



THE COURT OF CRIMINAL APPEAL

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

Appeal number - 343/2019

The Police

vs.

Yulia TOTEVA

Sitting of the 24th November 2020

The Court,

1. This is an appeal from a judgment delivered by the Court of Magistrates (Malta) on the 9th December 2019 against Yulia TOTEVA, holder of a Maltese identity card number 166178A, who was charged with having, on the 9th January 2016, between twenty minutes to five and thirty five minutes past five in the morning, in Mount Carmel Hospital, Attard, through imprudence, carelessness, unskilfulness in her art or profession, or non-

observance of regulations, caused the death of Richard Geoffrey Paxton.

2. By means of the said judgment, the Court of Magistrates (Malta), found the accused guilty of the charge and condemned her to the payment of a fine (multa) of five thousand euro (€5000), together with the payment of the sum of eight hundred sixty euro thirty seven cents (€860.37) representing one third of the expert fees.
3. Yulia TOTEVA filed an appeal against this judgment whereby she requested this Court to **revoke** the said judgment thereby declaring her not guilty and consequently acquitting her from the same; or alternatively to reform the judgment in that part relating to the punishment that ought to be meted out so that a more equitable and just punishment be delivered.
4. The reasons for this appeal are the following:-
 - (1) The appellant was found guilty of the charge on the basis of evidence that did not satisfy the level of sufficiency required in criminal proceedings, which renders this judgment unsafe and unsatisfactory. The prosecution failed to question the responsibilities of the other nurses who were also on duty on the night in question and who, on the register book, had overwritten the appellant's name next to the time slot during which this incident happened. The report of Dr. Mario Scerri should have been given more weight by the Court of Magistrates. The Court relied on the report of WPS Jennifer Caruana rather than the report of Dr. Mario Scerri. The appellant did not consent to her name being changed on the register book time slot. The Court of Magistrates relied mostly on the testimony of Nurse Paul Balzan and Correctional Officer Philip Zammit, both of whom had ulterior motives. The appellant did check on Paxton and she spoke to him also on the buzzer. She claims to be the person seen on the CCTV footage at 0404 and 0425.

(2) Moreover it was sufficiently proven that there were several administrative shortcomings, and that these were the cause of Mr. Paxton's death.

(3) One of the most important constitutive elements of the offence of involuntary homicide, the element of foreseeability in culpa, and the causal link between the act or omission and the death did not subsist.

(4) Although the Court of Magistrates recognised that there were other people who were negligent and who should carry the brunt of responsibility for Paxton's demise, that court still found the appellant guilty despite her being described as a hard worker and one of the best employees.

(5) The Court of Magistrates departed from the conclusions made in the reports of certain Court experts despite that these reports were based on hard evidence. Indeed the nurse who should have been monitoring during the time slot in question was Rakhil Noor, as could be seen from the report of Dr. Martin Bajada.

(6) The punishment that was meted out in this case was excessive and disproportionate considering the circumstances of this case.

Considers as follows

5. First of all this is an appellate Court tasked with the revision of the judgment delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature. This Court does not change the findings of fact, legal conclusions and the decisions made by the Court of Magistrates when it appears to it that the Court of Magistrates was legally and reasonably correct. In the judgment delivered by the Court of Criminal Appeal in its Superior Jurisdiction in the case *Ir-Repubblika ta' Malta vs Emanuel ZAMMIT*¹ it was held that this

¹ 21st April 2005. See also, inter alia, *Ir-Repubblika ta' Malta vs Domenic Briffa*, 16 th October 2003; *Ir-Repubblika ta' Malta vs Godfrey Lopez* and *Ir-Repubblika ta' Malta v. Eleno sive Lino Bezzina*, 24th April 2003, *Ir-Repubblika ta' Malta vs Lawrence Ascjak sive Axiak* 23rd January 2003, *Ir-Repubblika ta' Malta vs Mustafa Ali Larbed*; *Ir-Repubblika ta' Malta vs Thomas sive Tommy Baldacchino*, 7th March 2000, *Ir-Repubblika ta' Malta vs Ivan Gatt*, 1st December 1994; *Ir-Repubblika ta' Malta vs George Azzopardi*, 14th February 1989; *Il-Pulizija vs Andrew George Stone*, 12th May 2004, *Il-Pulizija vs Anthony Bartolo*, 6th May 2004; *Il-Pulizija vs Maurice Saliba*, 30th April 2004; *Il-Pulizija vs Saviour Cutajar*, 30th March 2004; *Il-Pulizija vs Seifeddine Mohamed Marshan et*, 21st October 1996; *Il-Pulizija vs Raymond Psaila et*, 12th May 1994; *Il-Pulizija vs Simon Paris*, 15th July

