



THE COURT OF CRIMINAL APPEAL

The Hon. Mr. Justice Aaron M. Bugeja M.A. (Law), LL.D. (melit)

Appeal number - 271/2017

The Police

(Inspector Maurice Curmi)

vs

Essam .B.M Abdellatif

Sitting of the 8th October 2019

The Court,

Having seen that this is an appeal by Essam .B.M Abdellatif from a judgment delivered by the Court of Magistrates (Malta) on the 8th June 2017. The same Abdellatif was charged with having, :

1. on the 11th February 2017 at around 13:00 in Triq Ta' Fuq il-Widien, Mellieha caused involuntary damages to the vehicle reg. no. KBE607 make Renault to the detriment of Carmel Buhagiar which damages amounted to €245.17 as per article 328 of the Criminal Code;
2. on the 14th February 2017 at around 16:42 in the Maltese Islands by means of electronic communication network or apparatus threatened and/or

insulted the person of Anton Borg with words as per article 49(a) of Chapter 399 of the Laws of Malta;

3. also accused with having made improper use of an electronic communication (watts app) as per article 49(c) of Chapter 399 of the Laws of Malta

The Court was also requested that in case of guilt it provides for the security of Mario Fenech and Carmel Buhagiar.

By means of a judgment delivered on the 8th June 2017, the Court of Magistrates (Malta), after seeing section 328(d) of the Criminal Code and sections 49(a)(c) of Chapter 399 of the Laws of Malta declared the accused guilty of all the charges proffered against him and condemned him to the payment of a fine (multa) of eighty euro and in terms of section 532A of the Criminal Code ordered the offender to pay Carmel Buhagiar the sum of three hundred and thirty euro and seventeen cents by way of damages sustained by the complainant within two months from the date of the judgment.

Essam .B.M Abdellatif filed an appeal from this judgment raising three grievances :

- a. the car in question was already damaged and the parte civile was taking advantage of him. Given that the bonnet was not aligned, the glass eventually shattered with no fault of the appellant;
- b. the appellant did not insult or threaten the parte civile; nor made improper use of communications equipment;
- c. the amount of damages ordered by the Court was not sustained by the evidence submitted.

As this Court did not have the actual transcripts, or at least the audio recordings of the testimony of the witnesses that tendered evidence before the Court of Magistrates, this Court had to take the testimony of the witnesses afresh.

From this testimony it transpired that on an unspecified date, Carmel Buhagiar had advertised a car for sale. He and the appellant could not agree on the selling price for the vehicle. He did send messages to the appellant on What's App and both used strong words with each other. Buhagiar explained that the car's bonnet could be opened. However the appellant lifted it up high and it cracked. Buhagiar noted that the mark on the windscreen (that could be seen in the encircled part in the picture exhibited at fol 19) was not a crack but rather a reflection. He stressed that it was the appellant who forced the bonnet open and broke the car's windscreen. He confirmed the quotations shown at folio (12 and) 13.

On the otherhand the appellant claimed that he went to Mellieha to see this car that was for sale. Buhagiar was holding up the bonnet while he was inspecting the car. But all of a sudden Buhagiar told him that appellant broke the windscreen. Then Buhagiar started to blackmail him. The appellant claimed that fol 17 was a picture taken from Maltapark and it showed that the windscreen was already cracked before he went to inspect the car.

The appellant contended that at no stage did he intend to offend Carmel Buhagiar via his What's App posting. The expression used by him was not meant to be offensive.

The Prosecution replied that the appellant confirmed that he opened the bonnet and that he heard a noise. It was at that point that Buhagiar noted the damages to the windscreen. The appellant was found guilty of involuntary damages to the property of the parte civile. Furthermore the appellant called the parte civile “old man”, which expression was offensive.

The appellant retorted that at no stage was a noise heard before the windscreen gave way.

