. He was on leave on 10th April 2018 so does not know anything about the case. However he knows that on 1st April they did an interview to the accused in prison for immigration purposes. He was with Major Michael Borg. They went to prison to see what the intention of Mr Feilazoo was after serving the sentence. It was the first and only time he met the accused. The department might have made contact before but he does not know. He asked about his intentions and spent ten minutes talking to him and the accused behaved well in his regard. The Nigerian passport and Spanish residence permit were both expired. He told him that he spent almost 10 years in prison. The passport was kept by whom records are taken care of and the residence permit was at his friend. This friend was spoken to by Inspector Darren Buhagiar while the witness was on leave. He said that he wants to go back to Spain but since he has pending cases in Malta he needs money to live. He confirmed that the accused wanted to go back to Spain and said that he has a son there. They wanted to see what his intention was in view that he is a third country national and can appeal the removal from the country. He does not know if there was a letter from ID Malta. If he decides to appeal the letter that ID Malta would have given him, they keep him at Hal Far Detention Services till the appeal is heard. He is not aware of an appeal but the accused said that he wants to leave. The procedure to leave Malta is for him to buy a ticket. If he does not have money, he explained that the Inspector would take care of them since he does not enter into certain decisions. He said that the case took place before 10th April being the date of release when he was not at work. Asked whether he checked if he could return to Spain, he replied that the Inspector takes care of that. He said that it could be that Spain refuse him. He said that he had told him that since he has a residence permit with Spain, they have to check with Spain, the Inspector checks with Spain whether it is ready to accept him back and extend documents. He told him that he would hear from them and then the Inspector had to take over. Asked about the procedure to go back to Nigeria, he replied that normally from Malta they make contact with Nigeria, they send them the copy of the passport and there is a documentation process which the Inspector takes care of. He is not involved in this. He does not know whether

someone made contact with the embassy of Nigeria. Notes of the interview were filed by the witness at folio 162 et sequitur and marked as GS1.

Considered;

That the facts, in brief are the following:

1. The accused was on 23rd February, 2010 convicted by the Criminal Court to twelve (12) years imprisonment and to a fine multa of fifty thousand euros (€50,000) converted into a further eighteen (18) months of imprisonment if the said fine is not paid according to law. The Court had also ordered the accused to pay the court experts' fees⁹;
2. The accused was on 1st April, 2018 spoken to by Major Michael Borg and PC 814 Gordon Stanmore and interviewed about his intentions after his release from prison. Since the accused wanted to go back to Spain, he was told that they would check whether he would be accepted by the Spanish authorities. The accused testified that he was never spoken back and this was not contested;
3. The accused was released from Cordin Correctional Facility on 10th April, 2018 and was escorted to the Immigration office of Inspector Darren Buhagiar at the Police head quarters by SRT Dennis Thornton CO165 and SRT Matthew Cilia CO177;
4. The accused was informed that he could not return to Spain since the Spain authorities would not accept him back. A removal order was issued and the accused was informed that he would have to be sent to Nigeria but would in the meantime be kept at the detention centre;

⁹ A copy of the judgment is found at folio 31 et sequitur and marked as AM3.

5. It results that the accused objected to all this. It is alleged that he became aggressive and resisted to be handcuffed and to get into the van of the detention services. As a result, it is alleged that the two (2) correctional officers suffered bodily harm;

6. In view of the alleged resistance and aggressiveness, pepper spray was also used upon the accused. Correctional Officers and police officers managed to handcuff the accused while PS 435 David D'Amato tied the legs of the accused with tie-clips, the accused was subsequently taken into the detention services van;

7. An ambulance was called and took the accused to Mater Dei Hospital in view that the accused complained that he could not breathe properly and alleged that he had pain in his heart;

8. Medical reports¹⁰ filed in the acts provide that the accused had a number of injuries, including a grievous injury *per durata*¹¹;

9. Charges were issued against the accused as per charge.

The aggravation suffered by the accused according to the appeal application consists in the fact that on the basis of all the evidence produced before the court as well as on the basis of the circumstances of the case as unfolded, the Court of Magistrates (Malta) as a Court of Criminal Judicature ought only to have found the appellant guilty of the fourth (4th) charge which was proffered against him and therefore ought to have only applied the corresponding punishment under article 338(ee) of the Criminal Code and ought to have acquitted him from all the remaining charges.

¹⁰ Report of Dr Mario Scerri at folio 69 et sequitur and documents filed by Dr Frances Dalli Badjadi and marked as Doc FDB1 at folio 133 et sequitur;

¹¹ According to the report of Dr Mario Scerri at folio 69 et sequitur;

This therefore means that the appellant is not appealing from guilt of the fourth (4th) charge which reads '*disobeyed the lawful orders of Insp. Darren Buhagiar, CO165 Dennis Thornton and CO177 Matthew Cilia, any authority or of any person entrusted with a public service, or hinders or obstructs such person in the exercise of his duties, or otherwise unduly interferes with the exercise of such duties, either by preventing other persons from doing what they are lawfully enjoined or allowed to do, or frustrating or undoing what has been lawfully done by other persons, or in any other manner whatsoever and this in breach of Article 338(ee) of Chapter 9 of the Laws of Malta;*'.

The appellant is however appealing from guilt of the remaining charges.

The appellant's appeal is mainly based on an appreciation of facts brought before the First Court. 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 reach the conclusion it did. In the judgment in the names **'The Police (Supt. Pio Pisani) vs. David Rigglesford'**¹², 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 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'***

¹² Decided by the Court of Criminal Appeal on 31st May 2007 (Criminal Appeal number: 6/2007)

*Malta vs. George Azzopardi*¹³; *“Il-Pulizija vs. Carmel sive Chalmer Pace”*¹⁴; *“Il-Pulizija vs. Anthony Zammit”*¹⁵ and others.)

This Court also refers to what was held by LORD CHIEF JUSTICE WIDGERY in *“R. v. Cooper”*¹⁶ (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.”*¹⁷

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

In Criminal Appeal : *“Ir-Republika ta’ Malta vs. Ivan Gatt”*, decided on the 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

¹³ Decided on the 14th February, 1989

¹⁴ Decided on the 31st May, 1991

¹⁵ Decided on the 31st May 1991

¹⁶ ([1969] 1 QB 276)

¹⁷ (Confer also : BLACKSTONE’S CRIMINAL PRACTICE (1991) , p. 1392)

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'**¹⁸ are found in the footnotes)

The appellant submitted that the First Court made an attempt to chastise the Immigration Authorities for the horrendous manner in which they treated the appellant in spite of the fact that he had been incarcerated at the Corradino Correctional Facility for the past ten (10) years, only seemingly taking an interest in his case just days prior to what was meant to have been his effective release from incarceration, yet this was just an attempt at lip service because the Court gave no real consideration to the effect such conduct had upon the mental state of the accused. The appellant submits that the conduct of the Police vis-a-vis the appellant was such as to cause temporary insanity in the mind of the accused whilst in the office of Inspector Darren Buhagiar, leading him to outrightly declare that he would not spend another single day in deprivation of his liberty and thereby to expose himself to the charge of having refused to obey the 'legitimate' orders of Inspector Darren Buhagiar. The appellant submits that this mental state of temporary insanity on the part of the appellant suffices to exonerate him from all criminal responsibility even though in his appeal, in view of the legal maxim *ignorantia legis neminem excusat* the appellant declared that he is prepared to concede that he did in fact disobey a legitimate order of Inspector Buhagiar who having declared him to be an illegal immigrant as so entitled to do so by law, had every right in *stricto juris* to order his detention.

¹⁸ Decided by the Court of Criminal Appeal on 31st May 2007 (Criminal Appeal number: 6/2007)

Considered;

The Court will first consider this first part of this ground of appeal regarding '*temporary insanity*' which the appellant submits in his appeal. What the appellant from his appeal seems to be implying is that the fact that he had been incarcerated for ten (10) years and faced with an order to be sent to the detention centre instead of regaining total freedom after years of incarceration, caused in the mind of the appellant temporary insanity since he did not want to spend another day in deprivation of his liberty. In fact, it results that even though the appellant had served his sentence, he was escorted to the immigration office at the Police Head Quarters upon his release. The appellant submits that his mental state of temporary insanity on his part suffices to exonerate him from all criminal responsibility.

The Court starts by making it clear that there is no concept of 'temporary insanity' under Maltese law. A person is in the eyes of the law either sane or insane. He either has the *intendere e volere* or does not.

It appears that while the Court¹⁹ had appointed Dr Mario Scerri to examine the accused and document his injuries, the appellant at no point in the proceedings before the First Court requested the appointment of a psychiatrist in order to examine his mental state and to determine whether the appellant at the time of the alleged offence had the mental capacity in terms of the law to commit the alleged offences and therefore whether he is answerable to the charges brought against him.

The Court makes reference to the case in the names '**Il-Pulizija (Spt. Saviour Baldacchino) -vs- Ahmed Ali, li hu identifikat bin-numru MM 96/2002**'²⁰ where the Court considered:

¹⁹ Presided by Magistrate Dr. Yana Micallef Stafrace on 12th April, 2018

²⁰ Decided by the Court of Magistrates as a Court of Criminal Judicature on 9th March, 2016 (Case number: 692/2013)

'Dak li trid tiddetermina issa din il-Qorti in vista tax-xhieda taz-zewg psikjatri hu jekk l-kundizzjoni li hu aflitt biha l-imputat twassalx sabiex l- imputat jitqies li kien fi stat ta' genn fit-termini tal-ligi?

*Din il-Qorti ser taghmel riferenza ghas-sentenza studjata moghtija fil-kaz **Il- Pulizija vs. Fortun Farrugia**:²¹*

"Illi l-artikolu 33(a) tal-Kapitolu 9 ta' l-Ligijiet ta' Malta jghid testwalment: "Kull persuna tkun ezenti minn responsabbilta' kriminali jekk fil-waqt tal-att jew tan-nuqqas kienet fi stat ta' genn."

