



## **Criminal Court**

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

**Appeal Number: 283 / 2020**

**The Police**

**vs**

**Ahmed Ahmar Mohammed**

Today 2nd March, 2021

The Court,

Having seen the charges brought forward before the Courts of Magistrates (Malta) as a Court of Criminal Judicature against the appellant Ahmed Ahmar Mohammed, of 27 years of age, son of Mohammed and Shukri Qasat, born in Somalia, on the 1st January, 1992, residing at 4, Triq Miggiani, Hamrun and holder of Police card number 13B-079, that:

In these islands on the 1st of December 2019 and on the preceding days :

1. *Had in his possession the whole plant Cannabis or part thereof in terms of section 8(d) of Chapter 101 of the laws of Malta which drug was found in circumstances which denote that it was not destined for his personal use;*
2. *Committed this offence in a distance of 100 metres from the parameters of a school, club, or similar place where youths usually meet up and this in this in terms of section 22(2) of Chapter 101 of the laws of Malta*

The Court was asked in case of a guilty verdict, besides awarding punishment to condemn the accused to pay for the expenses which relate to the appointment of court experts in terms of section 533(1) of Chapter 9 of the laws of Malta.

The court took note of the judgement delivered by the the Courts of Magistrates (Malta) as a Court of Criminal Judicature dated 2nd December, 2020, where the court did not find the accused guilty of the second charge and thus acquitted him from such charge and after having seen sections 8 (d), 22 (1) (a) u 22 (2) (b) (i) of Chapter 101 of the laws of Malta and Regulations 4 and 9 of Legal Notice 292 of the year 1939, found the accused guilty of the first charge and condemned him to a term of imprisonment for two years and to the payment of a fine multa of one thousand euros (€1,000).

In addition in terms of article 533 of Chapter 9 of the laws of Malta, also condemned the accused to pay the Registrar of Courts the sum of five thousand, one hundred and ninety eight euros and twelve euro cents (€5,198.12) representing the expenses that were incurred in relation to the appointment of the court experts Dr Marisa Cassar, Gilbert Mercieca, and WPS 293 Michelle Camilleri.

In Conclusion the court ordered the destruction of the drugs and objects exhibited in these proceedings and this under the care and attention of the court registrar of courts who in turn has to draw up a report to document the procedure adopted for such destruction, which document has to be exhibited in the acts of these proceedings not later than fifteen (15) days from its destruction. Such destruction is not to take place before the prosecuting officer declares that the exhibited drug is not needed in relation to any other ongoing proceedings and if it is needed then the destruction will take place within fifteen days that those same proceedings become a *res judicata*.

The court took note of the application of the appellant Ahmed Ahmar Mohammed presented in the registry of this court on the 18th December, 2020, wherein he asked the court to uphold his appeal and reform the appealed judgment by confirming that part of the judgement wherein the accused was not found guilty of the second charge

and consequently acquitted from it and cancels and revokes that part of the judgment where the accused was found guilty of the first charge and consequently acquitted him from such charge and from the punishment awarded or alternatively to cancel and revoke that part of the judgment regarding the awarded punishment whilst confirming guilt by meeting out a punishment which is more suitable and fair in the circumstances of the case .

The court took note of the aggravations which are clear and manifest and consist of the following:

The appellant humbly submits that the first court could never have found the accused guilty of the charges brought forward against him on the basis of the evidence brought forward and consequently is limiting his first aggravation on the grounds that the first court carried out a wrong appreciation of the facts.

The above is being said particularly because the first court based its judgement on the particular piece of evidence brought forward by the prosecution namely that the DNA of the accused which was found on the bags which contained the sachets of the drug Cannabis Grass.

The defence held that it is to be said that the traces of DNA can be found on an object without the person touching that same object. For instance when a person sneezes or coughs his DNA would be found nearby possibly on the object though he would never have touched the object. There is a scientific difference between DNA and a fingerprint and thus one has to examine if such piece of evidence is enough to establish guilt which guilt must be established on the basis of 'proof beyond reasonable doubt'.

The defence further insisted that it was important to highlight the ambience in which the accused lived. A small house made up of two rooms in which there were four single beds and the accused used to sleep in one of them. In this same room was another single bed which was used by another person. Every bed was accessible to each person living in the same house.

In relation to the examination carried out by the first court with regard to appreciation of the facts reference is made to the judgment in the names '**Il-Pulizija (Spt. A. Zammit) Vs Faical Mahouachi**' wherein the court held that :

*' Issa hu principju ormaj stabilit fil-gurisprudenza ta' din il-Qorti (kemm fil-kaz ta' appelli minn sentenzi tal-Qorti tal-Magistrati kif ukoll fil-kaz ta' appelli minn verdetti w sentenzi tal-Qorti Kriminali) li din il- Qorti ma tiddisturbax l-apprezzament dwar il-provi magħmul mill-Ewwel Qorti jekk tasal għall-konkluzzjoni li dik il-Qorti setgħet ragonevolment u legalment tasal għall-konkluzzjoni li waslet għaliha. Fi kliem iehor, din il-Qorti ma tirrimpjazzax id-diskrezzjoni fl-apprezzament tal-provi ezercitata mill-Ewwel Qorti, izda tagħmel apprezzament approfondit tal-istess biex tara jekk dik l-Ewwel Qorti kienetx ragjonevoli fil-konkluzzjoni tagħha. Jekk izda din il-Qorti tasal għall-konkluzzjoni li l-Ewwel Qorti fuq il-provi li kellha quddiemha, ma setgħetx ragjonevolment tasal għall-konkluzzjoni li waslet għaliha, allura din tkun raguni valida, jekk mhux addirittura mpellenti, sabiex din il-Qorti tiddisturba dik id-diskrezzjoni w konkluzzjoni (ara f' dan is- sens inter alia **Pulizija vs Raymond Psaila et (Qorti ta' l-Appell Kriminali 12/5/1994)**, **Ir-Repubblika ta' Malta vs George Azzopardi (Qorti ta' l-Appell Kriminali 14/2/1989)**, **Pulizija vs Carmel sive Chalmer Pace (Qorti ta' l-Appell Kriminali 31/5/1991)** **Pulizija vs Anthony Zammit (31/5/1991)**.*

The defence stated that the principles there in enunciated are applicable to the current appeal. This argument leads to the question as to whether the first court was correct in reaching a verdict of guilt on the basis of the evidence brought forward against the accused.