Considers the following : -

The specific functions of this Court, as court of criminal appeal, were clearly explained in the case *Ir-Repubblika ta' Malta vs Emanuel Zammit* decided by the Court of Criminal Appeal in its Superior Jurisdiction¹ where it was held that : -

¹ Tal-date 21 April 2005. Vide also: *Ir-Repubblika ta' Malta vs Domenic Briffa*, 16 ta' Ottubru 2003; *Ir-Repubblika ta' Malta vs. Godfrey Lopez u r-Repubblika ta' Malta v. Eleno sive Lino Bezzina* 24 ta' April 2003, *Ir-Repubblika ta' Malta vs. Lawrence Ascjak sive Axiak* 23 ta' Jannar 2003, *Ir-Repubblika ta' Malta vs. Mustafa Ali Larbed; Ir-Repubblika ta' Malta vs Thomas sive Tommy Baldacchino*, 7 ta' Marzu 2000, *Ir-Repubblika ta' Malta vs. Ivan Gatt*, 1 ta' Dicembru 1994; u *Ir-Repubblika ta' Malta vs George Azzopardi*, 14 ta' Frar 1989; u l-Appelli Kriminali Inferjuri: *Il-Pulizija vs Andrew George Stone*, 12 ta' Mejju 2004, *Il-Pulizija vs Anthony Bartolo*, 6 ta' Mejju 2004; *Il-Pulizija vs Maurice Saliba*, 30 ta' April 2004; *Il-Pulizija vs Saviour Cutajar*, 30 ta' Marzu 2004; *Il-Pulizija vs Seifeddine Mohamed Marshan et*, 21 ta' Ottubru 1996; *Il-Pulizija vs Raymond Psaila et*, 12 ta' Mejju 1994; *Il-Pulizija vs Simon Paris*, 15 ta' Lulju 1996; *Il-Pulizija vs Carmel sive Chalmer Pace*, 31 ta' Mejju 1991; *Il-Pulizija vs Anthony Zammit*, 31 ta' Mejju 1991.

In the case *Ir-Repubblika ta' Malta vs. Domenic Briffa* it was also stated as follows :

kif dejjem gie ritenut huwa principju stabbilit fil-gurisprudenza ta' din il-Qorti li hija ma tiddisturbax l-apprezzament dwar il-provi maghmul mill-ewwel Qorti jekk tasal ghall-konkluzjoni li dik il-Qorti setghet ragjonevolment u legalment tasal ghall-konkluzjoni li tkun waslet ghalha. Fi kliem iehor, din il-Qorti ma tirrimpjazzax id-diskrezzjoni fl-apprezzament tal-provi ezercitata mill-ewwel Qorti izda taghmel apprezzament approfondit tal-istess biex tara jekk dik l-ewwel Qorti kinitx ragjonevoli fil-konkluzjoni taghha. Jekk, izda, din il-Qorti tasal ghall-konkluzjoni li l-ewwel Qorti, fuq il-provi li kellha quddiemha, ma setghetx ragjonevolment jew legalment tasal ghall-konkluzjoni li tkun waslet ghalha, allura din tkun raguni valida, jekk mhux addirittura impellenti, sabiex din il-Qorti tiddisturba dik id-diskrezzjoni u konkluzjoni.

This is therefore a court of revision and not a court of retrial. In the ordinary course of its appellate functions, this Court analyses the evidence that would have been tendered before the Court of Magistrates as well as the arguments raised by the parties on the facts of the case and the pertinent applicable laws. However it does not do this to substitute itself to the Court of Magistrates. The decision whether the person charged is guilty or not guilty is taken by the Court of Magistrates.²

This Court, as a court of criminal appeal analyses whether the Court of Magistrates could, legally and reasonably, on the basis of the evidence and