*Illi esposizzjoni eccellenti tal-ligi in tema ta' demenza ghall-finijiet ta' l-Artikolu 33(a) tal-Kodici Kriminali saret f'sentenza moghtija mill-Qorti tal-Appell Kriminali (Sede Superjuri) fl-4 ta' Marzu 2010 fis-sentenza **Ir-Repubblika ta' Malta vs Anthony Schembri** fejn saret referenza ghal dak li qalet il-Qorti tal-Appell (diversament komposta) fis-sentenza taghha **Ir-Repubblika ta' Malta v. David Norbert Schembri** tal- 25 ta' Settembru 2008:*

*"Kif inhu risaput, l-espressjoni "stat ta' genn" fil-paragrafu (a) ta' l-Artikolu 33 tal-Kodici Kriminali ghandha sinjifikat legali li mhux necessarjament jattalja ruhu ma' dak li fil-medicina jew fil-psikjatrija jitqies bhala "genn". Kif jispjegaw l-awturi Jones u Christie fil-ktieb taghhom *Criminal Law*: "It is important to emphasise at the outset that insanity is a purely legal concept. It is not a clinical term derived from psychiatry or psychology. Insanity is not synonymous with any medical conception of mental disorder."*

"Fi kliem iehor, persuna tista' tkun marida mentalment fil-mument li tkun ghamlet l-att ta' kommissjoni jew ommissjoni li jammonta ghall-element materjali tar-reat, izda dan ma jfissirx necessarjament li dik il-persuna kienet fi "stat ta' genn" ghall-

²¹ Qorti tal-Magistrati (Ghawdex) bhala Qorti ta' Gudikatura Kriminali, [27.02.2014]; kif ukoll Il-Pulzija vs. Mario Said [28.04.2011] (This reference is found in the fourth (4th) footnote of the cited judgment)

finijiet ta' l-imsemmi Artikolu 33(a), cioe` tali li tkun ezenti minn responsabbilta` kriminali. Biex ikun hemm l-istat ta' genn li jezenta mir-responsabbilta` kriminali jrid jirrizulta inqar fuq bazi ta' probabbilita`, meta d- demenza tkun giet eccepita mill-akkuzat jew imputat u allura l-piz ikun fuqu biex jipprova l-fatt, li l-akkuzat jew imputat kien qed ibati minn marda tal-mohh li minhabba fiha, fil-mument ta' l-att ta' kommissjoni jew ommissjoni, huwa kien priv (i) jew mill-kapacita` li jifhem in-natura u l-kwalita` ta' dak l-att li qed jaghmel, jew (ii) mill-kapacita` li jifhem li dak li qed jaghmel hu hazin, jew (iii) mill-kapacita` li jaghzel jekk jaghmilx jew le dak l-att. Marda tal-mohh - disease of the mind bl- Ingliz - mhux necesarjament tkun patologija lokalizzata fil-mohh - in the brain. Kif jispjega Lord Diplock fil - kaz ta' Sullivan [1984] AC 156, u b'referenza ghall-M'Naghten Rules - regoli, li wiehed m'ghandux jinsa, jirreferu biss ghall-kapacita` di intendere, mentri l-ligi taghna tikkunsidra wkoll jekk kienx hemm il-kapacita` di volere: -

“The nomenclature adopted by the medical profession may change from time to time...But the meaning of the expression ‘disease of the mind’ as the cause of ‘a defect of reason’ remains unchanged for the purpose of the application of the M'Naghten rules...‘mind’ in the M'Naghten rules is used in the ordinary sense of the mental faculties of reason, memory and understanding. If the effect of a disease is to impair these faculties so severely as to have either of the consequences referred to in the latter part of the rule , it matters not whether the aetiology of the impairment is organic, as in epilepsy, or functional, or whether the impairment itself is permanent or is transient and intermittent, provided that it subsisted at the time of commission of the act.’

“U kif spjegat aktar fi Blackstone’s Criminal Practice 2008: “It can also be seen that to a large extent, whether something is a disease of the mind depends on the consequences it produces - impairment of the faculties of reason, memory and understanding. The disease certainly need not be one primarily located in the brain if it produces the relevant consequences there. Thus arteriosclerosis (hardening of the arteries) causing temporary loss of consciousness is a disease of the mind for these purposes even though it is of physical rather than mental origin...However not every

cause of an impairment of these mental faculties is a disease of the mind. A disease is something internal to the accused and so: 'A malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences cannot fairly be said to be due to disease' (per Lawton LJ in Quick QB 910 at p. 922, emphasis added).'.....

"Biex din il-Qorti tikkonkludi fuq dan l-aspett ser tikkwota minn dak li wiehed isib fl-appunti tal- Professur Sir Anthony Mamo:

"The question [of insanity], when it arises, is one of fact: it has, that is to say, to be decided whether the defendant had a mental disease and, if so, whether it was of such a character and degree as to take away the capacity to know the nature of his act or to help doing it.'"

*Ghallhekk din il-Qorti ghandha il-kompitu tistharreg jekk l-imputat fil-hin ta'l-kummissjoni tar-reat kienx inkapaci "**di intendere e di volere**" u dana abbazi ta' dak li jikkonkludi l-espert psikjatriku u anke fid-dawl tal-provi mismugha f'dina il-kawza, senjatament lill-Psikjatra Spiteri kif ukoll dak li din il-Qorti stess kellha l-opportunita` tesperjenza ghall-darba, darbtejn.'*

As considered in the case in the names '**The Police Police Inspector Ivan Portelli Police Inspector Sandro Zarb V MOHAMMED MAKHLOUF**'²²:

'In Malta, we have no legal definition of such insanity but the mental attitudes which exempt a criminal offender from punishment is contained in section 33, which also deals with intoxication.

Our criminal code distinguishes between insanity at the time of the commission of the crime and insanity at the time of trial.

Insanity at the time of commission of the crime not only excludes any punishment but it also

²² Decided by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 22nd January 2001

excludes any guilt in the agent. In this connection in fact **Falzon** in his book **Annotazione alle Leggi Criminali** under the pseudonym of **Un Giovane Avvocato Maltese** - page 219 says

"che la clemenza o il furore, come pure la forza, contemplato nei degli articoli sono cause di giustificazione del reato, ed hanno per effetto non già d'attenuarlo ma di fatto sparire del tutto o di escludere ogni reità nell'agente, la dichiarazione del Jury nei detti casi dev'essere di non reità dell'accusato".

Thus the law looks upon the offender who was insane at the time of the commission of the offence as if he had never violated the

relative proviso of the Penal Code, the reason being that the formal element of crime is absent in the insane offender.

The intellect and the free will are the two supporting pillars on which the edifice of criminal responsibility rests. If one of these pillars crumbles down, the whole edifice will follow suit.'

The Court as presided in the same case²³ also considered:

*'The court feels that it should make reference to the address of Judge Vincent Degaetano to the jurors in the case **The Republic of Malta v Charles Degiorgio** (Bill of indictment No 17/94). He states that although our law does not define the term insanity, it means that the state of mind which results from a sick mind - a disease of the mind, which has as its nature and grade the faculty of depriving the accused individual either from the capacity of recognizing and knowing the nature and quality of his act **or** of depriving him of the capacity to know whether the act is wrong or not; in other words depriving him of his freedom of choice - la capacita di intendere e volere. In his opinion it is not necessary that both elements are absent at the same time. It is enough if one element of the above is lacking. It is not even necessary according to our law to know what type of illness was the accused suffering from at*

²³ In the names **'The Police Police Inspector Ivan Portelli Police Inspector Sandro Zarb V MOHAMMED MAKHLOUF'** decided by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 22nd January 2001

the moment of the commission of the act, in other words whether he had a break down, sub normality, abnormality, paranoia, psychosis or feeble mildness. Irrespective of the nomenclature, what is necessary is the effect of such illness, in other words the effect to render one of the above- mentioned elements missing.

For example in the case **Police v Karmenu Bugeja**, decided by the Court of Criminal Appeal on the 13th January, 1947, it was held that delusions, or false perceptions of the accused did not leave him in control of himself in such a way as to be able to perceive the falsity of the perception and correct them, but they made him lose the power of cognition which amounts to the loss of the sense of proper individuality - perception that became like a psychic ferment that brings about the disintegration of personality - so the plea of insanity was upheld.

Thus our law lays down no a priori test in respect of insanity. Every case is treated by itself and section 33 comprises all terms of insanity and thus this system is more advantageous than the system of classification of the various forms of mental classes as cited in the **Digestivo Italiano** - Vol XII - parte seconda, pagina 229 -

"Evidentemente il sistema che offre maggiori inconvenienti, e' quella che procede all'enumerazione delle varie forme d'alienazione mentale " and this because " gli aspetti che puo assumere la pazzia, sono tanti e cosi vari che difficile riesce una precisa e completa loro classificazione".

Manzini in his book **Trattato di Diritto Penale** - Vol II, pagina 92 "- defines insanity as

'una forma clinica d'infermita mentale e non ad una mera stato passionale.'

It results from a close look at a journal named **The International Journal of Law and Psychiatry**, in particular to the paper named "**The Reformulated Defense of Insanity in the Australian Criminal Code** - Act 1955 - Bernardette McSherry - that the term insanity as based on the McNaughton Rules, has been replaced in their code with the following section 7:3(1). It states:

"A person is not criminally responsible for an offence if at the time when he or she carried out the conduct constituting the offence, he or she was suffering from a mental impairment that

had the effect that:

a. The person did not know the nature or quality of his or her conduct;

b. He or she did not know that his or her conduct was wrong (that is the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people was wrong) or

c. The person was unable to control his or her conduct. In the light of the above, this seems to be an appropriate classification to the definition of insanity mentioned in our code."

Now coming back to the facts of this case the Court surprisingly was not faced with a plea of insanity from the defense but felt that it should investigate the matter itself ex officio after hearing the psychiatrist.'

In the case under examination, the Court is of the opinion that the fact that after that the appellant was incarcerated for a significant number of years, faced with the news that he was not about to regain total freedom but was going to be kept at the Detention Centre before being sent to Nigeria no doubt caused a high amount of stress and tension, especially considering that such information was given to him after he had served his sentence. However it was not in any manner proven before the Court that the accused at the time of the offence did not have the legal capacity to commit the offences.

The Court also makes reference to the testimony of Lara Bartolo who testified on thirteenth (13th) of November of the year two thousand and eighteen (2018) who was part of the ambulance team, who stated that '*We found him alert, conscious, he was responding, he was answering all the questions I asked, he was never unresponsive with us.'* She explained '*Examined him and the assessments, we saw that he was breathing, first of all he was responsive, that he was breathing, had good circulation and his glucose level was fine, he was obeying commands, so he was in a full mental capacity, in front of me he never had a fit, he was like I said always alert.'*

The Court therefore rejects the appellant's submission that he was under '*temporary insanity*' not only since this is not part of the Maltese legal system but also since there is no evidence which confirms that he lacked the mental capacity at the time that the alleged offences took place. The Court is convinced that the appellant had both the intellect as well as free will at the time of the offence.

