THE COURT OF CRIMINAL APPEAL

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

Appeal number: 175/14

The Police
vs.
Tatiana Skoric TESIC

Sitting of the 30th September 2021

The Court:

A. THE CHARGES:

1. Having seen that this is an appeal lodged by Tatiana SKORIC TESIC from a judgment delivered by the Court of Magistrates (Malta) on the 10th April 2014 against holder of Serbian passport number 007883726, who was charged with having:

    i. Caused, suffered or permitted the use of her vehicle with registration number ABS649, make Landrover, to be driven by Borislav Ilicic, a person not duly licensed to drive a motor vehicle or any other vehicle (Art. 15(1)(b)(Chapter 65);

    ii. For having on the same date, different times and circumstances caused or permitted any other person (Borislav Ilicic) to use a motor vehicle hence vehicle registration number ABS649, make Landrover, on a road without same having policy of insurance in respect of third party risks (Art. 3(1) Chapter 104)

iii. For having on the same date, different times and circumstances as owner of the above-mentioned vehicle failed to see that said vehicle is always and at all times covered by a licence issused by the authority (Reg. 14(3) LS 368.02).

iv. For having on the same date and at about 8am in St. Julian's Police Station, given false oath before a judge, magistrate or any other officer authorised by law to administer oaths (Art. 108(1)(a) of Chapter 9).

B. THE JUDGEMENT OF THE COURT OF MAGISTRATES

2. By means of the said judgment, the Court of Magistrates (Malta), after having seen Section 15(1)(b) of Chapter 65 of the Laws of Malta, Section 3(1) of Chapter 104 of the Laws of Malta and Regulation 14(3) of L.S. 368.02, found the accused TESIC guilty of the charges marked one, two and three and condemned her to a fine of Euro 2,500 and disqualified her from holding or obtaining a driving licence for a period of one year from the date of the judgment. The Court declared the accused not guilty of the fourth charge brought against her and consequently acquitted her from the said charge.

C. THE APPEAL

3. SKORIC TESIC Tatiana filed an appeal wherein she requested this Court to modify the judgment delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 10th April 2014 in her regards in this case in the first place by affirming the same judgment insofar as the appellant was found guilty of the third offence proferred against her and insofar as the appellant was not found guilty of the fourth offence proferred against her and was consequently acquitted; secondly by quashing the rest of the judgment including the penalties inflicted upon the appellant and finally by substituting the punishment which is more adequate in view of all the circumstances of the case including the revocation of the suspension of her driving licence. The appellant, in brief, argued as follows:

i. No proof whatsoever was produced to justify the appellant's guilt of the first charge proferred against her.

ii. No proof whatsoever was producted to justify guilt of a continuous offence under the second charge proferred againt the appellant; and

iii. The penalty inflicted upon the appellant is very harsh indeed in view of all the circumstances of the case.

D. THE CONSIDERATIONS OF THIS COURT

I. Considerations of a General Nature

4. 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 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 impelling reason, to vary

[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 Asciak 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 Octuber 1996; **Il-Pulizija vs Raymond Psaila** et, 12th May 1994; **Il-Pulizija vs Simon Paris**, 15th July 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 tiddisturbahx, 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 tiddisturbahx (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 Asciak 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).

the discretion exercised by the Court of first instance and even change its conclusions and decisions.

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

6. 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:

> 637. 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.

7. 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.

8. 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, 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'.

9. 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.

10. 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 sure[4] 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 also reflect the standard adopted by the English Courts of Criminal Justice and they were also expressed by Mr. Justice William Harding as applicable to the Maltese Courts of Criminal Jurisdiction in the appeal proceedings **Il-Pulizija vs Joseph Peralta** decided on the

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[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 Decided on the 9th July 2003 by the Court of Criminal Appeal presided by Mr. Justice Joseph Galea Debono.

[3] Decided on the 9th July 2003 by the Court of Criminal Appeal presided by Mr. Justice Joseph Galea Debono.

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

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

11. 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.

12. 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.

13. 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.

14. 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 bżonn 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 Ingliżi 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".

15. 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 substitute 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.

16. In **Ir-Republika ta' Malta vs. Ivan Gatt** delivered by the Court of Criminal Appeal on the 1st. December, 1994, it was held that where an appeal was based on the evaluation of the evidence the exercise to be carried out by this Court was to examine thoroughly the evidence and see if there are contradictory versions tendered by witnesses. If it results to the Court that there were contradictory versions – as in most cases there would be – this Court has to assess whether any one of these versions could be freely and objectively believed without going against the principle that any doubt should always go in accused 's favour. If the said version could have been believed by the Court of First Instance, the duty of this Court was to respect that discretion and that evaluation of the evidence even if in the evaluation conducted by this Court, this same Court came to a conclusion different from the one reached by the jury. This assessment made by the Court of First Instance will not be disturbed and replaced by the assessment of this Court unless it was evident that the Court of First Instance would have made a manifestly wrong assessment and evaluation of the evidence and consequently that they could not have reasonably and legally have reached that conclusion.[5]

[5]See **Ir-Republika ta' Malta vs. Mustafa Ali Larbed** decided by the Court of Criminal Appeal on the 5th July, 2002.