Kif gie ritenut diversi drabi, hawn qieghdin fil-kamp ta' l- apprezzament tal-fatti, apprezzament li l-ligi tirrizerva fl- ewwel lok lill-gurati fil-kors tal-guri, u li din il-Qorti ma tiddisturbax, anke jekk ma tkunx necessarjament taqbel mija fil-mija mieghu, jekk il-gurati setghu legittimament u ragonevolment jaslu ghall-verdett li jkunu waslu ghalih. Jigifieri l-funzjoni ta' din il-Qorti ma tirrizolvix ruhha f'ezercizzju ta' x'konkluzjoni kienet tasal ghalha hi kieku kellha tevalwa l-provi migbura fi prim'istanza, imma li tara jekk il-verdett milhuq mill-gurija li tkun giet "properly directed", u nkwadrat fil-provi prodotti, setax jigi ragonevolment u legittimament milhuq minnhom. Jekk il- verdett taghhom huwa regolari f'dan is-sens, din il-Qorti ma tiddisturbax (ara per eżempju Ir-Repubblika ta' Malta v. Godfrey Lopez u r-Repubblika ta' Malta v. Eleno sive Lino Bezzina decizi minn din il-Qorti fl-24 ta' April 2003, Ir-Repubblika ta' Malta v. Lawrence Ascjak sive Axiak deciza minn din il-Qorti fit-23 ta' Jannar 2003, Ir-Repubblika ta' Malta v. Mustafa Ali Larbed deciza minn din il-Qorti fil-5 ta' Lulju 2002, ir-Repubblika ta' Malta v. Thomas sive Tommy Baldacchino deciza minn din il-Qorti fis-7 ta' Marzu 2000, u r-Repubblika ta' Malta v. Ivan Gatt deciza minn din il-Qorti fl-1 ta' Dicembru 1994).

² And this unless there are exceptional circumstances mentioned in article 428(3)(5) of the Criminal Code in which case this Court could decide itself the merits of a case.

legal arguments submitted to it, arrive to its conclusions stated in its judgment. It is only in pursuit of this aim that this Court makes its detailed analysis of the evidence and arguments submitted. If this Court deems that the Court of Magistrates carried out a proper legal and reasonable appreciation of the evidence and legal arguments submitted to it, then this Court does not disturb the conclusions reached by that Court.

However if this Court is convinced that the Court of Magistrates did not carry out a reasonable appreciation of the evidence or a correct legal analysis of the arguments submitted to it, such that this Court does not feel it safe and satisfactory to rely on the conclusions reached by the Court of Magistrates, then this Court has the power to disturb the discretion exercised and decisions made by the Court of Magistrates and may substitute its conclusions with its own.

Considers further : -

The determination of this case lies, principally on the credibility of the evidence that was tendered by the *parte civile* and the appellant. After hearing the testimony of the witnesses that testified before it, and after making an appreciation of their demeanour in terms of articles 637 of the Criminal Code, the Court of Magistrates concluded that the testimony of the *parte civile* was more credible than that tendered by the appellant and decided to rely on the version of events recounted by the *parte civile*. Given the different versions as to the cause of the damage to the windscreen in question, it was imperative for the Court to make a thorough assessment of the testimony of both witnesses and decide who

to believe and to what extent. This Court finds that the Court of Magistrates could legally and reasonably arrive at the conclusion that the version tendered by the *parte civile* was more credible, and hence, reliable.

According to Article 328 of the Criminal Code : -

Whosoever, through imprudence, negligence or unskilfulness in his trade or profession, or through non-observance, of any regulation, shall cause any fire or any damage, spoil or injury as mentioned in this sub-title, shall, on conviction, be liable...

The Court has seen that both parties agree that the car in question had sustained damages prior to the inspection carried out by the appellant. The Court of Magistrates believed the version of events tendered by the *parte civile* as to what led to the cause of damage to the windscreen, namely the mishandling or rough handling of the bonnet by the appellant.

The Court considers that the appellant knew that the car was already damaged prior to his inspection. Consequently the appellant should have been more prudent and skilful in the manner in which he handled the bonnet. The appellant claims that the windscreen was already cracked when he inspected the vehicle and he made reference to the pictures at fol 17 and 19. However this Court cannot conclude, even on a balance of probabilities, that the mark shown on the windscreen was a crack, as he contends.