Considered;

That the appellant submitted that once he completed his term of incarceration as was imposed upon him by the Criminal Court, the appellant was fully entitled to regain his liberty and was to have been immediately released from detention. He submits that correctional officers CO165 Dennis Thornton and CO177 Matthew Cilia no longer had any legitimate jurisdiction or authority to exercise over him and the actions of these correctional officers in forcibly escorting the appellant to the office of Inspector Darren Buhagiar at the Police General Headquarters in Floriana amounted to unlawful arrest even since the appellant had up to that time not been declared to be an illegal immigrant and had not been served with any removal order by the competent authority. Furthermore, the Correctional Officers concerned had no authority to give any orders to the appellant within Inspector Buhagiar's office even though the appellant submits that no such orders were given to him by them, if at all orders were only given to the Correctional Officers by Inspector Buhagiar. He submits that they are Correctional Officers, not members of the Police Force and they exercise their authority over inmates only within the confines of the Corradino Correctional Facility.

Inspector Darren Buhagiar who testified on nineteenth (19th) of April of the year two thousand and eighteen (2018) explained that '*as soon as I told him that he was going to end up in detention he started getting aggressive, being angry, he could not accept the fact that he is going to be detained again because he told me that he did ten (10) years in prison and he was getting frustrated about that and when I saw that he was not listening to my instructions that he was not abiding by them there were two (2) officers from the Corradino Facilities two (2) SRT Officials and I spoke with one of them and I told*

him that we need to do something there. And then I gave him the last instruction, I told him he needs to comply with the instructions for his sake and he didn't comply, he kept on insisting that I will not do one day in detention, I did ten (10) years in prison, that's what he said and he told me as well that if you send me to Nigeria with escorts they will go to Nigeria but they will not come back to Malta. Then the SRT Officials approached him both of them and told him to get out from the office to get inside the van, the detention van. He did not want to, he kept resisting the arrest and then they ended up in a scuffle. The two (2) officers tried to restrain him, they ended up on the floor at some point, they tried to cuff him, initially they couldn't cuff him because he kept resisting and he is a strong person and they were had to use other means of restraint, they had to use the pepper spray as well and in the end they cuffed him, they managed to cuff him.' (Emphasis and underlining added by this Court)

Inspector Darren Buhagiar also explained that 'There were other persons at the time present in the office as well, they were members of my office as well, they were members of my office as well WPC 138 Alexia Grech, SM Michael Borg, there were also persons from other offices from the Immigration who also tried to give a hand as well during the hand cuffing procedure and then they managed to get him out from the office hand cuffed and he was put inside the van....'

CO 177 Matthew Cilia who testified on nineteenth (19th) of April of the year two thousand and eighteen (2018) explained that he together with CO 165 Dennis Thornton were ordered to escort to CID to assist before Inspector Buhagiar. In his words 'fl- ghaxra (10) ta' April elfejn u tmintax (2018) ghall- habta tas-siegħa u kwart (1:15) kont overtime mit- tmienja (8:00) sal- hamsa (5:00), break duty kelli ordni biex jiena u CO 165 Dennis Thorton immorru skorta s-CID biex nassistu ahna quddiem l-Ispettur Derrin Buhagiar għad- deportation...'. (Emphasis and underlining added by this Court)

He explained that what his involvement was, stating 'X' hin missejtu qalli : Tmissnix ghax inweggikom. Min hemm Dennis Thorton qallu : Ejja ha nimxu u huwa refa' jdejh, x'hin refa' jdejh intlaqat ta' hlajt il- leminija u ntlqat Dennis Thorton, spiccajna ma l-art

biex ahna nkunu nistghu nimmanettjawh u wzajna certu forza minimu f' dan l-ufficju li kien hemm l- Ispettur Derrin Buhagiar. Huwa sakemm qeghdin nirrestrenjawh dan kien difficli ghalina biex ahna nimmanettjawh minhabba hli huwa fih persuna, fih tifel huwa. X'hin tajtu l- verbal warning li ahna ha nuzaw il- gass ghal tliet darbiet huwa baqa' jinsisti u wkoll x'hin jiena kont qed nirristrenjah gidimli l- parti t' idi li hija l- leminija...'

The other Correctional Officer CO 165 Dennis Thornton who also testified on nineteenth (19th) of April of the year two thousand and eighteen (2018) explained that '*Fl-ghaxra (10) ta' April mort b'Frilazoo s-CID yard ghand l- Ispettur Derrin Buhagiar, wasalna fuq il- post u dahhalnieh go l- ufficju u hrigt barra fejn il- van jiena. Wara ftit hin qisu kwarta gie s-sur Buhagiar qalli : Ghandna bzonn l- assistenza taghkom, qalli : ghax dan qed jirrifjuta li jmur id-detention, qalli : gej bil-paroli. Ghidtlu : All right. Jiena dhalt gewwa ghax siehbi kien gewwa diga, gie s-sur Frilazo u l- Ispettur rega beda jfehmu li jrid imur li jrid imur u biex jifirma xi haga ta' l-appell imbaghad jiddeciedu minn hemm, qallu : Id-detention jiena mhux ha mmur, qallu : ghal l- ebda raguni. Morna jiena u siehbi CO 177 ippruvajna nkellmuh bil- kelma t-tajba, kif missejnielu jdejh hekk ghollha jdejh u hadni hawn u qabad jirrezisti...'* CO 165 Dennis Thornton continued explaining what took place. From his testimony, it results that after CO 165 Dennis Thornton and CO 177 Matthew Cilia escorted the accused from the Correctional Facility of Cordin to the Immigration Office CID, while CO177 Matthew Cilia was in the office of Inspector Darren Buhagiar, CO 165 Dennis Thornton was present. It was after this Inspector informed CO 165 Dennis Thornton that the accused was not cooperating that CO 165 Dennis Thornton took action. The appellant contends that CO 165 Dennis Thornton and CO 177 Matthew Cilia no longer had any legitimate jurisdiction or authority to exercise over him and that their actions amounted to unlawful arrest.

In order to consider whether the Correctional Officers had any right to exercise authority over the appellant, the Court will be making reference to pertinent provisions of the Prisons Act, Chapter 260 of the Laws of Malta. In this Act, "prison"

is defined as '*the Corradino Prison and includes any other place or building declared or deemed to be a prison under the provisions of article 3;*'

This Act defines "prisoner" as "*any person who is confined in any prison;*" while "*prisons officer*" is defined as "*any public officer of whatever grade or category, who is appointed or seconded to serve in the Department of Correctional Services and includes the Director.*"

Article 11 of Chapter 260 of the Laws of Malta provides that:

'(1) Prisons officers shall carry out such duties as may be assigned to them by regulations made under this Act or by any direction of the Minister.

(2) In the performance of their duties within a prison and when on escort duties with prisoners outside the prisons, prisons officers shall be vested with all such functions, powers and duties as are by law vested in an officer of the Malta Police Force.' (Emphasis and underlining added by this Court)

Article 11(2) of Chapter 260 of the Laws of Malta means that prison officers are to perform their duties either within a prison or when on escort duties with '*prisoners*' outside the prisons. Their functions, powers and duties are by law those vested in an officer of the Malta Police Force. From the acts, it results that the appellant had been discharged from the Cordin Correctional Facility and he was therefore not at Corradino Prison. The Court must therefore refer to **article 3(3) of Chapter 260** of the Laws of Malta to determine when a prisoner is deemed to be confined in a prison. This subarticle provides that:

'A prisoner shall be deemed to be confined in a prison while he is being moved to or from a prison or from one prison to another or while he is under treatment or observation in any hospital.' (Underlining added by the Court).

Article 4(2) of Chapter 260 of the Laws of Malta then provides that it shall be lawful to confine in a prison:

'(d) Any person detained in custody under the provisions of the Immigration Act, other than under article 10 or 22 thereof;'

Article 10 of Chapter 217 of the Laws of Malta, the Immigration Act refers to temporary detention while article 22 of the same Act refers to deportation orders. This means that since the appellant was first being transported from the Cordin Correctional Facility to the Depot and once declared an illegal immigrant at the Depot was being ordered to get into the detention services van in order to be transported to the detention centre, this is tantamount to a person detained in custody which in terms of article 4(2) of Chapter 260 of the Laws of Malta is considered as lawful to confine in a prison. The Court is of the opinion that since the intervention of the Correctional Officers was carried out after the Inspector informed the appellant about the removal order and was therefore considered as an illegal immigrant, the Correctional Officers where at the moment vested with all functions, powers and duties as are by law vested in an officer of the Malta Police Force.

Furthermore, this Court also considers that it also results that while CO 177 Matthew Cilia was in the office together with Inspector Darren Buhagiar, CO 165 Dennis Thornton states that Inspector Buhagiar told him that their assistance was needed. Inspector Darren Buhagiar in his testimony while not mentioning which of the two officers was in the office, stated that *'there were two (2) officers from the Corradino Facilities (2) SRT Officials and I spoke with one of them and I told him that we need to do something there.'*

This Court therefore considers that the submission of the appellant that the Correctional Officers *'themselves who found the opportunity of having another go at a former inmate by exercising what can be described as excessive violence over his person in an attempt to compel him to submit to Inspector Buhagiar's orders.'* is unfounded. From the evidence produced, it results that the Correctional Officers were initially ordered to escort the accused to the office of Inspector Buhagiar and only intervened in view of

a Superior's order, in the sense that as CO165 Dennis Thornton, Inspector Darren Buhagiar informed CO165 Dennis Thornton that help was needed. It in no manner results that the Correctional Officers were hindered or informed by the Inspector to desist from intervening, but on the contrary it results that their actions were a result of the appellant's non adherence to the instructions of the Inspector and that their intervention was in the presence of the Inspector himself. The Court therefore rejects the appellant's claim that the Correctional Officers had no authority to give any orders to the appellant within Inspector Buhagiar's office, not only because the order for the appellant to go in the detention services van was given by the Inspector himself but also since the actions of the Correctional Officers were in adherence to the Inspector's orders to the appellant.