Court makes its own detailed analysis of the record of the proceedings held before the Court of first instance in order to see whether that Court was reasonable in its conclusions. If as a result of this detailed analysis this Court finds that the Court of first instance could not reasonably and legally arrive at the conclusion reached by it, then this Court would have a valid, if not compelling reason, to vary the discretion exercised by the Court of first instance and even change its conclusions and decisions.

6. In the ordinary course of its functions, this Court does not act as a court of retrial, in that it does not rehear the case and decide it afresh; but it intervenes when it sees that the Court of Magistrates, would have mistakenly assessed the evidence or wrongly interpreted the Law - thus rendering its decision unsafe and unsatisfactory. In that case this Court has the power, and indeed, the duty to change the findings and decisions of the Court of

1996; *Il-Pulizija vs Carmel sive Chalmer Pace*, 31st May 1991; *Il-Pulizija vs Anthony Zammit*, 31st May 1991.

In *Ir-Repubblika ta' Malta vs Domenic Briffa* it was further stated:

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 tid-disturbahx, 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 ghaliha 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 tid-disturbahx (ara per ezempju *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).

Magistrates or those parts of its decisions that result to be wrong or that do not reflect a correct interpretation of the Law.

7. Two very important articles of Maltese Law of Evidence are articles 637 and 638 of the Criminal Code. According to article 637 of the Criminal Code:

Any objection from any of the causes referred to in articles 630, 633 and 636, shall affect only the credibility of the witness, as to which the decision shall lie in the discretion of those who have to judge of the facts, regard being had to the demeanour, conduct, and character of the witness, to the probability, consistency, and other features of his statement, to the corroboration which may be forthcoming from other testimony, and to all the circumstances of the case: Provided that particular care must be taken to ensure that evidence relating to the sexual history and conduct of the victim shall not be permitted unless it is relevant and necessary.

8. Furthermore, article 638 of the Criminal Code states that:

(1) In general, care must be taken to produce the fullest and most satisfactory proof available, and not to omit the production of any important witness.

(2) 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.

9. These principles have been confirmed, time and again in various judgments delivered by this Court.² Moreover as it was held in *Il-Pulizija vs Joseph Thorne*,³

mhux kull konflitt fil-provi ghandu awtomatikament iwassal ghall-liberazzjoni tal-persuna akkuzata. Imma l-Qorti, f' kaz ta' konflitt fil-provi,

²*Il-Pulizija vs Joseph Bonavia* per Judge Joseph Galea Debono dated 6 ta' November 2002; *Il-Pulizija vs Antoine Cutajar* per Judge Patrick Vella, decided on the 16th March 2001; *Il-Pulizija vs Carmel Spiteri* per Judge David Scicluna, decided on the 9th November 2011; *Ir-Repubblika ta' Malta vs Martin Dimech*, Court of Criminal Appeal (Superior Jurisdiction), decided on the 24th September 2004.

³ Deciza fid-9 ta' Lulju 2003 mill-Qorti tal-Appell Kriminali Sede Inferjuri ippreseduta mill-Imhalled Joseph Galea Debono.

trid tevalwa l-provi skond il-kriterji enuncjati fl-artikolu 637 tal-Kodici Kriminali w tasal għall-konkluzzjoni dwar lil min trid temmen u f' hix ser temmnju jew ma temmnux'.

10. This jurisprudence shows also that the main challenge faced by Courts of Criminal Jurisdiction is the discovery of the truth, historical truth, behind every *notitia criminis*. Courts of Criminal Jurisdiction are legally bound to decide cases on the basis of direct and indirect evidence brought before them. But evidence and testimony produced in criminal trials do not necessarily lead the Court to the discovery of the historical truth. A witness may be truthful in his assertions as much as he may be deceitful. Unlike a mortal witness, circumstantial evidence cannot lie. But if this evidence is not univocal, it may easily deceive a Court of Criminal Jurisdiction thus leading it to wrong conclusions.