The appellant humbly submits that the circumstantial evidence which was brought forward is not enough for a conviction of guilt as is requested by the Criminal Court. In this case the prosecution only brought forward circumstantial evidence - The DNA of the accused

From an examination of the circumstantial evidence namely in particular with reference to the fingerprints there are established principles in our domestic caselaw. The same line of argumentation applies to this case under examination regarding traces of DNA, which too are classified as circumstantial evidence.

In the case in the names '**Il-Pulizija v. Noel Frendo**<sup>1</sup>' the court held that :

*' L-impronti digitali (u daww palmari) huma forma ta' prova indizzjarja – "circumstantial evidence" – li kif qal Lord Salmon fil-kaz DPP v. Kilbourne [1973] AC 729, p. 758 "...works by cumulatively, in geometrical progression, eliminating other possibilities." Il- kwistjoni kollha hi mhux jekk l-impronta instabitx f' post pubbliku jew f' post privat jew anqas pubbliku – il-kwistjoni kollha hi jekk, fid-dawl ta- cirkostanzi kollha, il-post fejn instabet l- impronta tikkonvincix lill-gudikant lil hinn minn kull dubbju dettat mir- raguni li dik l-impronta saret mill-persuna li lilha tappartjeni fil-kors tal-kommissjoni minn dik l-istess persuna tar-reat li bih tkun akkuzata jew fil-kors ta' xi atti li jammontaw għall- anqas għal tentattiv ta' dak ir-reat. Hekk, per eżempju, impronta misjuba f' bank fil-parti fejn il-pubbliku għandu access u meta jirrizulta li l-imputat kien jiffrekwenta dak il- bank ftit li xejn tista' sservi ta' prova kontra dak l-imputat jekk huwa jigi akkuzat b' serq minn dak il-bank. L-istess ma jistax jinghad, però, jekk dik l-impronta tinstab fuq il- bieb ta' l-istrongroom tal-bank fejn l-impjegati tal-bank biss jistgħu jidhlu u meta l-imputat ma hux tali impjegat u ma jirrizultax li qatt kellu għalfejn jersaq lejn dak il-bieb.'*

In the judgment in the names '**Il-Pulizija (Spettur Paul De Battista) kontra Emanuel Camilleri**<sup>2</sup> (the court held that :

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<sup>1</sup> Court of Criminal Appeal dated 30<sup>th</sup> November 2004

<sup>2</sup> Given by the Criminal Court of Appeal on the 30<sup>th</sup> June 1998

*' Il-prova tal-fingerprint, f' dan il-kaz partikolari, kien jinhtiegilha korroborazzjoni minn provi cirkostanzjali ohra. Hemm kazijiet fejn il-prova tal-fingerprint wahedha tkun bizzejjed biex il-Qorti tkun moralment konvinta mill-htija tal-akkuzat. Izda f' dan il-kaz, din hi l-unika hekk imsejja prova cirkostanzjali li hemm fli-process, u kif inhi, prova cirkostanzjali wahda, minghajr indizji jew provi cirkostanzjali ohra magħha li jkunu univoki u konkordanti, qatt ma tista' tghamel prova konklussiva.'*

In the judgment in the names 'Il-Pulizija Spettur Neil Harrison Vs Simeon Nicholas Sultana' <sup>3</sup> the court held that:

*' Illi in vena legali l-Qorti tosserva li sabiex il-prova indizzjarja twassal għas-sejbien ta' hitja, trid tkun cara u univoka fis-sens li twassal necessarjament, u f' kument ta' dak li hu ragjonevoli, għall-htija tal-imputat. Fi kliem iehor, l-elementi ta' prova kostitwenti l-prova indizzjarja jridu jkunu bazati fuq cirkostanzi provati li, interpretati b' mod ragjonevoli, ma jistghux iwasslu għal konkluzjoni ohra għajr dik tas-sejbien ta' htija. Multo magis meta din tkun l-unika prova li fuqha l-prosekuzjoni qeda isserrah il-kaz tagħha. F' kaz li l-elementi ta' prova jistghu ragjonevolment jwasslu għal konkluzjoni li ma tkunx is-sebien ta' htija, allura għandha tapplika l-massima ' in dubbio pro reo' u cioe' li dan id-dubbju ragjonevoli għandu jmur favur l-imputat.'*

In the case in the names **Il-Pulizija (Spettur Pierre Grech) vs Dylan Agius**<sup>4</sup> the court held that :

*' Illi l-gurist Ingliz Pollock C.B14 jiddeskriwi l-prova cirkostanzjali u t-tifsira tal-univocita` tagħha bis-segwenti mod:*

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<sup>3</sup> Given by the Courts of Magistrates as a court of Criminal Judicature on the 1<sup>st</sup> November 2001

<sup>4</sup> Given by the Courts of Magistrates as a court of Criminal Judicature on the 8<sup>th</sup> July 2016

*“It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.”*

Thus with reference to the principles herein mentioned this first court could not have found the accused guilty of the first charge brought forward by the prosecution.

Considers,

With regard to the first aggravation of the appellant in relation to the fact that the first court made a wrong appreciation of the evidence brought forward in particular it gave a wrong definition as to what constitutes circumstantial evidence.