II. An analysis of the evidence produced before the Court of Magistrates (Malta) on the basis of which the Court found the appellant guilty of the first charge proferred against her which forms the subject matter of the first grievance of the appellant.

17. The first charge brought against the appellant SKORIC TESIC is based on the provisions of Article 15(1)(b) of The Traffic Regulation Ordinance, Chapter 65 of the Laws of Malta which reads as follows:

> Any person who:
>
> (b) causes, suffers or permits his car to be driven by a person not duly licensed to drive a motor vehicle or other vehicle, shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) not exceeding one thousand and two hundred euro (€1,200) or to imprisonment not exceeding one year.

18. In order for this offence to subsist, it needs to be necessarily established that, a person, allowed a vehicle which is within his possession and/or control, to be driven on the road by another person **who was not duly licensed to drive** that motor vehicle or any other vehicle at all. The offence would not subsist if the person driving any such vehicle is recognised as a licensed driver by the relevant authorities. Central to this offence is the fact that the person driving any such vehicle is not licensed to be doing so. This provision has been interpreted by our courts as also providing for those situations where the person allowing the use of such vehicle is not necessarily the owner thereof but anyone who has control and possession over any such vehicle being used by a person not duly licensed at law. In the case **Il-Pulizija vs. George Ebejer,**[6] the Court of Criminal Appeal stated the following:

> Issa, il-Prosekuzzjoni ċċitat is-sentenza Lloyd vs. Singleton, riportata fid-Davies, The Law of Road Traffic p.295, fejn hemm hekk:- ''Held: that the offence of permitting a person to use a motor vehicle contrary to section 35(1) can be committed not only by the owner, but also by any one who is in in general charge and control of the vehicle.''
>
> Id-dispożizzjoni tal-Liġi ngliża hi bħal dik tal-liġi maltija li ġiet mudellata fuqha;

[6] Decided on the 9th March 1957.

Minbarra ċ-ċitazzjoni ta' dik l-awtorita', hemm anki amplifikazzjoni tagħha fit-test ''Road Traffic Prosecutions'' tal-Wilkinson (1953), p.7., fejn jingħad hekk: - ''The statement in Goodbarne vs. Berck (1940) 2 All En. R. At p. 616 that the only person who can permit the use of a car, in that he can forbid another person to use it, is the owner is incorrect; any person who has control of a vehicle on the owner's behalf e.g. chaffeur or a manager of a company, can permit its use (Lloyd vs. Singleton)(1953), J. All E.R. 251; Morris vs. Williams (1952) 50 L.G.R. 3081;

.../...

Infatti, is-sigurta' hija ntiża għall-protezzjoni tal-pubbliku u hu għalhekk indifferenti jekk il-persuna mhux illiċenzjata lil lilha jiġi permess illi ssuq tkunx jew le sid il-karozza.

19. From the evidence produced in these proceedings, this Court observes the following:
   (i) the appellant is the registered owner of vehicle model Landrover Freelander bearing registration number plate ABS 649;
   (ii) that on the night of the 7th January 2012, the appellant allowed her son Borislav Ilicic to drive this vehicle;
   (iii) that the vehicle was not licensed to be driven on the Maltese roads seeing that the appellant's road licence had been so expired and never renewed since the 31st of January 2010;
   (iv) that the appellant's car was not insured in respect of third party risks as required in terms of Chapter 104 of the Laws of Malta to be driven on the road;
   (v) Boris Ilicic, the person driving the car owned by the appellant, was charged together with the appellant in proceedings that were initiated on the 12th January 2012;
   (vi) Borislav Ilicic testified both before the appointed expert as part of the Magisterial Inquiry as well as before the Court of Magistatres (Malta) in the sitting dated 6th June 2013 when proceedings against him in relation to this case were still pending.

20. The appellant is correct in stating that the Prosecution had failed to prove beyond a reasonable doubt that Borislav Ilicic did not have a valid driving licence recognised in Malta on the date of the accident. No evidence was produced either that he had such a licence or that he did not have such a licence. This means that the Prosecution did not manage to prove the fundamental element that is required for the subsistence of the offence contemplated in Article

15(1)(b) of Chapter 65 of the Laws of Malta. This Article still makes it incumbent on the Prosecution to prove, beyond a reasonable doubt, that the person caught driving the vehicle, as permitted by the person who had control over such vehicle, was **not** in possession of a valid driving license. This evidence was not produced in this case.