11. A Court of Criminal Jurisdiction can only convict an accused if it is sure that the accused committed the facts constituting the criminal offence with which he stands charged, and this on the basis that the Prosecution would have proven their case on a level of sufficiency of evidence of proof beyond a reasonable doubt. Courts of Criminal Jurisdiction need only to be sure of an accused's guilty; they do not need to be absolutely sure of his guilt. But if a Court of Criminal Jurisdiction is sure⁴ of an accused's guilt, then it is obliged to convict and mete out punishment in terms of Law. These principles relating to the level of sufficiency of evidence were also expressed by Mr. Justice William Harding in the appeal proceedings *Il-Pulizija vs*

⁴ *R v Majid*, 2009, EWCA Crim 2563, CA at 2.

Joseph Peralta decided on the 25th April 1957 as being at the basis of a conviction reached by a Maltese Court of Criminal Jurisdiction.

12. However if Defence Counsel manage to propound sound factual and legal arguments such that, on a balance of probabilities, manage to create a reasonable doubt in the mind of the Court as to the guilt of the accused, then the Court of Criminal Jurisdiction is obliged to acquit the accused.

13. Maltese Law entrusts the Court of First Instance with the exercise of analysis and assessment of the evidence of the case. The Court of Magistrates is one such Court. That Court is normally best placed to make a thorough assessment of the evidence brought before it as it would have, most of the time, physically lived through those proceedings, and also being able to make a proper assessment of the witnesses who would have testified before it, thus making full use of the criteria mentioned in articles 637 and 638 of the Criminal Code.

14. But even where, for some reason, the Court of Magistrates would not itself have heard the witnesses, the law still entrusts that Court with the primary analysis and assessment of the facts of a case as well as the eventual decision on the guilt or innocence of the accused. On the otherhand, the Court of Criminal Appeal is a court of second instance, entrusted with the analysis of whether, on the basis of the evidence and legal arguments submitted, the Court of

Magistrates could legally and reasonably arrive at the conclusions reached in its judgment.

15. The Court of Criminal Appeal does not disturb the conclusions reached by the Court of Magistrates lightly or capriciously. In the case *Il-Pulizija vs Lorenzo Baldacchino* decided by the Criminal Court on the 30 th March 1963 by Mr. Justice William Harding it was held as follows : -

Ma hemmx bzonn jinghad li l-komportament tax-xhud (*demeanour*) hu fattur importanti ta' kredibilita (ara Powell, *On Evidence*, p. 505), u kien, ghalhekk, li inghad mill-Qrati Inglizi segwiti anki mill-Qrati taghna, illi "great weight should be attached to the finding of fact at which the judge of first instance has arrived" (idem, p. 700), appuntu ghaliex "he has had an opportunity of testing their credit by their demeanour under examination".

16. To recapitulate, in *Il-Pulizija vs. Vincent Calleja* decided by this Court on the 7th March 2002, the Court of Criminal Appeal, as a court of revision of the sentence of the Court of Magistrates does not pass a new judgment on the facts of the case but makes its own independent evaluation and assessment of the facts of the case in order to see whether the decisions reached by the Court of Magistrates were "*unsafe and unsatisfactory*". This Court does not substituted the decision of the Court of Magistrates unless that decision is deemed "*unsafe and unsatisfactory*". If this Court finds that on the basis of the evidence and legal arguments submitted to it the Court of Magistrates could legally and reasonably arrive at its conclusions mentioned in its judgment, then this Court does not vary the conclusions reached by that Court : - even if this Court, as a Court of Criminal Appeal could have arrived at a different

conclusion to that reached by the Court of Magistrates had it been tasked with the same role.

Considers further

17. This Court reviewed the evidence brought before the Court of Magistrates. It has given particular regard to the testimony of the appellant before that Court and compared it to the other evidence brought in this case. The appellant does not contest the fact that on the day of the incident she was nurse on duty; but she contests the fact that she was made to appear as being the officer in charge of monitoring Paxton during the time when he committed suicide. She claims that the register was altered by another nurse without her consent.

18. This Court saw that the records were indeed changed. However the Court of Magistrates was not convinced that this happened without the appellant's consent - and that Court gave its reasons why it was not so convinced.