This court is a court of revision from the judgement delivered by the first court and thus does not intervene in the discretion used by the first court in examining the evidence especially when the first court could have legally and reasonably reached the decision it took. In the judgment in the names the **Republic of Malta vs Emmanuel Zammit**<sup>5</sup> delivered by the Criminal Court of Appeal, the court held that:-

*k]if dejjem gie ritenut huwa principju stabbilit fil-gurisprudenza ta' din il-Qorti li hija ma tiddisturbax l-apprezzament dwar il-provi magħmul mill-ewwel Qorti jekk tasal għall-konkluzjoni li dik il-Qorti setghet ragjonevolment u legalment tasal għall-konkluzjoni li tkun waslet għaliha. Fi kliem iehor, din il-Qorti ma tirrimpjazzax id-diskrezzjoni fl-apprezzament tal-provi ezercitata mill-ewwel Qorti izda tagħmel apprezzament approfondit tal-istess biex tara jekk dik l-ewwel Qorti kinitx ragjonevoli fil-konkluzjoni tagħha. Jekk, izda, din il-Qorti tasal għall-konkluzjoni li l-ewwel Qorti, fuq il-provi li kellha quddiemha, ma setghetx*

*ragjonevolment jew legalment tasal għall-konkluzjoni li tkun waslet għaliha, allura din tkun raguni valida, jekk mhux addirittura impellenti, sabiex din il-Qorti tid-disturba dik id-diskrezzjoni u konkluzjoni.*

Even If this court carries out an examination of what was said by each witness before the courts of Magistrates the role of this court remains that of revision. In its ordinary function this court does not become one of retrial and thus does not hear the evidence brought forward again and decides the case afresh. The decision as to the guilt of the accused is taken by the courts of Magistrates (Malta) as a court of Criminal Judicature which is duty bound to analyze all the evidence and legal arguments brought forward so that it may reach its own conclusion.

This court, thus revises the judgment of the Courts of Magistrates by seeing if according to the evidence brought forward by the parties and the legal arguments debated before the first court are enough for the court to establish guilt as pronounced in its judgment. In order for this court to be able to carry out this exercise of revision this court has to examine thoroughly the evidence brought forward and analyse all the legal arguments brought forward and then move on to see as to whether on the basis of the evidence provided the first court could reach the conclusion it did in the given judgment and ascertain that it is according to law.

If this court feels that the courts of Magistrates reached the right conclusion according to the evidence produced in the case even if that was not the only conclusion that the first could have reached, then this court does not go on to change the decision given by the first court. If however, on the other hand the court decides that according to the evidence or legal arguments brought forward before her, the courts of Magistrates was mistaken in the appreciation of the evidence brought before her to the extent that this court does not feel that it is safe and satisfactory to rest on such conclusions then this court has the power and duty to change that judgment delivered by the Courts of Magistrates as a Court of Criminal Judicature or that part of the judgment which is incorrect and not according to law. This evidence however primarily has to reflect the general principles of evidence in a criminal court of law.



**Article 637 of the Criminal Code** provides that the question of credibility rests with those who have to judge in fact the law states that:-

*'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'.*

Section 638 of the Criminal Code makes it clear that it is the obligation of the prosecution to bring forward the best evidence so that the level of proof of the prosecution is met with success. If that same evidence consists solely of the testimony of one witness, the court can still reach that level of proof that is required in criminal proceedings, if that particular witness is given credibility since such evidence will be considered as full and satisfactory evidence just as if such evidence was given by two or more witnesses.

In fact **section 638(2) of the Criminal Code** states that *'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'*. This principle has been confirmed in a number of cases which were brought before the court. Thus it is legally correct for the court to find guilt on the basis of the evidence given by one witness.

As held in the case in the names **The police vs Joseph Thorne**<sup>6</sup>

*'[M]hux kull konflitt fil-provi ghandu awtomatikament iwassal ghall-liberazzjoni tal-persuna akkuzata. Imma l- Qorti, f' kaz ta' konflitt fil-provi, trid tevalwa l-provi skond il-kriterji enuncjati fl-artikolu 637 tal-Kodici Kriminali w tasal ghall-konkluzzjoni dwar lil min trid temmen u f' hix ser temmnu jew ma temmnux'*

Thus in this same context the biggest challenge that the court faces is that of establishing the truth, since the evidence that is brought forward before the courts - whether it is direct or indirect not necessarily leads to the truth. A witness can be consistent in the truths he utters, and may also be consistent in the lies he says and

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<sup>6</sup> Decided by the Criminal Court of Appeal on the 9<sup>th</sup> July 2003

this is why we also have the offence of perjury in the Criminal Code. The courts are not able to read people's minds. The courts in fact try to understand what lies inside the mind of the witness, that which lies in his heart and in their conscience and this by analyzing what the witness says under oath and by examining further their demeanour. The courts have to rely ONLY on the evidence that is brought before them, namely all direct and indirect evidence.

Indirect evidence is that which relies on particular circumstances of the case. Although circumstances do not speak like witnesses do and thus cannot lie, on the other hand they can be misleading. These courts always relied on the premise that for circumstantial evidence to be considered as the basis for guilt, this has to be univocal in other words directed only and exclusively to one direction to one conclusion and nothing more. Otherwise, if the circumstance gives rise to more than one avenue, the court may not rest its case on it and proceed to find guilt. If there is doubt dictated by reason, the court cannot find the accused guilty.

On the other hand Criminal law does not dictate that for a guilt to be established the courts must be satisfied beyond absolute certainty. The Maltese procedural law stems from the British system where it is required that a court vested with Criminal competence can only find guilt once the prosecution proves its case beyond reasonable doubt dictated by reason on the basis of the evidence brought forward in the case. If on the other hand the defence wishes to disprove a fact it must do this on the basis of probability either by bringing forward its witnesses or evidence or by disproving facts brought forward by the prosecution. This it does by raising doubts which are dictated by reason and thus weakening the case of the prosecution. The level of proof of the prosecution in proving its case is much higher than that of the defence in ascertaining the innocence of the accused.