Considers;

The appellant submits that the First Court also failed to appreciate that the appellant did not assault or commit any acts of violence whatsoever in regard to Inspector Darren Buhagiar himself or in regard to any other Police Officer, even though it was the very inspector Buhagiar and not the aforementioned Correctional Officers who had just declared the appellant to be an illegal immigrant and who had ordered his detention. According to the appellant the importance of this in evaluating the evidence of the case cannot be underestimated because it clearly lends credibility to the contention of the appellant that he did not adopt any violent stance, whatsoever, but on the contrary it was the Correctional Officers themselves who found the opportunity *'of having another go at a former inmate by exercising what can at best be described as excessive violence over his person in an attempt to compel him to submit to Inspector Buhagiar's orders.'*

This Court considers that from the evidence produced, even though as testified by Inspector Darren Buhagiar, when the appellant was informed that he will end up in detention *'he started getting aggressive, being angry'*, it does not result that the appellant assaulted Inspector Darren Buhagiar but it is alleged that he was violent towards the Correctional Officers. It is alleged that while CO 177 Matthew Cilia was

bitten in his right hand, Dennis Thornton CO 165 was hit in his face, in the words of Dennis Thornton '*Hadni taht ghajnejja*'. It does not appear that the Inspector was in any way violent towards Inspector Darren Buhagiar. In fact charges issued against the accused do not include any allegations of violence in relation to the Inspector but to CO 165 Dennis Thornton and CO 177 Matthew Cilia. The Court does not agree with the appellant that the fact that it is being alleged that he was violent towards the Correctional officers but not against the Inspector, in one way or another confirms the credibility of the appellant's allegation that in his words they wanted to have '*another go at a former inmate*'.

The Current Incident Report filed at folio 11 et sequitur provides that '*Meta l-membri tal-SRT missewh biex juruh li hemm bzonn jitla fil-vann dan qabad ixxejjer idejh fejn laqat lil SRT Dennis Thornton that ghajnejh il-leminjia. Wara li gara hekk il-membri tal-SRT qabduh u spickaw mal-art jissiltu mieghu biex jippruvaw jimmanetjawh fejn Joseph baqa jirrezisti u waqt li qieghdin jaghmlu dan Joseph gidem id il-leminjia lil SRT Matthew Cilia b'konsegwenza li meta raw hekk intuza il-pepper spray biex ikunu jistghu jikkontrollaw lil din il-persuna.*' This is translated to '*When the SRT members touched him to show him that he was required to get into the van, he started to resist and ended up hitting SRT Dennis Thornton under his right eye. After such happened, the SRT members caught him and ended up on the floor trying to handcuff him whereby Joseph went on resisting them and while doing so Joseph bit srt matthew Cilia's right arm, and as a consequence of which pepper spray was used in order to control this person.*'²⁴

PS 435 David D'Amato who testified on 3rd May of the year 2018) stated '*Dak il-hin jiena hragt naqra fil- bieb u bdejt nisma hafna storbu gej minn naha ta' l- ufficcju tas-sur Darren Buhagiar. Jiena mort nittawwal u x' hin dhalt l- ufficcju tas-sur Darren Buhagiar sibt persuna mixhuta ma l- art wiccha l- isfel u zewg (2) membri ta' l- SRT gharkuptejhom ma l-art, kif stajt nifhem dak il-hinn qed jippruvaw jimmanitjaw lil din il- persuna li jiena qieghed naghraf fl- Awla. Dak il- hin xammejt ukoll il- pepper spray u ndunajt li ntuza l- pepper spray ghax xorta bdejt naqta nifsi u waqt din il-kommosjoni li kien hemm ghadejja*

²⁴ According to the report at folio 94.

stajt ninnota li dan kien qed jippruvaw jimmanitjawh minn wara. Jien dak il- hin dan kien aggressiv, beda jxejjer saqajh, beda jxejjer idejh u dan il- hin tlabt biex jaghtuni t-Tie-clips, dak il- hin iddecidejt illi nimmanittjah minn saqajh.' When asked whether there was other violence apart from moving his legs and hands, he answered that he was looking at him from above, he was seeing him shaking his hands refusing to be handcuffed. He decided to tie him from the legs to reduce his aggression. Inspector Darren Buhagiar in his testimony, although stating that he was informed that the accused bit the hands of two of the SRT officers since they were directed to the health Centre to do a certificate, he did not see him biting '*because during the scuffle I couldn't see exactly what was happening.*' The Court through the evidence produced understood that not both Correctional Officers were bitten, but that CO177 Matthew Cilia was bitten while Dennis Thornton was hit in his face, in the words of Dennis Thornton '*Hadni taht ghajnejja*'.

WPC 138 A. Grech in her affidavit declared that the accused kept on resisting and was aggressive and pepper spray had to be used. The accused testified on the second (2nd) of July of the year two thousand and eighteen (2018) where he stated that '*Dennis Thornton. Grabbed me from the back and put me in the front. And he start hitting me. ... then after they put pepper spray. When they put pepper spray on me, I couldn't see, I couldn't breathe. I was shouting with painful voice and during that incident - I cannot say - I couldn't believe what is happening for that moment because everything seems strange for me. And when they were kicking me I was fighting, I couldn't breathe, I couldn't breathe. But one of them tried to . . . mouth . . .*' He stated that '*I couldn't breathe and one of them tried to cover my mouth when I was desperate for air.*' He explained '*And then I fear that my life is in danger in that moment because I couldn't breath and was desperate for air from my mouth and one of them tried to cover my mouth. Mistakenly his finger came in my mouth and I closed my mouth. And after everything they put second pepper spray and put in cuffs and put me in the van.*' He confirmed that one of the officer's fingers ended up in his mouth. He gives the impression that this took place after the first time pepper spray was used. The Court finds it hard to believe that the appellant mistakengly bit one of

the officer's fingers. He gives the impression that the actions of the Correctional Officers were a result of previous issues with these two prison officers such that there are pending procedures in which they are involved. The Court does not agree that the aggression was a result of the pepper spray used or that the appellant was acting aggressively in self defence since it results that pepper spray was used after. This was also confirmed in WPC 138 A. Grech's affidavit who declared that '*Feilazoo baqa jirrezisti u l-ufficjali tal-habs uzaw forza minima sabiex Feilazoo jigi mmantetjat izda Feilazoo baqa jirrezisti u kif ukoll gidem lil ufficjali tal-habs. Wara ftit minuti smajt l-ufficjali tal-habs jaghtu twissija lil Feilazoo sabiex jieqaf jirrezisti ghax kien ser jintuza l-pepper spray. Feilazoo baqa jirrezisti u jkun aggressiv u ghaldaqstant dan inghata l-pepper spray. Wara ftit minuti u bl-ghajjnuna ta Pulizija ohra li sa dak il-hin gew l-ufficju, minhabba l-komossjoni, Joseph Feilazoo gie immanetjat u gie eskortat gewwa l-vann ta detenzjoni.*' S.M. 739 M. Borg in his affidavit declared that the SRTs complained that they had suffered some injuries in their hands and went to the Floriana Health Centre.

Considers;

The appellant makes reference to where the First Court in the appealed decision considered that:

'To get an impression of the level of his aggressiveness, suffice to refer to the CCTV footage taken from the cameras inside the CID yard at 13.56.54hrs and 13.57hrs wherein after the accused was escorted out of the office and placed in the detention van, the detention van is seen swaying from one side to another. He was still being aggressive notwithstanding he had just been placed in the van. This does not given an indication of a "mere verbal resistance".

The appellant in this regard submits that very conveniently no CCTV footage is available to show what really happened inside Inspector Buhagiar's office. He submits that it is extremely worrying to see a court of Justice make such observations in regard to the appellant who had just been physically manhandled by the aforementioned correctional Officers, fell down to the floor, administered pepper

spray to his face, handcuffed and bundled out and into the detention van. According to the appellant, inside that van the appellant was not being aggressive but was gasping for his breath fighting for his life.

This Court has viewed the CCTV footages of the CID yard exhibited by the prosecution. The footages only show the yard through different angles, and where at a particular moment a number of persons are seen going towards the detention services van which the Court is assuming the accused was put in. While from the footage it results that the van is seen shaking, the Court cannot base guilt upon this footage alone since the alleged offences took place in the Inspector's office and not in the yard. The footage alone is not sufficient to confirm the level of aggressiveness on the part of the accused. Furthermore, pepper spray was used in the office of the inspector and therefore before the accused was put back into the van. The Court will therefore not comment on the footages exhibited and will not draw any inferences from the fact that the van is seen shaking or in the First Court's words 'swaying'.

The appellant also submitted that the First Court ought to have properly borne in mind the facts, including the fact that an ambulance had to be called for a medical team to attend to the appellant who was also taken to Hospital. He asks why would the Police Authorities call in an ambulance if all was fine with the appellant? The Court considers that CO 177 Matthew Cilia stated that as SRT they used necessary minimal force. S.M, 739 M. Borg through his affidavit declared that the SRT tried to handcuff the accused who continued resisting and ended up on the floor with Feliazoo under and the two SRT's on him to try to hand cuff him. He declared that since Feilazoo was saying that he could not breathe properly, an ambulance was called and a medical team took him to Mater Dei Hospital. WPS 138 A. Grech declared in her affidavit that the accused was complaining of pain in his heart so an ambulance was called and was taken to hospital.

Dr Mario Scerri in his report filed at folio 69 et sequitur regarding a medicolegal examination on the accused on 13th April 2018, concluded:

1. That Joseph Feilazoo alleged that on the 10th of April 2018 he was assaulted by members of the SRT at the Immigration Police Office;
2. That as a result of this alleged assault, he sustained bruises on the face which were a result of blunt trauma and a haematoma on the left mastoid process being also the result of blunt trauma;
3. That the abrasions described on the left forearm were produced by handcuffs;
4. That the fracture described on the left radial head was due to blunt trauma;
5. That this fracture is of a greivous fracture per durata.'

Dr Mario Scerri in his testimony dated the 18th of May 2018 when asked how these injuries were caused, replied '*Blunt trauma*' and explained that '*He might had fallen and hit it or he might had been hit on it or in direct force applied to the forearm and the radial head was fractured.*'

A case summary regarding the appellant was filed at folio 123 and marked as Dok JF1. Dr Francis Dalli Badjadi who testified on 26th of July 2018 stated that he had examined the accused on 12th of April 2018 and 17th of April 2018. He was examined at Corradino Facility and described the injuries suffered by the accused. He however could not state with what these injuries were compatible. Medical documents were filed at folio 133 et sequitur and marked as Doc FDB1.