19. The appellant claims that during that night her monitoring duties were from 1 to 3 am. Rakhil Noor was responsible for monitoring duties between 3 and 5 am. This was also shown in an entry in the register underneath the tippexed line marked with a cross on doc

ET2(A) at fol 376 and ET2(B) at fol 377. Yet, during her testimony, at fol 394, the appellant places herself in the monitoring room before 0500. This tallies with the testimony of Paul Balzan. So despite that she claims that she had no monitoring duties during that time, she was still in the monitoring room around that time.

20. Balzan states clearly that at that time the appellant was the nurse on duty watching over Paxton. Balzan explains how Paxton was not visible on screen as he was not within the camera's field of vision. So he decided to check physically on Paxton. Yet the appellant did not do the same, even though she too was in the monitoring room, and according to Balzan, she was the nurse on duty at that time.

21. Despite the bad quality picture on the monitor, there is no doubt that for a considerable period of time Paxton could not be seen, as he had moved toward the blind spot. Why was no action taken by the appellant during those crucial minutes when Paxton went towards the blind spot? The appellant stated that she was in the monitoring room. She also knew that Paxton went to the blind spot. At fol 393, being asked by Defence Counsel why could not Paxton be seen preparing to hang himself, the appellant replied *because he was behind the door*.

22. Now if, for argument's sake, it was not the appellant's duty to monitor Paxton during those fateful minutes, the fact still remains that she was in the monitoring room and she could also see Paxton's movements on the monitor. She could, and did see, that Paxton went to the blind spot, and spent some minutes there. Was she

justified doing nothing simply because according to her it should have been Rakhil Noor who should have performed the monitoring duties on Paxton at the specific moment in time?

23. The evidence in this case could lead the Court of Magistrates to arrive at the reasonably and legally sound conclusion that the appellant was responsible for monitoring duties during these crucial moments. Even though she was not the only officer responsible for the supervision of Paxton during that fateful night, as there were other persons tasked with similar responsibilities - as can also be witnessed from the Police NPS report, yet this Court cannot conclude that the assessment carried out by the Court of Magistrates was wrong. The Court of Magistrates made a detailed analysis of all the evidence in this case and its conclusion that the cumulative effect of this evidence pointed towards the responsibility of the appellant was legally and reasonably correct. The first grievance hereby being rejected.

24. This Court is appalled by the various administrative shortcomings and ill practices that plagued this case. There was a crescendo of circumstances, shortcomings and oversights, all converging at the same place and time, that led to the tragic demise of Paxton. The evidence shows that most of these shortcomings and ill practices were later addressed by the competent authorities. Yet these shortcomings and ill practices on their own - despite them highly facilitating the preparation and execution of Paxton's plan to

somehow commit suicide - were not the only and exclusive cause of Paxton's death, as Defence suggests.

25. This Court is convinced that had there been the proper protocols and practices in place, Paxton's death could, and should, have been avoided. Yet even with the highly inept protocols and practices in place on the day of the incident, the appellant's inertia during those fateful moments - as highlighted by the Court of Magistrates' judgment - did not stop the tragic event that should not have been allowed to happen. Given that Paxton was placed level one surveillance, then part of the duty of the appellant was precisely to see to it that no such event happened.

26. The second grievance is being rejected.

Considers further

27. This Court does not agree with the third grievance of the appellant.

28. The evidence shows that Paxton was a high risk inmate. That is why he was placed on level one surveillance in the first place. It is true that it was Paxton himself who decided to commit suicide, and that he clearly planned this to the minutest detail. His resolve to call it a definitive day is clearly shown in the manner in which this suicide was planned and executed. Yet it was precisely because he was such a high risk case that should have prompted the appellant

not to take things for granted or adopt a relaxed attitude towards Paxton's behaviour. It was her duty to clearly foresee that something was amiss when Paxton went off camera for a relative long time. In those circumstances recalling the patient via the means of communication available is not enough. Proactive action was necessary to avoid any incidence of self harm from happening - especially in those delicate cases where the patients were well known to be able and willing to self harm.

29. A thorough, minute and professional search in Paxton's room, on Paxton's personal effects and on the few movable items placed in that room should have led to the discovery of the rope that was eventually used by Paxton. This episode surely contributed to the execution of his suicidal plan. Had there been such a proper search - in every nook and cranny of the room and its contents, then his plan to hang himself with a piece of cord or string would have been foiled. That too did not happen.