The court reaches its verdict after examining all the admissible evidence brought forward by the parties. In other words all the ordinary and expert evidence, as well as that evidence which is direct and indirect. As is the case in point. At the end of this exercise the court has to be morally sure that the offence happened in the manner that is being alleged by the prosecution and this on a level of proof that is beyond reasonable doubt. This is the highest level of evidence that a conviction should be

based upon, a level which is below that of absolute certainty but higher than that based on a balance of probability.

In the British case **Majid**<sup>7</sup>, **Lord Moses** held that:-

*Judges are advised by the Judicial Studies Board, as they have been for many years, to direct the jury that before they can return a verdict of guilty, they must be sure that the defendant is guilty.'*

Besides in the book **The Modern Law on Evidence**, **Adrian Keane** u **Paul McKeown**<sup>8</sup> uttered the following:

*[I]n the wake of difficulties encountered with the formula of proof beyond reasonable doubt, Majid makes it clear that the direction on the criminal standard must adhere to the formula of proof by being "sure", in accordance with the longstanding advice given to judges by the Judicial Studies Board. That advice currently contained in the Crown Court Bench Book, is simply that the prosecution prove their case if the jury, having considered all the relevant evidence, are sure that the accused is guilty. Further explanation is described as 'unwise'. If the jury are not sure then, they must find the accused not guilty.*

The courts have many a time in domestic caselaw held that for there to be a conviction based solely on circumstantial evidence, every circumstantial fact must lead to the same conclusion namely that it is the accused and no other person who could have committed the offence in question.

In the case **Republic of Malta vs Andrea Zammit**<sup>9</sup> the court made reference to the address of the Judge when presiding the Jury in wustions and held that:-

*'[I]ssa hemm imbagħad ir-raba' tip ta' prova li diġa` ssemmiet waqt it-trattazzjoni li hija s-circumstantial evidence. [...] L-importanti pero` li tibqghu tiftakru li jekk is-circumstantial evidence, jiġifieri serje ta' ċirkostanzi jistgħu jwassluk għall-konkluzjoni waħda u waħda biss allura dik hija biżżejjed biex tistrieħ fuqha, anke fuqha biss biex issib il-ħtija. Pero` jekk is-cicumstantial evidence ma twassalkomx għal konkluzjoni waħda biss imma tista' tagħti lok għal diversi konkluzjonijiet,*

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<sup>7</sup> R v Majid, 2009, EWCA Crim 2563, CA at 2

<sup>8</sup> Oxford University Press, 2012, p. 106 – 108

<sup>9</sup> Decided by the Criminal Court of Appeal on the 12<sup>th</sup> January 2016

*jew għall-inqas tnejn, allura ma tistgħux tistrieħu fuqha biss biex issibu l-htija. Dik hija r-regola prinċipali tas-circumstantial evidence. Circumstantial evidence tista' tigi minn hafna affarijiet."*

In the case in the names **The Police vs Joseph Buttigieg et**<sup>10</sup> the court held :-

*'[D]in il-Qorti kellha diversi okkazzjonijiet sabiex tippronuncja ruhha dwar is-sahha probattiva ta' provi cirkostanzjali. Filwaqt illi dawna huma ammessi jistgħu jwasslu għall-htija jekk tirrizulta konkluzzjoni wahda. Jigifieri li l-provi tkun univoka.*

It thus results from a careful examination of local caselaw that if there is more than one interpretation that could be given to the circumstantial fact which could possibly instill doubt that it was not the accused that committed the offence he is accused of, then the court cannot move on to find guilt on the basis of that circumstantial fact since circumstantial evidence has to be directed to one avenue as held in the case the **Police vs Michael Ellul Vincenti**<sup>11</sup>

*"Hemm ukoll il-provi cirkostanzjali illi johrogu minn dan il-process, provi illi huma wkoll imporanti, a dirittua mpellenti għall-prosekuzzjoni, li jwasslu għal konkluzzjoni wahda u wahda biss. Meta persuna tkun qieghda tikkonsidra sabiex tagħmel reat, dina tagħmel minn kollox sabiex tahbi l-operat u rresponsabilta' tagħha għal dak ir-reat u jista' jkollok sitwazzjoni fejn ma jkollokx xhieda okulari izda jkollok diversi ndizji li kollha jwasslu għand l-akkuzat bhala l-unika persuna illi seta' kien fil-pozizzjoni illi jikkommetti r-reat in kwistjoni."*

This line of reasoning was upheld in the case **The Republic of Malta vs Eduardo Navas Rios**<sup>12</sup> wherein the court held that:-

*"It has been constantly held that in order that circumstantial evidence may serve as a basis to convict it must first and foremost be narrowly examined and then in order to give weight to a circumstance or to a number of circumstances as proving guilt this or these must be unambiguous or unequivocal meaning that these must be definite or unmistakable or clearly pointing to only one conclusion. If*

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<sup>10</sup> Decided by the Criminal Court of Appeal on the 1<sup>st</sup> June 2010

<sup>11</sup> Decided by the Criminal Court of Appeal on the 3<sup>rd</sup> October 2013

<sup>12</sup> Decided by the Criminal Court of Appeal (superior jurisdiction) on the 9<sup>th</sup> May 2013

*circumstantial evidence may have more than one meaning then that circumstance or circumstances cannot be given any weight or consideration at all because although circumstances do not lie they may deceive."*

As also quoted in the case **The Police vs Kyle Stone**<sup>13</sup>:-

*"Circumstantial evidence – li kif qal Lord Salmon fil-kaz DPP v Kilbourne [1973] AC 729, p. 758 “& works by cumulatively, in geometrical progression, eliminating other possibilities."*

When the parties in criminal proceedings choose to bring forward some evidence, they have to do this by following the best evidence rule. Thus they have to bring forward the best evidence as explained above. In the judgment in the names **The Republic of Malta vs George Spiteri**<sup>14</sup> the court held:

*[H]uwa principju fundamentali fil-process kriminali li l-ligi tesigi li kull min jrid jipprova xi haga, ghandu jressaq l-ahjar prova, u dan jista' biss jaqa' fuq prova sekondarja kemm il-darba din l-ewwel jew l-ahjar prova mhiex disponibbli. Hu veru wkoll, izda, li min ghandu jiggudika jista', skond il-ligi, u minkejja dan il-principju fundamentali appena msemmi, joqghod fuq ix-xhieda anke ta' persuna wahda jekk b'dak li tghid din il-persuna, jikkonvinci lill-gudikant sal-grad tal-konvinciment morali mill-htija tal-persuna akkuzata.*

The circumstantial evidence has to be absolutely univocal, directed without any shadow of a doubt to one direction. Obviously if such circumstantial fact can be given more than one interpretation then that fact is not considered as circumstantial evidence upon which the court can establish guilt. As required by law for circumstantial evidence to be considered as admissible evidence such evidence must be such as not to allow any doubt in its interpretation since any doubt that may arise from examining such fact will be given in favour of the accused.

In the case in the names **The Police vs Cyrus Engerer**<sup>15</sup> the court held that:-

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<sup>13</sup> Decided by the Criminal Court of Appeal on the 20<sup>th</sup> September 2013

<sup>14</sup> Decided by the Criminal Court of Appeal (superior jurisdiction) on the 5<sup>th</sup> July 2002

<sup>15</sup> Decided by the Criminal Court of Appeal on the 8<sup>th</sup> May 2014

*[B]iex wiehed jistabilixxi jekk l-provi cirkostanzjali huma univoci wiehed irid jara l-assjem ta' dawn ic-cirkostanzi migjuba bhala prova u li dan il-konvinciment morali huwa wiehed ibbazat sal-grad rikjest tal-prosekuzzjoni tac-certezza morali (u mhux dik assoluta) jew il-prova lil hinn minn kull dubbju dettat mir-raguni. In oltre il-konkluzjoni biex tkun univoka mhux necessarjament trid tkun l-uniku xenarju li jista jintlahaq izda trid tkun l-unika wahda li tista twassal ghal htija b'mod ragonevoli kontra dak li jkun. Fi kliem iehor jekk jinholoq dubbju dwar l-univocita tal-provi cirkostanzjali liema xenarju alternattiv ma jkunx wiehed ragonevoli, dan ma jistax iwassal sabiex il-Qorti tillibera a bazi tan-nuqqas ta' univocita.*

The law leaves the examination of evidence in the hands of the Courts of Magistrates. This is so because the Courts of Magistrates are in the best position to examine the evidence. The presiding magistrate would have lived the case as it develops before it. It hears the witnesses give their evidence before it, something which this court is deprived of. Thus it is only reasonable that the law leaves the matter of discretion in the appreciation of the testimony in the hands of the Courts of Magistrates and this discretion cannot be disturbed easily.

Even in those circumstances where the particular Courts of Magistrates for one reason or another did not hear the evidence itself, it nonetheless still enjoys the question of discretion which would have been vested in the original courts of Magistrates. The court of Criminal Appeal remains the court of second instance, a court of revision to see whether the courts of Magistrates is able to reach the conclusion it does and ascertain that the verdict given was safe and satisfactory. This was further ascertained in the case **The Police vs Lorenzo Baldacchino**<sup>16</sup>

*[M]a 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 Ingliزي 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".*

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<sup>16</sup> Decided by the Criminal Court of Appeal on the 30<sup>th</sup> March 1963

As was held by this court in a different composition in the case **The Police vs Vincent Calleja**<sup>17</sup>

*'...din il-Qorti, bħala Qorti ta' revizjoni tas-sentenza tal-Qorti tal-Maġistrati ma terġax tagħmel ġudizzju ġdid fuq il-każ f'dak li għandu x'jaqsam mal-valutazzjoni u evalwazzjoni tal-fatti tal-każ, iżda tillimita biss ruħha biex tara jekk id-deċiżjoni tal-Qorti tal-Maġistrati kienetx "unsafe and unsatisfactory" fuq il-bażi tar-riżultanzi li jkollha quddiemha dik il-Qorti. B'hekk din il-Qorti ma tistax tissostitwixxi d-deċiżjoni tal-Qorti tal-Maġistrati sakemm id-deċiżjoni ta' dik il-Qorti ma tkunx "unsafe and unsatisfactory". Jigifieri jekk din il-Qorti tara li l-Qorti tal-Maġistrati setgħet legittimament u raġonevolment tasal għall-konklużjonijiet li waslet għalihom fuq il-bażi tal-provi u tal-argumenti legali li kellha quddiemha, allura din il-Qorti ma tistax taqbad u tibdel il-konklużjonijiet ta' dik il-Qorti – anke jekk il-Qorti tal-Appell Kriminali setgħet kienet tasal għal konklużjoni differenti minn dik milhuqa mill-Qorti tal-Maġistrati.*

Considers further,

Thus in the light of the above legal enunciations this court will now move on to examine the evidence brought forward by the prosecution to see whether the verdict reached by the first court is safe and satisfactory and the court will be carrying out this exercise by examining in detail the evidence given by the ordinary witnesses as well as that evidence brought forward by expert evidence. The court will examine as to who was more credible and consistent in his deposition. The court will also examine whether the circumstantial evidence brought forward by the prosecution reaches the level of beyond reasonable doubt and see whether it is directed to one avenue in other words whether it is directed univocally to the guilt of the accused and the accused only.

The appellant states in his appeal application that the Court of Magistrates could not have found guilt in his regard since the court gave a wrong interpretation to the facts at issue especially when interpreting the question in relation to the DNA of the accused found on the bag where the drugs were kept. Namely that the bag was found under the bed where the accused sleeps even though this room is accessible

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<sup>17</sup>Decided by the Criminal Court of Appeal on the 7<sup>th</sup> March, 2002

to all four tenants of the house Thus the appellant feels that such evidence is not univocal but can have more than one interpretation.

The court thus examined in detail all the evidence of this case.