Lara Bartolo part of the ambulance team who testified on the 13th of November 2018, who explained that she was called on an ambulance '*because there was a man that had query seizures.*' Asked what the accused was complaining about, she replied '*En route the most complain was about his hands they were both handcuffs so he was complaining about his right hand and in fact we loosened the handcuffs because they were hurting him, but no other injuries, he didn't mention anything.*' Raymond Grech who testified on the 13th of November 2018 who was the driver of the ambulance stated that they found the accused in a good condition. He explained that they were told to be careful because he bites and spits. He also explained that '*qbadna hrigna l- istretcher,*

dahhalnieh ghal go l-ambulanza bl- istretcher, beda jaghti ghax ma riedx jiccaqlaq, ma riedx johrog minn gol-van ghal go l-istretcher u minn hemm u minn hawn hrignieh u tlaqna Mater Dei.' Jesmond Galea who testified on the 13th of November 2018 stated that he was a first responder and stated that when they arrived they were told to be careful since he bites and spits. He explained that *'ahna kif waslet in- nurse fuqu, rat hux qed jikkomplenja min xi wgieh, kien qed jikkomplejna mill- manetti li kienu huma strict ma idejh li kienu qed iweggghuh. Hallewlu naqra l-manetti, lluzjawhom, ghamilneh fuq stretcher, bhala griehi u dan ma jidhirx li kien hemm, minn nahha tieghi ma rajtlu l-ebda griehi lis-sinjur u wassalnieh l- isptar...'*

From the acts, it is clear that an ambulance was called on site in view that the appellant complained with pain in his heart and complained that he could not breathe. While it results that the accused had a number of injuries, the Court is not in a position to state how these came about, in that whether excessive force was used. The charges in question are against the accused and determining whether the appellant's injuries were a result of force used by officers would exceed the competence of this Court. What is clear is that minimal force had to be used in order to handcuff the appellant in view that he refused to go to the detention centre and resisted the officers.

Considers;

That the appellant also submits that the First Court *'took plains'* to enunciate the situations in which Police Officers, not Correctional Officers, are entitled to use force. However no effort is made by the Court to analyse and more importantly apply those principles to the particular case. According to the appellant, had the Court done so, it would undoubtedly have found that the Correctional Officers, even if they were at all entitled as Correctional Officers operating outside the precinct of prison to use force themselves, that the level of force to which they resorted was outrageously excessive and disproportionate when simply confronting a person who

considered himself to be within his rights to refuse to obey an order given by Inspector Buhagiar which he considered to be illegitimate.

The appellant also submits that it is to be appreciated that the appellant was alone and grossly outnumbered by the Police Officers and Correctional Officers both within, as well as close by and outside Inspector Buhagiar's office. He submits that he was surrounded on all front and was certainly '*not on home ground.*' This according to the appellant both lends to the credibility of his own version of the events as they unfolded as well as places the Correctional Officers concerned, being in an obviously advantageous position vis-a-vis the appellant, in a more onerous position of justifying their conducts towards the appellant, and also because the record of the appellant during his lengthy period off incarceration at the Corradino Correctional Facility was impeccable and there was no record produced of the appellant having ever been involved in any violent incident throughout his detention there. This in this Court's opinion is unfounded. The fact that the appellant was 'outnumbered' is irrelevant. The appellant was not brought to Inspector's office in order to be interrogated but to be informed that a removal order had been issued and that he will be sent to the detention centre since he had been declared an illegal immigrant.

The Court will now consider the five (5) charges brought against the accused in order to determine whether the First Court could reasonably and legally find the accused guilty of these charges.

Considered further;

That the first charge brought against the accused reads '*assaulted or resisted by violence or active force not amounting to public violence, CO165 Dennis Thornton and CO 177 Matthew Cilia, persons lawfully charged with a public duty when in the execution of the law or of a lawful order issued by a competent authority and this in breach of article 96 of Chapter 9 of the Laws of Malta;*'

Article 96 of chapter 9 of the Laws of Malta reads:

'Whosoever shall assault or resist by violence or active force not amounting to public violence, any person lawfully charged with a public duty when in the execution of the law or of a lawful order issued by a competent authority, shall, on conviction, be liable -

(a) where the assault or resistance is committed by one or two persons, to imprisonment for a term from six months to two years and to a fine (multa) of not less than four thousand euro (4,000) and not more than ten thousand euro (10,000);

(b) where the assault or resistance is committed by three or more persons, to imprisonment for a term from nine months to three years and to a fine (multa) of not less than five thousand euro (5,000) and not more than fifteen thousand euro (15,000).'

As considered in **'Il-Pulizija (Spettur Daryl Borg) Vs Jerken Decelis'**²⁵:

'L-imputat kien fid-dmir li, minghajr paroli u xenati zejda, jobdi l-ordnijiet legittimi li kienu gew moghtija lill- mill- Pulizija sabiex imur l-Ghassa ta' San Glijan. L-ordnijiet legittimi moghtija mill-Pulizija lic-cittadin ma humiex hemmhekk biex jigu konstestati, argumentati, mkasbra jew injorati sommarjament mir-ricevent. Qeghdin hemmhekk biex jigu obduti – dejjem u minghajr dewmien, ghalkemm bla pregudizju ghad-dritt ta' dak li jkun li jirreklama wara l-gustizzja intrinseka ta' dik l-ordni.²⁶ Altrimenti jkun ifisser li kull persuna jkollha l-jedd tagixxi kif trid u joghobha minghajr hadd ma jista' jzommha jew irazzanha. Nigu fi stat ta' gungla – l-antitezi tal-ordni mehtiega biex il-hajja socjali tkun tista tezisti f'armonija relattiva.'

In the same judgment²⁷, the Court also considered:

²⁵ Decided by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 22nd November, 2013 (Number 894/2013)

²⁶ Il-Pulizija vs Maria Victoria Sive Marvic Attard Gialanze, Qorti tal-Appell Kriminali, per VDG, 25 ta' Gunju 1997. (This reference is found in the fourth (4th) footnote of the cited judgment)

²⁷ **'Il-Pulizija (Spettur Daryl Borg) Vs Jerken Decelis'** decided by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 22nd November, 2013 (Number 894/2013)

'Il-Qorti hija konvinta lil hinn minn kull dubju dettat mir- raguni li l-imputat ikkommetta r-reati mnissla minn ingurji jew theddid kontra ufficjali pubblici jew offizi fuq il-persuna taghhom. Il-kwistjoni legali hawnhekk hija jekk b'tali azzjonijiet l-imputat irrendiex ruhu hati tar-reat ta' attakk jew rezistenza bi vjolenza kontra l-Pulizija. Wara li l-Qorti gharblet il-provi kollha nonche l-gurisprudenza applikabbli ghall-istess, thoss li l-estremi ta' dan ir-reat imnissel mill- Artikolu 96 tal-Kodici Kriminali ma jezistux f'dan il-kaz. Dan ghar-ragunijiet segwenti. Ghalkemm huwa minnu li l- imputat irrezista dan l-arrest u huwa minnu wkoll li fil- mument tar-rezistenza PS 1456 weggha hafif sebghu il- kbir t'idu l-leminija, l-istess Pulizija jtenu li l-imputat ma hebbx ghalihom jew attakkahom. Il-kwistjoni legali hija – l-imputat qabez il-limiti tar-rezistenza ghall-arrest li jwassal ghal rezistenza bi vjolenza jew addirittura attakk fuq il- Pulizija?

Skont l-Gharef Imhalled William Harding fil-kaz "Il-Pulizija vs John Mallia" deciz nhar il-21 ta' Mejju 1960 :-

Jekk wiehed jindahal fid-doveri tal-pulizija u juza mhux biss "vie di fatto", imma vjolenza effettiva allura hu jkun hati ta' attakk u rezistenza lill-Pulizija a differenza tal-kaz, fejn ikun hemm semplici kliem oltragguz jew semplici minacci jew "mera inazione". Fil-kaz tal-persuna li tkun f'idejn il-Pulizija jista' talvolta jkun hemm certa tolleranza, billi dik il-persuna tkun qeghda tirrezisti lill-Pulizija ghax tkun spinta mix-xewqa naturali tal-liberta' proprja; imma din it-tolleranza tispicca malli dik il-persuna tispingi jdejha fuq il-membri tal-Pulizija li jkunu qeghdin izommuha biex toffendihom fil-persuna taghhom u tmur oltre s-semplici sforz biex tevadi l-arrest.

Issa f'dan il-kaz, din il-Qorti thoss li dak li ghamel l-imputat kien precizament li rrezista lill-Pulizija ghax kien spint mix- xewqa naturali tal-liberta' proprja – u mix-xieghda tal- Pulizija li kienu qeghdin jezegwixxu l-manuovra tal-arrest jirrizulta li l-imputat ma hebbx ghalihom; u ghalhekk din il- Qorti ma thosshix moralment konvinta li bl-agir tieghu l- imputat spinga jdejh fuq il-Pulizija li kienu qeghdin izommuh **biex joffendihom fuq il-persuna taghhom.** Il- griehi sofferti minn PS 1456 kienu konsegwenzjali ghall- movimenti fizici inkonsulti tal-imputat biex ma jigix immanettjat u ma kienux konsegwenzjali ghal movimenti fizici ohrajn li permezz taghhom l-imputat ried li joffendi lil PS 1456 fuq il-persuna tieghu biex iwegghu.