Considered further

21. The position relating to onus of proof differentiates the offence contemplated in Article 15(1)(b) of Chapter 65 from the other offence of driving a car without a valid insurance policy mentioned in Article 3(1) of Chapter 104 of the Laws of Malta, and which is contemplated in the second charge brought against the appellant. According to jurisprudence on the matter, if a person is caught driving a car without a licence, the onus of proving that he has a valid insurance policy then shifts onto the defendant and it is no longer the Prosecution who has to prove the absence of a valid insurance policy. In **Il-Pulizija vs. Tarquin Vella**[7], the Court of Appeal quoted Archbold as saying the following when commenting on an identical provision to Article 3(1) under English law:

> The Prosecution has to prove that the defendant used a vehicle on the road. Once that is established, it is for the defendant to prove that there was a valid policy of insurance in force at the time: **Philcox vs. Carberry.**

22. The Court of Appeal elaborated further in this regard, quoting from the Criminal Law Review, 1960 wherein reference was made to the case of **Philcox vs. Carberry**:

> It is an established rule of evidence that where the truth of the party's allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it lies upon the latter. In the Criminal Law, it is submitted that the rule should be confined to cases where it is an offence to do some act in the absence of a licence or permission and similar cases. It was stated by Talbot J., obiter, in Williams vs. Russell that on a charge of using a motor vehicle without there being in force a policy of insurance, the onus was on the accused to prove he had a policy. This would seem, with respect, a proper application of the principle and is confirmed by the present case.

23. During the course of the case before the first court, the appellant decided to testify. She spontaneously and voluntarily

[7] Decided on the 23rd March 2021

admitted that on the night in question her Landrover Freelander was being driven by her son, was neither licensed nor insured. However, she made no reference as to whether her son Borislav Ilicic was in possession of a valid driving licence in Malta; nor was she questioned in this regard. It was Borislav Ilicic who, during his testimony before the first court claimed to be in possession of a valid driving licence issued in Serbia.[8] Even though this Court has serious doubts as to the truthfulness of this statement, it still cannot rely on it for the present case for the following reason.

24. Boris Ilicic and the appellant were co-accused in these proceedings, and so this Court is bound by the rules of procedure contained in Article 636(b) of the Criminal Code, (interpreted a contrario senso) which means that anything said by a co-accused either in favour or against the other co-accused is not admissible as evidence.[9] In the case **Il-Pulizija vs. Omissis u Saada Sammut**[10] the Court of Criminal Appeal summarised this cardinal rule of procedure in the following manner:

> Hekk di fatti kien gie ritenut mill-Qorti Kriminali b'Digriet tat-22 ta' Dicembru, 1998 fil-kawza "Ir-Repubblika ta' Malta vs. Ian Farrugia". Dik il-Qorti, f'dak id-Digriet, wara li ghamlet riferenza ghall- gurisprudenzahemm citata, rriteniet li persuna li tkun akkuzata, kemm bhala komplici kif ukoll bhala ko-awtur,bl-istess reat migjub kontra dak l-akkuzat liehor ma tistax tingieb bhala xhud favur jew kontra dak l-akkuzat liehor sakemm il-kaz taghha ma jkunx gie definittivament deciz u li dan il-principju japplika sija jekk dik il-persuna tkun giet akkuzata fl-istess kawza tal-akkuzat l-iehor – b' mod li jkun hemm "koakkuzati" fil-veru sens tal-kelma – u sija jekk tkun akkuzata fi proceduri separati. Il-bazi ta' dan il-principju hu l-argument "a contrario sensu" li jitnissel mill-paragrafu (b) tal-Artikolu 636 tal-Kodici Kriminali. Konsegwentement dik il-Qorti kienet iddecidiet li dak ix-xhud li kien akkuzat bhala ko-awtur bl-istess reat li bih l-akkuzat kien jinsab akkuzat, ma hux kompetenti li jixhed, qabel ma l-kaz tieghu jghaddi in gudikat. (Ara ukoll fl-istess sens Digriet tal-Qorti Kriminali fil-kawza "Ir-Repubblika ta' Malta vs. Brian Vella" [4.2.2004] u ohrajn.). L-unika eccezzjoni ghal dir-regola hi proprju dik kontenuta fl-art. 636 (b) li tirrendi tali xhud kompetenti biex jixhed ghalkemm ikun imputat tal-istess reat li fuqu tkun mehtiega x-xhieda tieghu, meta l-Gvern ikun weghdu jew tah l-impunita' sabiex hekk ikun jista' jixhed.