30. The appellant was not the only person who should have been monitoring Paxton. Other persons shared that duty with her. Yet the Court of Magistrates was convinced, on the basis of the evidence supplied, that at that moment in time when Paxton disappeared from the field of vision on the monitor it was the appellant who was the nurse specifically tasked with that duty. But it transpired that she was not the only one who should have been monitoring Paxton during that night. Had all those responsible done their duties properly, then this tragic death would have been avoided.

31. High risk individuals like Paxton are known to go at great lengths to reach their self-harming goals. The classification of Paxton as level one in itself shows the high level of supervision required precisely because of the likelihood of such individuals to resort to self-harm at the first available opportunity. That high level of supervision is required precisely in order for the responsible officers to intervene and to stop all those foreseeable events of self-harm that in cases like Paxton's were not simply probable, but highly likely. This did not take place in this case.

32. This third grievance is hereby rejected.

Considers further

33. This Court agrees that, apart from the appellant, there were other officers who were negligent and who should also carry part of the responsibility for Paxton's demise. The Court of Magistrates did note that the appellant was a hard worker and one of the best employees. Yet these good qualities on their own cannot exonerate her from her share of responsibility in this case. By her inertia, despite her seeing Paxton moving to the blind spot and remaining there for a number of minutes without intervening, the appellant failed her duties and the duty of care towards Paxton by failing to act with the required diligence when she was duty bound to and consequently contributed towards his demise.

34. Once that she was a nurse on duty, she was in the monitoring room, she was watching the monitor and she saw that Paxton had moved out of sight of the camera for a number of minutes – even if for argument’s sake she was not the officer monitoring him according to the CCTV register – once she effectively saw that Paxton moved to a blind spot for a number of minutes, she could not remain a static spectator and hope that one of her colleagues intervene, simply because according to her she was not the one tasked with the monitoring duties when the incident happened. In those circumstances, the appellant had a duty to act.

35. Once the appellant was in the monitoring room and saw from the monitor that Paxton moved to a blind spot, she still had a duty to act by buzzing him and asking him to move, or to ask a Guard to call on him immediately and physically check him out, or, if she was not the officer on monitoring duty to alert the officer on monitoring duty to act on Paxton. This inertia was the cause and extent of her responsibility in this case.

36. The fourth and fifth grievances are hereby rejected.

Considers further

37. The punishment meted out by the Court of Magistrates falls within the parameters of punishment established by Law. As can be seen from the judgment, when awarding punishment, the Court of

Magistrates took into consideration the specific circumstances of this case.

38. However for the reasons explained earlier on, this Court agrees that the Court of Magistrates should have weighed less on the appellant. The appellant is answerable for her omissions. However others should have also been taken to task over the massive collective failure to protect the life and personal safety of the vulnerable prisoner Paxton was in this case. Her timely action could, and should have stopped Paxton from committing suicide. Yet the appellant operated within a framework that was riddled with inadequate practices and structural shortcomings, both at organisational as well as operative level, that highly contributed to the tragic event in this case. The appellant's inertia was part of a total organisational and operative massive failure in this case.

39. It is clear that Paxton's unfortunate behaviour was the primary cause for this incident. But Paxton's calculated, pondered and deliberate action, tragically planned to the minutest logistical and executional detail should have been countered by the duty of care and supervision that should have been exercised by the responsible officers, among whom the appellant, who was part of a serious of massive failures as highlighted by the Court of Magistrates in its judgment.

40. Surely, the appellant could and should have done her part to prevent this from happening - and that is where she was taken to

task. Yet she was surely not the only one who should have carried the responsibility, and consequence, for Paxton's tragic end.

Decide

Consequently, for the above-mentioned reasons the Court upholds in part the appeal lodged by Yulia TOTEVA and while confirming that part of the judgment wherein she was found guilty of the offence in terms of article 225(1) of the Criminal Code, this Court reforms that part of the judgment wherein she was condemned to pay the fine (*multa*) of five thousand euro (€5000) such in virtue of this judgment that this fine (*multa*) is being reduced to three thousand euro (€3000) instead.

Aaron M. Bugeja

Judge