## **Evidence**

Inspector **Saviour Baldacchino** gave evidence on the 9th January 2020 and explained that he was at work on the 1st December 2019 and his colleague Inspector James Grech was investigating a murder case that involved an Africal man and he was thus getting together a team of officials to help out in this investigation. He needed some officials to carry out an inspection in a hosue in Triq Miggiani, Hamrun. The witness explained that the road is a narrow one and thus one can only access it on foot.

They, thus stopped infront of the door numbered four (4) but no one opened the door despite them knocking. The witness however managed to obtain entry from a neighbouring site that was under construction. The moment he entered the house he saw a person who was asleep on a sofa. He woke him up and then proceeded to open the front door wherein the whole police team walked in.

They then started speaking with the person and asked him if other people lived in the same house and he told them that there were another two persons liiving in the same house. They started carrying out a search in relation to things that may be connected to the murder that Inspector James Grech was investigating.

They then went in the back part of the house , namely in the second room and under the bed they found a garbage black bag with stuff inside. The moment they held the mattress up they came across a sachet which alledgedly contained Cannabis Grass. Whilst carrying out the search Abdullah Hassan Faud was present and knew what was happening. They gave him all the legal rights he was entitled to and asked him what was inside the garbage bag and he told them that it was not his but belonged to the two persons who lived in that room. They then lifted the other mattress in the same room and found another garbage bag with a large quatity of Cannabis Grass. The larger ammount was found in the second bag. The witness then stated that he went out of the room and saw the accused who was approacching the door and then suddenly stopped and was going to turn back. He approached him and restrained



him and asked him where he was going. The witness says that the person looked unsure of himself and did not know what he was doing. He asked him where he lived though he did not reply and then asked him to accompany him to the house number 4, Triq Miggiani, Hamrun. When they entered the house Abdullah Hasan Faud said that the accused was one of the men who lived in that room where the two black garbage bags were found. The accused started saying that he has nothing to do with the place.

He then gave the accused all his legal rights and the accused calmed down and was no longer agitated. He spoke to him in Maltese and in English and at no moment in time did he think that the appellant was not understanding what was being said. On the premises a confrontation was held between the accused and Abdullah Hasan Faud and in his presence Abdullah Hasan Faud the accused said that the accused lives there. Subsequently the accused admitted that he lives in that house and that he sleeps in that room. At that moment he was shown the two bags that were found under the two beds and he categorically denied that the bags belonged to him. According to Abdullah Hasan Faud the garbage bag that contained a larger quantity was found under the bed where the appellant sleeps.

**Inspector James Grech** took the witness stand and confirmed that he was investigating a murder of an African man that had happened a few days before. He stated that he had received some confidential information that two of the persons involved in this murder lived in 4 Triq Miggiani Hamrun. He thus went to this house and on the front terrace there were two doors and he looked into the house through the letterbox. He saw that there was a person inside. Inspector Saviour Baldacchino obtained access to the house via a neighbouring site that was under construction. Inside they met Abdullah Hasan Faud who was asleep and thus they woke him up. They informed him that they were going to carry out a search in the house in relation to a murder that they were investigating. They asked him if there were other persons who lived in the same house and he told them that there were two other persons who lived there but at that time were not in the house.

During the search he confirmed that they came across objects related to drugs and these were found under the bed and under the mattress. He said that there were

three garbage bags quite large and inside them he could see that there were sachets already pre packed and the Cannabis Grass was not yet divided. As they were carrying out this search there appeared the appellant. According to what Inspector Baldacchino told him this person was going to leave the moment he saw them but was stopped and accompanied him into this room where the garbage bags were found. At that time he told them that he had nothing to do with that residence and not even with the bed where the bags were found. Though Abdullah Hasan Faud confirmed to them that the accused lived there and that he sleeps on the bed where the drugs were found He exhibited two photos that were taken by him personally and these were marked as document JG1.

**Scientist Gilbert Mercieca** gave evidence on the 20th December 2019 and explained that he was given four documents which were marked as documents A,B,C and D. In the first document there was a sack containing nine sachets with a green substance. In the second there was a sachet with green substance. In the third there was some residue found and in the fourth and final bag there was a large bag which had substance green in colour and another bag which had 90 sachets containing a green substance.

He carried out a scientific examination and confirmed that parts of them contained the plant Cannabis. He confirmed that in the first document there were nine sachets and these were picked up from a Garden in Balta l -Bajda and had a 15% percentage of purity with a value of €173. Whereas the other three exhibits were all found in the house numbered 4, Triq Miggiani, Hamrun and there was a total of 113 small sachets and a small bag. The total weight of the illicit substance found was 244.62 grams and had an average percentage of 2.1% valued at €4,648.

Traces of the drug Cannabis were also picked up from a plastic bag marked as dok C. He confirmed that the packaging was handed over to the members of the SOCO team for finger print purposes. He presented his report which was marked as dok GM1.

**Dr Marisa Cassar** gave evidence and explained that she was nominated in the acts of the inquiry regarding the finding of illicit substances in the residence number 4 Triq Miggiani, Hamrun wherein she had to make a DNA examination. She explained that

she had carried out her duty and even made a comparison between the DNA of the accused and that found on three of the exhibits. Her report was marked as dok MC. Besides the accused there were two other persons who gave samples for the purpose of the comparisons she carried out but there was no match with them. The only DNA match that was found matched the DNA of the accused Ahmed Ahmar Mohammed.

**Keith Cutajar**, Forensic Computer Scientist gave his testimony on the 23rd January 2020 and stated that he had been appointed by the court to examine the mobile phone Samsung SM J250 however he could not carry out his duty since such phone had a pattern lock and he could not open it. He explained that he could have sent the telephone abroad though he was not given the authorisation to do so. He presented his report which was marked as dok KC1.

On the 27th February 2020 he once again gave evidence and explained that the accused had passed on the password of the phone and thus he could carry out the data extraction from the set. He then presented his second report which was marked as dok KC2.