Fuq dan il-punt, il-Qorti sejra ssegwi l-insenjament imnissel mis-sentenza tal-Qorti tal-Appell Kriminali fil-kaz "Il-Pulizija vs Joseph Zahra" deciza nhar l-10 ta' Mejju 2002 fejn similmment ghal dak li gara f'dak il-kaz, fil-kaz in disamina ma giex pruvat sodisfacentement li kemm

(a) mill-movimenti fizici maghmula mill-imputat waqt li kien qiegħed jirrezisti l-arrest u

(b) mill-grad ta' forza uzata minnu waqt din ir-rezistenza

jista' jingħad li l-imputat ippreveda l-possibilita li b'dak li kien ser jagħmel seta' jikkaguna hsara u ghalkemm ma riedx dik il-hsara huwa kien indifferenti għall-konsegwenza ta' ghemilu b'mod li xorta għamel l-att li kkaguna l-hsara (intenzjoni pozittiva indiretta). Izda l-Qorti hija konvinta moralment li l-imputat, ghalkemm ma riedx jikkawza hsara lill-min kien qiegħed jipprova jarrestah waqt li qed jipprova ma jhallihomx jimmanettjawn, huwa kien xorta fid-dmir li jintebah li b'dak li kien qiegħed jagħmel seta' jikkaguna xi hsara lil min kien qiegħed jipprova jimmanettjah. Kif qalet il-Qorti tal-Appell Kriminali għalhekk il-hsara ma kienetx dolozament ikkagunata izda kienet ikkagunata kolpozament u għalhekk il-griehi sofferti minn PS 1456 ma jistghux f'dan is-sens jitqiesu li kienu griehi ta' natura hafifa kagunati volontarjament mill-imputat, izda semmai kienu griehi ta' natura hafifa ikkagunati involontarjament filwaqt li l-imputat kien qiegħed jipprova ma jhallix lill- Pulizija jimmanettjawn. Konsegwentement l-imputat għandu jigi ritenut responsabbli ai termini tal-Artikolu 226(1) tal-Kodici Kriminali u mhux tal-Artikolu 214 u 221(1) tal-istess Kodici.'

The Court in **'Il-Pulizija (Spettur Spiridione Zammit) (Spettur Jurgen Vella) vs Faiz Omar Elsallak'**²⁸ in relation to article 96 of Chapter 9 of the Laws of Malta considered:

'L-Artikolu 96, imbagħad ghalkemm ukoll għandu bhala vittma, l-ufficjal pubbliku, jikkontempla tlett elementi essenzjali għal kostituzzjoni ta' dana r-reat:

²⁸ Decided by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 29th September, 2014 (Numru: 275/2012)

Fl-ewwel lok, irid ikun hemm l-attakk jew resistenza. Illi jkun hemm biss disubbidjenza tal-ligi jew ta' ordni moghtija minn xi awtorita' ghalhekk mhux sufficjenti ghal kummissjoni ta' dana r-reat. Il- Mamo jkompli jghid: "It is only when the insubordination or defiance goes so far as to obstruct the execution of the law or of lawful orders of the competent authority that the crime of attack or resistance can arise. The purpose of the agent in this crime, therefore, must be precisely that of obstructing or frustrating the execution of the law or the lawful orders of the competent authority, by opposing the action of those charged therewith". Fin-nuqqas ta' dana jista' jissussisti biss ir-reat ikkontemplat fl-Artikolu 95 biss. Inoltre l-attakk jew resistenza trid tkun necessarjament akkompjanta bl-uzu tal-forza, vjolenza jew bil-hebb. Ghalhekk insulti jew theddid qatt ma jistghu jwasslu ghal htija taht dina d-disposizzjoni tal-ligi.

Fit-tieni lok ir-reat irid jigi kommess fil-konfront ta' ufficjal pubbliku jew kif tghid testwalment il-ligi "persuna inkarigata skond il-ligi minn servizz pubbliku". Illi l-Qorti taghmel riferenza ghal dak sottolinjat iktar 'il fuq u cioe illi huwa necessarju illi ghalkemm tali persuna mhux necessarjament ghandha tkun liebsa uniformi jew xi marka jew sinjal li turi l-kapacita li fiha qed tagixxi, madanakollu x-xjenza tal-persuna li qed tikkommetti dana r-reat illi l-vittma hija ufficjal pubbliku hija necessarja. Altrimenti l-mens rea ghal kummissjoni ta' dana r-reat ikun nieges.

Fl-ahharnett huwa necessarju illi l-attakk jew resistenza kontra l-ufficjal pubbliku jrid isir filwaqt illi huwa jkun qieghed jagixxi ghall-esekuzzjoni tal-ligi jew ta' ordni moghtija skond il-ligi minn awtorita' kompetenti. Il-Mamo jkompli jghid: "Therefore, any violence committed after the law or the order has already been executed, even though it may be on account of such execution, would not give rise to this crime."

From the acts of the proceedings it clearly and beyond reasonable doubt results that the appellant's resisted by violence and active force the two correctional officers CO 65 Dennis Thornton and CO 177 Matthew Cilia. Although the correctional officers are not police officers they as has been considered earlier on in this judgment are certainly persons lawfully charged with a public duty when in the execution of the law or of a lawful order issued by a competent authority. Their functions, powers

and duties are by law as vested in an officer of the Malta Police Force in terms of article 11(2) of Chapter 260 of the Laws of Malta. It has been proven that the appellant was obstructing the execution of a lawful order, in that he was objecting to be sent to the detention centre and was objecting to go in the detention services van. In this sense, it results that the aggression took place when the two correctional officers were trying to execute the orders given by Inspector Buhgiar to have the accused sent to the detention centre. It is also clear that the appellant was well aware of who the officials were, meaning that the person who was giving the order was Inspector Darren Buhgiar and who the two Correctional Officers were. In fact, the accused in his statement and specifically at folio 8, where he refers to the Inspector and states that *'He said I have to go to Detention and I told them that I was not going there and not to put me in prison after 10 years. He told me that I must go and I said I was not going there. He said that prison has nothing to do with his procedure. The SRT got involved and wanted me to go in the van and pushing me...'* He also stated *'According to the Insp. Darren he told me that the prison has nothing to do with procedure, what were the prison officers doing there to aggravate the situation?'* The accused in his testimony before the First Court also stated *'Then the officer he wanted to get involved. I tell him he is present the inspector, the prison has nothing to do with this office, why you want to get involved. If the Inspector ... then we take it from there. But then he insists and he says he can do as he wishes. It is ok.'* It is also clear that the aggression took place during the execution of the order, meaning while the Correctional Officers were trying to handcuff the accused to take him in the van. As the First Court considered *'he refused to be handcuffed; his refusal was not simply verbal as he suggested in his cross-examination. It was also physical.'*

As considered earlier on in the judgment through direct reference to the testimonies of a number of witnesses, it results a number of witnesses did not see the accused in the act of biting one of the officers or assaulting the other but confirmed that the appellant was aggressive, so much so that pepper spray had to be used in the aim of handcuffing him. On the other hand, WPC 138 A. Grech's through an affidavit declared that *'Feilazoo baqa jirrezisti u l-ufficjali tal-habs uzaw forza minima sabiex Feilazoo jigi mmantetjat izda Feilazoo baqa jirrezisti u kif ukoll gidem lil ufficjali tal-habs.'*

Wara ftit minuti smajt l-ufficjali tal-habs jaghtu twissija lil Feilazoo sabiex jieqaf jirrezisti ghax kien ser jintuza l-pepper spray...' This witness declares that the prison officials were bitten by the accused however the Court through the testimonies of the Corretional Officers in question understood that one was bitten and the other officer was hit in his face under his right eye. Notwithstanding this, the fact that the appellant was aggressive has been sufficiently proven. This Court finds it hard to believe the appellant when he testified before the Firsrt Court that *'Mistakenly his finger came in my mouth and I closed my mouth.'*

As considered by the First Court *'It is also important to note that both the bruise resulting from a blow given to CO 165 Thortnon underneath his eye as well as the bite inflicted on CO 177 Cilia's right hand took place before the pepper spray was used.²⁹ Hence, these injuries cannot in any way be considered as a reaction to the use of pepper spray. Bearing in mind this scenario, the use of force as well as the use of the pepper spray was legitimate and aimed to reign in the accused and limits his aggressiveness.'*

While as this Court considered earlier on in this judgment and made clear that it will not base any guilt upon the CCTV footages exhibited, from the evidence produced it is clear that the First Court could legally and reasonably find the accused guilty of this first (1st) charge brought against him.

Considered;

That the second charge brought against the accused reads *'reviled, threatened or caused bodily harm to CO165 Dennis Thornton and CO177 Matthew Cilia persons lawfully charged with a public duty, while in the act of discharging their duty or because of having discharged such duty, or with intent to intimidate or unduly influence them in the discharge of such duty and this in breach of article 95 of Chapter 9 of the Laws of Malta;'*

Article 95 of chapter 9 of the Laws of Malta reads:

²⁹ Refer to Fol. 51. (This reference is found in footnote 8 of appealed judgment)

'Whosoever, in any other case not included in the last preceding two articles, shall revile, or threaten, or cause a bodily harm to any person lawfully charged with a public duty, while in the act of discharging his duty or because of his having discharged such duty, or with intent to intimidate or unduly influence him in the discharge of such duty, shall, on conviction, be liable to the punishment established for the vilification, threat, or bodily harm, when not accompanied with the circumstances mentioned in this article, increased by two degrees and to a fine (multa) of not less than eight hundred euro (800) and not more than five thousand euro (5,000).''

In the case in the names **'Il-Pulizija (Spettur Spiridione Zammit) (Spettur Jurgen Vella) vs Faiz Omar Elsallak'**³⁰, the Court regarding **article 95 of Chapter 9** of the Laws of Malta considered:

'Illi Artikolu 95 jitkellem dwar l-ingurja jew theddid fil-konfront tal-ufficjal pubbliku. Illi ghalhekk l-element materjali ta' dana r-reat huwa l-ingurja jew it-theddid. Dawn jistghu jiehdu kemm il-forma verbali kif ukoll miktuba, gesti jew tpingija li huma intenzjonati biex inaqqsu l-gieh u r-reputazzjoni tal-persuna lejn min huma diretti.

Illi l-vittma ta' dana r-reat jista' jkun biss l-ufficjal pubbliku u l-ingurja jew it-theddida trid issir jew (1) filwaqt illi jkun qed jaghmel servizz pubbliku (2) jew inkella minhabba li jkun ghamel dana s-servizz pubbliku (3) jew bil-hsieb li jbezzghu jew jinfluwixxi fuqu kontra l-ligi fl-esekuzzjoni ta' dak is-servizz

Illi l-awturi jaghmlu distinzjoni bejn il-mottiv wara l-ingurja jew it-theddid fl-ewwel istanza u dana l-mottiv fit-tieni u t-tielet istanza msemmija fil-ligi. Dana billi meta l-oltragg isir fil-mument illi l-ufficjal pubbliku jkun qiegħed jagħti s-servizz ma huwiex necessarju illi l-ingurja jew it-theddida tkun marbuta mal-funzjoni illi huwa jkun qiegħed jeżercita. L-awturi Cheveau et Helie, li jsemmi l-Professur Mamo fin-notamenti tiegħu, ighidu:

³⁰ Decided by the Court of Magistrates (Malta) as a Court of Criminal Judicature on 29th September, 2014 (Numru: 275/2012)

“Quando l’oltraggio si verifica nel corso delle funzioni, il motivo che lo determina e’ indifferente; la legge vede soltanto il turbamento, l’ingiuria fatta all’esercizio delle funzioni, l’insulto che degrada la loro dignita’; avesse pure quest’ingiuria una causa determinante estranea alle funzioni, il turbamento all’esercizio di esse sussisterebbe sempre.”