However this notwithstanding, the fact that the windscreen could have been already cracked, did not exonerate the accused from exercising the necessary diligence and prudence when handling the car's bonnet - and more so when it was clear that the car was already in a damaged state.

Once he handled the car's bonnet, then he was duty bound to exercise the diligence and prudence of a *bonus paterfamilias* in those circumstances – something which he did not do. According to the case decided by the Criminal Court, then exercising appellate jurisdiction, in the names *Il-Pulizija vs Carmelo Callus*, decided on the 26th May 1958 : -

Il-Kodiċi Kriminali, f' materja ta' danneggjament, jitkellem fuq ħsara, tħassir jew tghariq ta' hwejjeġ ta' haddiehor; liema lokuzzjoni tikkomprenċi gradazzjoni mid-disturzzjoni totali għall-icken dannu. Għaldaqstant ma jistax jingħad li l-imputat ma għamelx ħsara fl-oġġett għax dan kien ġa mħassar, jekk hu komplax ħassru, u jekk dak l-oġġett, anke hekk imħassar, xi valur kellu.

The Court therefore dismisses the first grievance.

Considers further : -

That the second charge is that on the 14th February 2017 at around 16:42 in the Maltese Islands by means of electronic communication network or apparatus threatened and/or insulted the person of Anton Borg with words as per article 49(a) of Chapter 399 of the Laws of Malta.

There is a discrepancy between the Maltese and the English version of the summons served on the appellant by reference to the name of the person against whom allegedly threats or insults were hurled. The name Anton Borg is clearly entered by mistake as no Anton Borg was mentioned during the evidence. This discrepancy was probably the result of a *lapsus calami* or *computatri* on the part of the prosecution – and something that should have been avoided.

However the more worrying mistake relates to the definition of the crime envisaged in the second charge, purportedly reflecting the provisions of article 49(a) of Chapter 399 of the Laws of Malta. This article elevates to a crime the act of a person who by means of an electronic communications network or apparatus **threatens the commission of any crime**. This sub-article does not criminalise insults made via an electronic communications network. Nor does it criminalise threats made via an electronic communications network. Article 49(a) of Chapter 399 elevates to the status of crime the act of a person threatening the commission of any crime. No such act was committed by the appellant in this case.

Furthermore as far as the third charge is concerned, after having analysed the testimony of Carmel Buhagiar and of the appellant as well as the documents exhibited at fol 20 - 27 this Court agrees with the appellant that he did not commit the crime envisaged in article 49(c) of Chapter 399 of the Laws of Malta. While it is true that the appellant posted the phrase "*nice move from an old man But guess what : I don't care*", this Court does not consider this comment, in the prevailing circumstances, as being tantamount to the crime mentioned in this article 49(c) of Chapter 399.

This Court considers that the Court of Magistrates could not, legally and reasonably find guilt in the appellant in relation to the second and third charges. The second grievance of the appellant is therefore being upheld.

As for the third grievance, appellant contends that the Court of Magistrates could not award the amount of damages ordered in the

judgment given that the amount liquidated was not sustained by the evidence submitted.

The appellant is right in this contention. According to the case *Il-Pulizija vs Joseph Zahra* decided by this Court as differently presided on the 24th February 2003 : -