**PC 813 Clitnon Vella**, Scene of the Crime Officer gave evidence and explained that he was given an order to examine the finger prints on the exhibits that were passed onto him by the scientist Gilbert Mercieca. He carried out this exercise and presented his report that was marked as dok CV1 and confirmed that the finger prints that he seized from the exhibits were good for comparison purposes. Though this examination was carried out by someone else.

**WPS 293 Michelle Camilleri** gave evidence in her capacity as a photographer nominated in the inquiry and confirmed that she had taken a number of photos and exhibited them in her report marked as dok AC1.

**Inspector Anthony Scerri** gave evidence and explained that he had just been informed by Inspector James Grech that he had just arrested two persons from inside the residence numbered 4 Triq Miggiani, Hamrun in relation to the finding of suspicious finding of illicit substances. He recognised one of these two persons as the accused present in court. Whereas the other person was Faud Adullahi Hasan.. He went into the house in question and the police gave him two bags one of which

contained 90 sachets of suspected Cannabis Grass and another bag which also contained Cannabis Grass. He was shown two beds and was told that the Cannabis was found under one of the beds. He was also told that the accused had told them that the substance was not his but belonged to the other person of Somali nationality named Rasta who also lived in that same room.

These two people who were in the house at that time were taken to the Police Head Quarters. He spoke with the scientist Dr Marisa Cassar who told him that the only swabs that were found matched the DNA of the accused. These were found on the bags marked dok S1 and S2. In relation to the dok marked S3 the expert witness states that there was not enough information to confirm that the accused was one of the contributors although there were some 'allels' which matched those of the accused. He confirmed that Rasta was also arrested in relation to another matter and swabs were likewise taken from him though his DNA was not found on the exhibits. He confirmed that the accused had released two statements marked as dok AS 6 and AS 8.

**Joseph Mallia** fingerprint expert nominated by the court stated that he was authorised to take the finger prints of the accused and carry out a comparative examination with those fingerprints found on the exhibits. He presented his report marked as dok JM and confirmed that there was no match with those finger prints of the accused.

**Architect Mario Cassar** presented his report regarding an on site inspection he carried out in order to see whether the house in question namely number 4, Triq Miggiani, Hamrun was found within 100 meters from a place which is frequented by youths. He confirmed that this aggravation does not subsist.

**Inspector Wayne Camilleri** confirmed that he too went in the house in question namely 4 Triq Miggiani, Hamrun to investigate a murder of an African man and confirmed that when the alleged drugs were found the investigation was passed on to Inspector Anthony Scerri who was on duty in the Drug squad for him to carry on with the investigation. He confirmed that he was present when the substance was found and likewise the accused was also in the same bed room. He confirmed that two black large bags were found and these were found under the mattress in the bed

room. He noticed that when they opened the bags he noticed that they were full of a substance green in colour which they suspected was Cannabis.

Mohammed Ahmed Ahmar gave two statements dok SB6 and SB8. He confirmed that when he was entering his home there was a police man who asked him if he lived there and he confirmed that he did. He says that he was shown a bag and he said that it contained the drug Marijuana. Shown the two bags that were found in the house in the room where he was living he denies that such bags belonged to him . Asked if his DNA would be found on the bags he says that he touched the white bag which contained the black bag inside. Though he stated that he had never touched the black bag until he was shown the bag in the hands of the police. He confirmed that the drugs belonged to Rasta. With him at home lived Faud sid and Abdul. Asked how he could say that the drug was Marijuana if it were not his he says he could say so from its smell. He confirmed that the drugs that were found under his bed is not his but belonged to Rasta known as Abdul.

The accused also voluntarily took the witness stand on the 26th October 2020. He stated that he had been living in Malta since the year 2013. He confirmed that he used to live in Hamrun together with four other persons named Mustafa, Abdou, Rasta u Abdi. In the house where he lived there were two rooms each room had two beds. He shared the room with Mustafa whereas Rasta shared it with Abdul. He also stated that today this house was demolished. He also confirmed that two of these people are in jail. He confirmed that the drug was found in the room where he sleeps with Mustafa and said that it was hidden under the mattress. He however stated that although the drug was found under the mattress where he slept it did not belong to him. He said the drug belonged to Mustafa Mahmoud Ahmed a Somali national. Asked if Rasta and Mustafa are one and the same person he answers in the negative.

Asked if he had touched the bags he explains that the police had shown him the bags and asked him if they were his and he then touched them. Asked to explain how his DNA was found in the inner packets of the bags he says that he is not able to. He insists that he had touched only the outside of such bags. He confirmed that he did not touch the inner packets.

**Sudfi Mohammed Abdi** gave evidence and asked if he knew the accused he said yes and that he used to live with him in Blata l Bajda together with Ahmed and Faud. He says that Faud ended up in jail before he did. He confirms that he used to share the bedroom with the accused. He says that there was a person who brought the drug to his house but does not know the person. He does not know where the drug was found because he was not there when it was found.

**Mustafa Ahmed Mohammed** says that he knows the accused by face though he never lived with him. He said that he used to live in the Open Centre and after moved to Floriana together with his brother. He knew the accused in Marsa. He ended up in jail because of fighting and being drunk. He also confirmed that he spent some time living in 39, Triq Indri Cilia, Hamrun though not with the accused.

Considers further,

As correctly observed by the first court, the court had first to establish whether the accused in had actual possession of the illicit substance and then move on to see whether such possession was for his exclusive use.

There is no doubt that it is not being contested that in the house number 4, Triq Miggiani, Hamrun where the accused lived, the police found a large amount of drugs which according to the court appointed expert Gilbert Merceica consisted in the drug Cannabis Grass. In fact, the expert confirms that in one of the bags there was 9.09 grams divided into 9 sachets with a purity of the drug Cannabinoid at 15.85%. Whereas in the other bag (which was larger) there was 152.6 grams of Cannabis Grass with a total weight of 244.62 grams divided into 113 small sachets (with an average of about 0.8 grams in each sachet) with an average percentage of Cannabinoid at 2.1%. Apart from all this the police also found traces of Cannabis residue in a big black bag.