Kuntrarjament fiz-zewg istanzi l-ohra jrid ikun jigi ppruvat nexus bejn l-oltragg u l-qadi tal-funzjoni pubblika.

Illi finalment ir-reat irid necessarjament jigi kommess fil-konfront ta’ ufficjal pubbliku jew ta’ persuna nkarigat skond il-ligi minn servizz pubbliku.

Il-Professur Mamo fin-notamenti tieghu jghid:

“This offence arises even though the person charged with the public duty may not at the time of discharging such duty be wearing his uniform or badge etc of office, provided the offender was aware of his status as such person.”

*Sahansitra f’sentenza moghtija mill-Qorti tal-Appell Kriminali fit-2 ta’ Novembru 1917 f’kawza fl-ismijiet **Il-Pulizija vs Giuseppe Borg** jinghad:*

“Nel reato di oltraggio ad ufficiale od impiegato pubblico, oltre il dolo specifico desunto dal fine dell’agente, e’ necessario ad integrare l’elemento morale od intenzionale del reato, la scienza della qualita’ ufficiale dell’oltraggiato, ma questa scienza puo’ sussistere indipendentemente dalla questione se il pubblico ufficiale portasse on no la divisa della sua carica al tempo dell’oltraggio; di guisacche’ il reato puo’ avverarsi anche se l’ufficiale non indossasse tale divisa a patto, ben inteso, che risulti della scienza nell’oltraggiante della qualita’ ufficiale dell’oltraggiato.”¹

Inspector Darren Buhagiar in the sitting held on 19th of April 2018 explained that 'I told him that a removal order and a return decision is going to be issued against him because Spain will not accept his arrival in Spain and as soon as I told him that he was going to end up in detention he started getting aggressive, being angry, he could not accept the fact that he is going to be detained again because he told me that he did ten (10) years in prison and he was getting frustrated about that and when I saw that he was not listening to my instructions that he was not abiding by them there were two (2) officers from the Corradino

Facilities two (2) SRT Officials and I spoke with one of them and I told him that we need to do something there. And then I gave him the last instruction, I told him he needs to comply with the instructions for his sake and he didn't comply, he kept on insisting that I will not do one day in detention, I did ten (10) years in prison, that's what he said and he told me as well that if you send me to Nigeria with escorts they will go to Nigeria but they will not come back to Malta.' (Emphasis and underlining added by this Court)

The defence in the note of submissions filed by the accused before the First Court regarding this submitted that 'The exponent accused certainly did not threaten to kill the guards, nor did he say that anyone else would kill them (in Nigeria). He was just saying that the Nigerian authorities would allow them entry but would not allow them exit from the country should they escort him there.'

As the First Court rightly considered 'It must be pointed out that at the point in time the accused addressed this comment, he had already become frustrated, he was not listening to the Inspector's instructions and he was not abiding by them. In such circumstances, it is difficult not to consider these words as specific threats aimed at intimidating or duly influencing the Inspector in the discharge of his duties.'

However, this Court notes that the charge indicates CO165 Dennis Thornton and CO177 Matthew Cilia as the injured parties of this charge. The Court must therefore consider whether there were other acts which were directed at these two (2) Correctional Officers.

CO 177 Matthew Cilia in his testimony dated 19th April 2018 stated '*Biddel l- attitudni tieghu quddiem l- Ispettur kif ukoll beda jghidlu wara li ma qabilx mieghu li d- detention jiena mhux sejjer ghax kemm pulizija u ufficjali ta' l- SRT u tad-detention jien noqtolomlok u ma jwasslunx lejn id-detention centre.*' (Emphasis and underlining added by this Court).

CO 177 Matthew Cilia also stated that the accused told him '*Tmissnix ghax inweggakom.*' Even though as the appellant submitted in his note of submissions

before the First Court, this was not corroborated by any other witnesses, the First Court was in an advantageous position in view that it heard witnesses testify viva voce before it and it could therefore evaluate the credibility of witnesses as well as the accused. Moreover, in terms of **article 638(2) of Chapter 9** of the Laws of Malta *'Nevertheless, in all cases, the testimony of one witness if believed by those who have to judge of the fact shall be sufficient to constitute proof thereof, in as full and ample a manner as if the fact had been proved by two or more witnesses.'*

The First Court considered that:

'This Court had the opportunity to hear CO 177 Matthew Cilia testify viva voce and him being cross-examined. From the way he behaved on the witness stand and the way he replied to the questions made, there was nothing which in any way suggested that this witness was not saying the truth.'

In view of the Court's considerations, the Court finds that the First Court was correct in finding guilt of this second (2nd) charge brought against the accused.

Considered;

That the third charge reads *'caused injuries of a slight nature on CO 165 Dennis Thornton and CO177 Matthew Cilia as certified by Dr. Gabriel Borg MD reg. number 5807 from Floriana Health Centre and this in breach of article 221 of Chapter 9 of the Laws of Malta;'*

Both CO 177 Matthew Cilia as well as CO 165 Dennis Thornton were examined on tenth (10th) of April of the year two thousand and eighteen (2018). Affidavits of Dr Gabriel Borg with medical certificates issued in relation to both were also filed in the acts of the proceedings at folio 26 and 28. Original medical certificates were filed at folio 9 and 10. The Court finds that the First Court was correct in finding guilty of this third (3rd) charge which has also been sufficiently proven.

Considered;

That the fourth (4th) charge reads '*disobeyed the lawful order of Insp. Darren Buhagiar, CO 165 Dennis Thornton and CO177 Matthew Cilia, any authority or of any person entrusted with a public service, or hinders or obstructs such person in the exercise of his duties, or otherwise unduly interferes with the exercise of such duties, either by preventing other person from doing what they are lawfully enjoined or allowed to do, or frustrating or undoing what has been lawfully done by other persons, or in any other manner whatsoever, and this in breach of Article 338(ee) of Chapter 9 of the Laws of Malta;*'

The appellant did not appeal from guilt of this charge. In fact, the appellant in his appeal submitted that:

'the Honorable Court of Magistrates (Malta) as a Court of Criminal Judicature ought only to have found the exponent guilty of the fourth (4th) charge which was proffered against him, and therefore ought to have only applied the corresponding punishment applicable to persons who infringe the provisions of Article 338(ee) of the Criminal Code (Chapter 9 of the Laws of Malta)'

The Court also confirms that the appellant not only disobeyed the lawful orders of Inspector Darren Buhagiar but also the orders of CO165 Dennis Thornton and CO177 Matthew Cilia whose actions were a result of the appellant's non adherence and resistance to the orders given by Inspector Darren Buhagiar. The Court is therefore confirming the First Court's decision in finding the accused guilty of this fourth (4th) charge.

Considered;

That the fifth (5th) charge reads '*wilfully distrubed the public good order or the public peace and this in breach of article 338 (dd) of Chapter 9 of the Laws of Malta.'*

The Court makes reference to the judgment in the names 'Il-Pulizija Vs Rocco D'Alessandro'³¹ where it was considered that:

'Minħabba li l-ewwel imputazzjoni hija kusr volontarju tal- bon-ordni jew tal-paci pubblika, il-Qorti qed tirreferi għas- sentenza 'Il-Pulizija versus Michael Camilleri et' tas-27 ta' Frar 2008 tal-Qorti tal-Appell Kriminali kif preseduta mill- Imħallef Dr.David Scicluna. F'dik is-sentenza nsibu dan li ġej dwar in-natura ta' din il-kontravvenzjoni.

'Issa, kif gie spjegat fl-Appell Kriminali fl-ismijiet 'Il-Pulizija v. Paul Busuttil' deciz fit-23 ta' Gunju 1994:

"Skond gurisprudenza kostanti tal-Qrati tagħna, dan ir-reat jgħodd ruħu meta jkun hemm dak li fil-common law Ingliza kien jissejjah 'a breach of the peace'. Din l- ekwiparazzjoni ta' dana r-reat mal-kuncett Ingliz ta' 'a breach of the peace' tirisali għal zmien Sir Adriano Dingli li proprju f'kawza deciza minnu fl-10 ta' Gunju, 1890, fl- ismijiet 'Ispettore Raffaele Calleja v. Paolo Bugeja et.,' kien qal hekk:

'Che il buon ordine e la tranquillita` pubblica sta nella sicurezza, o nella opinione ferma della sicurezza sociale, - nel rispetto dei diritti e dei doveri sia degli individui in faccia all'autorita` pubblica, sia degli individui stessi fra loro, e ogni atto che toglie o diminuisce la opinione della sicurezza pubblica, o della sicurezza individuale, e` violazione dell'ordine pubblico, indipendentemente dalla perpetrazione di altro reato'(Kollez. Vol. XII, p. 472, 475).1 Vol. LXXVIII.v.277.

A skans ta' hafna repetizzjoni, din il-Qorti tagħmel referenza għall-gurisprudenza miġbura fl-artikolu intitolat 'Calleja v. Balzan: Reflections on Public Order' publikat fil-Vol. X ta' The Law Journal - Id-Dritt (University of Malta, Autumn 1983) pagna 13 et seq., u speċjalment pagni 28 sa 31. B'zieda ma' dak li hemm f'dak l-artikolu wiehed jista' jgħid li r-reat ta' 'breach of the peace' fil-ligi Skoċċiza jirrikjedi wkoll ċertu element, imqar f'ammont żgħir hafna, ta' allarm. Fi kliem McCall Smith u Sheldon, fil-ktieb tagħhom. 'Scots Criminal Law', Edinburgh, Butterworths, 1992):

³¹ Decided by the Court of Criminal Appeal on 20th May, 2013 (Criminal Appeal number: 223/2012)

'The essence of the offence is the causing of alarm in the minds of the lieges. This alarm has been variously defined by courts. In Ferguson v. Carnochan (1889) it was said not necessarily to be 'alarm in the sense of personal fear, but alarm lest if what is going on is allowed to continue it will lead to the breaking of the social peace'. Alarm may now be too strong a term: in Macmillan v. Normand (1989) the offence was committed when abusive language caused 'concern' on the part of policemen at whom it was directed' (p.192).