It-tieni aggravju hu li ma ngabitx l-ahjar prova dwar il-hsara kagunata fil-vettura tal-Gvern. L-appellant ghandu, in parti, ragun. L-istima maghmula mix-xhud Paul Borg (ara d-dokument CC ezibit mix-xhud Charles Caruana) hija opinjoni ex parte u mhux ta' perit nominat mill-qorti. Fin-nuqqas ta' qbil bejn il-partijiet u salv dak li jinghad fis- subartikolu (2) ta' l-Artikolu 325, biex tigi determinata l- hsara ghall-finijiet ta' l-Artikolu 325(1) tal-Kodici Kriminali (moqri ma' l-Artikolu 335 ta' l-istess Kodici) din trid (i) jew tigi apprezzata direttament mill-gudikant, fis-sens li jekk il- gudikant ikun jifhem bizzzejjed jista' jiddetermina huwa stess l-ammont tal-hsara billi jezamina l-oggett in kwistjoni; jew (ii) il-parti leza tghid kemm effettivament hallset biex issir it-tiswija ta' jew fi l-oggett; jew (iii) billi jitqabbad perit mill-qorti biex jaghti l-fehma tieghu dwar l- ammont tal-hsara. F'dan il-kaz ma tqabbad ebda perit. L- uniku ammont li jista' jigi minn din il-Qorti accettat bhala hsara kagunata fil-vettura huwa dak ta Lm31 ghax effettivament dana l-ammont thallas mid-Dipartiment koncernat biex inxtrat mera gdida minflok dik miksura (ara d-deposizzjoni ta' Paul Borg, fol. 44). Dana l-ammont ipoggi r-reat ipotizzat fil-paragrafu (c) ta' l-Artikolu 325(1) u mhux, kif indikat fl-ewwel imputazzjoni kif migjuba mill- Pulizija Ezekuttiva, fil-paragrafu (b).

During the sitting of the 8th June 2017 the accused declared that there was no need for the quotations to be confirmed on oath and consequently the prosecuting officer declared that it had no further evidence to produce. However at no stage did the accused concede that the amounts mentioned in the said quotations were accepted by him as representing **the true and fair value of the damages in question** and that in view of this he was accepting the quotations. He merely stated that there was no need for the quotations to be confirmed on oath – when in point of fact that was the

least that could have been done in order to help the Court in arriving at its independent conclusion as to the *quantum* of the damages sustained. More so in this case where the responsibility for the damages was hotly contested by the accused.

Clearly the documents exhibited at folio 12 and 13 were just quotations. There was no agreement between the parties as to the value of the damages sustained. There was no admission by the accused that he was responsible for the damages. Hence the exercise that should have been done by the Court of Magistrates was :

- (a) to determine itself the amount of damages to be awarded, provided that the Magistrate is competent enough to determine the value of the damage after examining the damaged item himself – something that the Court did not state in its judgment;
- (b) the victim declaring the amount of money paid in order to fix the damage suffered – something that he could not do, given that these were just quotations.
- (c) to appoint an expert in order to determine the value of the damage – something that was not done by the Court during the course of the proceedings.

This Court deems that in order for a court of criminal justice to be able to award an amount of damages in terms of articles 15A or 532A of the Criminal Code as well as article 24 of the Probation Act, it still needs legally admissible evidence on the basis of which it can base its award; and this evidence had to be produced on the basis of any one of the abovementioned criteria.

Hence the Court deems that the third grievance merits to be upheld.

Consequently :

This Court determines the appeal as follows : while rejecting the first grievance, it upholds the second and third grievance raised by the appellant and hence it reforms the judgment of the Court of Magistrates abovementioned by : -

- (a) revoking that part of the judgment wherein it found the appellant guilty of the second and third charges and consequently this Court acquits the appellant from the said second and third charges;
- (b) revoking that part of the judgment wherein it condemned the appellant to pay Carmelo Buhagiar the sum of three hundred thirty euro; and on the otherhand by
- (c) confirming that part wherein it found the appellant guilty of the first charge;
- (d) and given that in virtue of this judgment the appellant was acquitted of the second and third charges, it revokes the punishment of the fine (multa) of eighty euro (€80) and substitutes

that punishment by an ammenda of fifty euro (€50) as punishment for the first charge in terms of article 328(d) of the Criminal Code.

This judgment is being delivered without prejudice to any civil remedy competent according to Law.

Aaron M. Bugeja

Judge