It also clearly results from the evidence given by the accused appellant before the court that he used to live in this same residence in Hamrun and that he used to sleep in the bed under which the bags where found. From an examination carried out by Joseph Mallia no finger prints were found to connect the accused with the bags. Though from the scientific DNA examination carried out by Dr Marisa Cassar there

was a genetic profiling (DNA) of the accused on the bag in which the sachets were found. On this same bag Gilbert Mercieca confirms that traces of Cannabis were also found. On the other bag also found under the other bed no profiling of the accused was found.

The accused appellant was asked if he ever touched the bag where his genetic profiling was found and he said that he did not. He explained that he only touched the outer bag when it was in the hands of the police and he was asked if the bag was his to which he replied no. Asked how his genetic profiling was found on the bag that contains the sachet the accused stood silent. The appellant did not appear credible in what he said since a number of inconsistencies arise in his statements released to the police and his deposition given in court. It is sufficient to point out that in his statement dated 1st December 2019 (Dok AS8) whilst denying that the drug in question was his he says that it belonged to Abdul known as RASTA. Whereas when he gave evidence in court on the 26th October 2020 he says that the drugs belonged to Mustafa Mahmoud Ahmed. Once again in his statement he says that with him in the house there were two other people living, in court he says that they were three other persons as confirmed by Abdullah Hassan Faud and Sudi Mohammed Abdi. Thus it results that the first court was correct to conclude that the accused was not consistent or credible and that the drugs that were found belonged to the accused.

With regards to the offence of aggravated possession this court makes reference to the case in the names **il-Pulizja vs Carmel Degiorgio**<sup>18</sup> which held that:-

*'F'kaz ta' pussess ta' droga f'cirkostanzi tali li juru li ma kinitx ghall-uzu esklussiv ta' persuna, il-posizzjoni legali hija cara; il-Qorti trid tkun sodisfatta lil hinn minn kull dubbju ddetat mir-raguni u a bazi tal-provi li jingabu mill-prosekuzzjoni li l-pussess tad-droga in kwistjoni ma kienx ghall-uzu esklussiv (jigifieri ghall-uzu biss) tal-pussessur. Prova ossia cirkostanza wahda f'dan ir-rigward tista', skond ic-cirkostanzi tal-kaz, tkun bizzejjed'.*

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<sup>18</sup> The court of Criminal Appeal on the 26<sup>th</sup> August 1998

Whereas in the judgment in the names **il-Pulizija vs Brian Caruana**<sup>19</sup> the court held that:-

*...kull kaz hu differenti minn l-iehor u jekk jirrizultawx ic-cirkostanzi li jwasslu l-gudikant ghall-konkluzzjoni li d-droga misjuba ma tkunx ghal l-uzu esklussiv ta' l-akkuzat, fl-ahhar minn l-ahhar hija wahda illi jrid jaghmiela l-gudikant, fuq il-fatti specji li jkollu quddiemu u ma jistax ikun hemm xi 'hard and fast rule' ta x'inhuma dawn ic-cirkostanzi indikattivi. Kollox jiddependi minn l-assjem tal-provi u minn l-evalwazzjoni tal-fatti li jaghmel il-gudikant...*

In the case in the names **il-Pulizija vs Carmel Spiteri**<sup>20</sup>, the court held: \_

*"Huwa veru, kif tajjeb osservat l-Ewwel Qorti fis-sentenza taghha, li meta l-ammont ta' droga ikun pjuttost sostanzjali, din tista' tkun cirkostanza li wahedha tkun bizzejjed biex tissodisfa l-Qorti li dak il-pussess ma kienx ghall-uzu esklussiv tal-hati'."*

It appears as a fact which is not contested that the amount of drugs that were in the possession of the appellant was considerable with a total weight of 226.5 grams and part of it was already divided into 90 sachets with an average weight of 0.8 grams per sachet. The Court considers the amount of sachets that were found under the bed of the accused to be rather high and the manner in which it was found hidden and divided into sachets was indicative that it was ready to be trafficked. These are all circumstantial evidence directed to the offence of aggravated possession of the drug Cannabis Grass.

Thus the Court is hereby confirming the judgement delivered by the first court and is confirming that part of the judgement where the accused appellant was not found guilty of the second charge of which he was acquitted and confirms the first that part of the judgement in relation to the first charge where he was found guilty of aggravated possession of the Cannabis Grass and condemned to two years imprisonment and to the payment of a fine 'multa' of one thousand euros. (€1,000).

The court is also confirming the order in terms of section 533 of the Criminal Code of Malta so that the appellant pays the expenses incurred in the appointment of experts

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<sup>19</sup>The court of Criminal Appeal on the 23<sup>rd</sup> May 2002

<sup>20</sup> The court of Criminal Appeal on the 2<sup>nd</sup> September 1999



in the sum of €5,198.12 which were payable to Dr Marisa Cassar, Gilbert Mercieca, AND wps 293 Michelle Camilleri.

It is also confirming the order for the destruction of the drugs and all objects related to the offence under the direction of the court registrar who in turn has to carry out a *proces verbal* detailing the procedure used for such destruction and his report is to be exhibited in the acts of these proceedings not later than fifteen days from the destruction. However such destruction is not to be carried out if the prosecuting officer states that the drug is necessary for other criminal proceedings. If so the order of destruction has to be carried out once those same proceedings are final.

The court orders that a copy of this judgement is sent to the Registrar of the Criminal Courts so that she is aware of the expenses she must collect on behalf of the government of Malta and see that the multa of one thousand euros (1,000) imposed by this court is actually collected

(ft) Consuelo-Pilar Scerri Herrera

Imhallel

TRUE COPY

Franklin Calleja

Deputy Registrar