Naturalment huwa kwazi impossibbli li wiehed jiddeċiedi aprioristikament x'jammonta jew x'ma jammontax f'kull kaz għar-reat ta' ksur volontarju tal-bon ordni u l-kwiet tal- pubbliku. Kif jgħid awtur ieħor Skoċċiż, Gerald H. Gordon, fit-test awtorevoli tiegħu 'The Criminal Law of Scotland' (Edinburgh, 1978):

'Whether or not any particular acts amount to such a disturbance is a question of fact depending on the circumstances of each case, and strictly speaking probably no case on breach of the peace can be regarded as an authority of general application' (p.985, para. 41- 01).

U aktar 'il quddiem l-istess awtur jgħid: ' . Although it has been held not to be a breach of the peace merely to annoy someone, such annoyance could amount to a criminal breach of the peace if the circumstances were such that it was calculated to lead to actual disturbance' (p. 986, para. 41-01).

Fl-Appell Kriminali fl-ismijiet Il-Pulizija v. Joseph Spiteri deciz fl-24 ta' Mejju 1996, din il-Qorti diversament presjeduta ziedet tgħid hekk:

"Il-Qorti hawnhekk tixtieq tippreciza a skans ta' ekwivoċi li l-kuncett ta' 'breach of the peace' kif abbraccjat fl-Iskozja huwa aktar wiesa' minn kif gie interpretat mill-qradi Inglizi. Fi kliem Jones u Christie fil-ktieb tagħhom 'Criminal Law' (Edinburgh, Sweet & Maxwell, 1992), b'referenza għal-liġi Skoċċiża in materja:

'While the major part of the criminal law of Scotland could indeed be expressed in some facile, breach-of the-peace- type phrase, such as 'doing things (or refraining from doing things) which cause, or could reasonably cause alarm or disturbance', this would lead inevitably to complete uncertainty as to what exactly the law did prohibit. At present there is considerable uncertainty as to what breach of the peace itself properly covers; and it would thus be most

unwelcome to extend that uncertainty by enlarging the scope of breach of the peace at the expense of other, fairly well defined offences. But this is, of course, something of a vicious circle. It is precisely because breach of the peace has become so ill-defined that it has proved possible for it to stray into fields occupied by other offences. The only way to halt this process is for breach of the peace to be defined in a clearer and more limited fashion than is currently the case. Regrettably, however, there is little indication that this is likely to be so' (p. 295).

Il-kuncett Ingliz ta' 'breach of the peace' li, kif ingħad, il- Qrati tagħna jidher li fil-massima segwew, gie spjegat mill- Professur A.T.H. Smith fil-ktieb tiegħu 'Offences Against Public Order' (London, Sweet & Maxwell, 1987) hekk:

'Because of the association between 'peace' and 'quiet', there is a natural tendency to suppose that a breach of the peace is 'any behaviour that disturbed or tended to disturb the tranquillity of the citizenry'. But if any legal expression is a term of art, breach of the peace is one of them. Recently the courts have refined the concept, and established very clearly that it is allied to harm, actual or prospective, against persons or property. The leading modern authority is undoubtedly the decision of the Court of Appeal in Howell . Watkins L.J. said:

' . Even in these days when affrays, riotous behaviour and other disturbances happen all too frequently, we cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done' (p.182).

Minn dana kollu din il-Qorti tara li, bħala regola, ikun hemm il-kontravvenzjoni kontemplata fil-paragrafu (dd) ta' l-art. 338 tal-Kap. 9 meta jkun hemm għemil volontarju li minnu nnifsu jew minħabba c-cirkostanzi li filhom dak l- għemil iseħħ inissel imqar minimu ta' inkwriet jew thassib f'moħħ persuna (li ma tkunx l-akkużat jew imputat) dwar l-inkolumita` fiżika ta' persuna jew dwar l-inkolumita` ta' proprjeta`, kemm b'rizultat dirett ta' dak l-għemil jew minħabba l-possibilita` ta' reazzjoni għal dak l-għemil. Naturalment dawn iċ-cirkostanzi jridu jkun tali li oġġettivament inisslu l-imsemmi nkwiet jew thassib.'

Il-Qorti kkwotat minn din is-sentenza 'in extenso' għaliex l- ispjegazzjoni mogħtija tista' tgħin biex il-Prosekuzzjoni tkun tista' tiddeciedi aħjar meta għandha tagħti din l-

imputazzjoni u meta le.

Minn dan il-każ jirriżulta li l-prinċipju li Qorti għandha ssegwi biex tar jekk kienx hemm ksur tal-ordni pubbliku huwa jekk mill-atti jirriżultax xi għemil volontarju li minnu nnifsu jnissel xi minimu ta' inkwriet jew tħassib f'moħħ persuna dwar l-inkolumita' fiżika ta' persuna jew proprjeta'.

Mill-provi l-Qorti ma tarax li jirriżulta dan il-biża' u għalhekk qed tiddeciedi li l-appellant ma hux ħati ta' din l- imputazzjoni.'

Reference is made to the testimony of PS 435 David D'Amato who testified on the 3rd May 2018 where he explained that he was in his office two doors away from the office of Inspector Darren Buhagiar when he heard a lot of noise coming from near the office of Inspector Darren Buhagiar. In his words '*jiena kont qiegħed go l ufficcju tiegħi ta' l- Ispettur Mario Haber u zewg bibien il- bogħod minna hemm l- ufficcju tas-sur Darren Buhagiar.*' Asked where his office is, he replied '*Id-Depot fil- bitha. Dak il- hin jien hriġt naqra fil- bieb u bdejt nisma hafna storbuġi gej minn naha ta' l ufficcju tas-sur Darren Buhagiar.*'

As the First Court rightly considered '*This definitely confirms the sense of alarm which was generated by the whole commotion precipitated by the accused.*' The Court was therefore also correct in finding guilt of this fifth (5th) charge.

Considered;

That the prosecution also requested that the accused be treated as a recidivist. A true copy of the judgment delivered against the accused by the Criminal Court in the names '**The Republic of Malta v. Joseph Feilazoo**'³² on 23rd February 2010' was filed at folio 31 et sequitur and marked as Dok. AM3. The Court was therefore also correct in treating the accused as a recidivist.

³² Bill of Indictment: 43/2009

Considers;

The appellant did present an ad hoc ground of appeal regarding the punishment imposed by the First Court. He only requested that the punishment be reformed in case that he is only found guilty of the fourth (4th) charge and acquitted of the other charges. The appellant however in his appeal had submitted that the First Court made an attempt to chastise the Immigration Authorities for the horrendous manner in which they treated the appellant, in spite of the fact that he had been incarcerated at the Corradino Correctional Facility for ten (10) years, only seemingly taking an interest in his case just few days prior to what was meant to have been his effective release from incarceration, yet according to the appellant this was just an attempt at lip service because the Court gave no real consideration to the effect such conduct had upon the mental state of the accused.

This Court makes it clear that considering the long period of incarceration the appellant was sentenced to, this Court expects that the Immigration Authorities should have handled the deportation procedures at a much earlier stage and not merely a few days before his release. Furthermore, the Court would have expected that the decision regarding the deportation would have been communicated before and not on the day of his expected release after having served his sentence. As the First Court correctly noted this is not the competent court to decide whether the rights of the accused were breached as a result of the way the Immigration Department handled this case. The Court while acknowledging that this without a doubt caused a level of uncertainty and stress to the accused, however makes it clear that the accused should have never acted the way he acted towards these officers but could have taken remedial legal action.

The Court while confirming that the punishment imposed by the First Court was within the legal parameters, finds that in view of the circumstances of the case, the punishment of two (2) year imprisonment is to be in terms of article 28A of Chapter 9 of the Laws of Malta suspended for three (3) years. The Court will also reduce the

fine multa imposed from five thousand euros (€5,000) to the minimum multa allowed by law of four thousand euros (€4,000).

It confirms where the Court ordered the payment of the fees relating to the appointment of Dr Mario Scerri and where it declared him an 'illegal'³³ immigrant and ordered his immediate deportation. The Court also confirms the order made in terms of article 383 of Chapter 9 of the Laws of Malta.

The Court therefore rejects the appeal filed by the appellant and confirms the judgment delivered by the First Court where it found the appellant guilty of all charges brought against him. This Court revokes where the Court condemned the appellant to two (2) years imprisonment from which the Court ordered that the period of time the accused had spent in prison till the date of the First Court's judgment should be deducted but instead condemns the appellant to two (2) years imprisonment which in terms of article 28A of Chapter 9 of the Laws of Malta are suspended for three (3) years. The Court while revoking where the Court ordered the payment of a fine of five thousand euros (€5,000) instead orders the payment of a fine (multa) of four thousand euros (€4,000). The Court also confirms the order for one (1) year in terms of article 383 of Chapter 9 of the Laws of Malta to provide for the safety of CO165 Dennis Thornton and CO177 Matthew Cilia. This order enters into force from today.

The Court confirms the payment of expenses related to the appointment of Dr Mario Scerri in terms of article 533 upon receipt from the Registrar of the Criminal Courts and Tribunals. The Court also confirms where the Court declared the appellant an prohibited immigrant³⁴ in terms of articles 5(2)(d) and 14 of Chapter 217 of the Laws of Malta and orders the Principal Immigration Officer to use his powers provided by

³³ Should have been 'prohibited' in terms of section 5 of Chapter 217 of the laws of Malta

³⁴ According to article 5 of Chapter 217 of the Laws of Malta and not 'illegal immigrant' as quoted in the judgment of the first court.

the Law, for his immediate deportation from these islands after the payment of the above mentioned fine and of the court appointed experts.

The Court warns the appellant of the consequence if he commits an offence within three (3) years from today.

The Court orders that a copy of this judgment is notified to the Principal Immigration Officer as well as to the Director of the Criminal Courts so that he may recover the expenses involved in the court appointed experts.

(ft) Consuelo Scerri Herrera

Judge

TRUE COPY

Franklin Calleja
Deputat Registratur