[8] page 221 when he testified before the Court of Magistrates (Malta) in the sitting dated 6th June 2013.
[9] Vide, among others: **Sua Maesta Ir-Re vs Carmeo Cutajar ed altri**,. Criminal Court 18th January 1927**; Il-Pulizija vs Toni Pisani** Court of Criminal Appeal 11th November 1944; **Ir-Re vs Karmenu Vella**, Criminal Coirt 3rd December 1947; **The Police vs Alfred W. Luck et**, Court of Criminal Appeal 25th April, 1949; **Ir-Repubblika ta' Malta vs Faustino Barbara**, Court of Criminal Appeal 19th January 1996 **Il-Pulizija vs Nasher Eshtewi Be Hag et**, Court of Criminal Appeal 2nd February 1996; **Il-Pulizija vs Carmelo Camilleri u Theresa Agius**, Court of Criminal Appeal 11th July 1997 and **Ir-Repubblika ta' Malta vs Domenic Zammit et** Court of Criminal Appeal 31st July 1998.
[10] Decided on the 16th November 2006.

25. Similarly, in **Ir-Repubblika ta' Malta vs. Domenic Zammit, Martin Zammit, Joseph Fenech, Lawrence Azzopardi u Gino Calleja**[11] the Court of Criminal Appeal stated the following:

> Kwantu għal dawn ix-xhieda li qed jintalbu mill-ko-akkużati, il-ġurisprudenza, ibbażata fuq il-liġi kif ukoll fuq il-buon sens, hi ċara. Persuna li tkun akkużata, kemm bħala kompliċi kif ukoll bħala ko-awtur, bl-istess reat miġjub kontra akkużat ieħor ma tistax tinġieb bħala xhud favur jew kontra dak l-akkużat sakemm il-każ tagħha ma jkunx ġie definittivament deċiż. Dan il-prinċipju japplika sia jekk il-persuna tkun akkużata fl-istess kawża tal-akkużat l-ieħor b'mod li jkun hemm ko-akkużat fil-veru sens tal-kelma-u sia jekk tkun ġiet akkużata fi proċeduri separati.

26. Consequently, in view of the above, this Court finds that the Court of Magistrates (Malta) could not, legally and reasonably, have found the appellant guilty of the first charge brought against her on account of the fact that even though the Prosecution proved beyond a reasonable doubt that the appellant was the owner or person having the control of vehicle ABS-649 and that she permitted this vehicle to be driven by Borislav Ilicic, it failed to prove, also, that same Boris Ilicic **was not** in possession of a valid driving licence.

27. The Court is therefore upholding the first grievance of the appellant.

III. An analysis of the evidence produced before the Court of Magistrates (Malta) in relation to the second grievance of the appellant.

28. This Court understands that the appellant is not contesting the finding of guilt by the Court of Magistrates (Malta) in respect of the second and third charges but the appellant is, by means of the present appeal application, contesting the application of Article 18 of the Criminal Code with regards to the second charge so proferred.

29. Article 18 of the Criminal Code reads as follows:

> Where the several acts committed by the offender, even if at different times, constitute violations of the same provision of the law, and are committed in pursuance of the same design, such acts shall be deemed to be a single

[11] Decided on the 31st July 1998.

offence, called a continuous offence, but the punishment may be increased by one or two degrees.

30. In the case **The Police (Inspector Louise Calleja) vs. Omissis,**[12] the Court of Criminal Appeal described the continuous offence as follows:

> As has been held, the concept of continuous offence in Article 18 was created for the benefit of the accused, it also comes at a heavy price for the same accused. Through this legal fiction, an accused can be charged for **a string of offences in breach of the same provision on the law which took place over a period of time**[13], indeed years and this on the basis of the date of the last known crime allegedly committed.

31. Similarly, in the case **Il-Pulizija vs. Razvan Aurel Stefan,**[14] this Court as presided made reference to the case **Il-Pulizija vs. Lorenzo Cuschieri**, decided on the 30th October 2001, to explain the workings of Article 18 of the Criminal Code in the following way:

> Ir-reat kontinwat huwa finzjoni legali krejata essenzjalment ghall-beneficcju ta' l-akkuzat b'piena indeterminata li tigi komminata biss bhala mizura esklussivament diskrezzjonali wara li jigu ppruvati bhala punibbli oltre kull dubju ragonevoli ir-reati individwali komponenti tieghu kif ukoll ippruvata l-ezistenza ta' rizoluzzjoni kriminuza wahda li tinkatena dawk ir-reati ma' xulxin. Fir-reat kontinwat innifsu ma jikkonkorrux dawk l-elementi essenzjali sabiex jista' jinghad li huwa reat b'ezistenza awtonoma. Invece huwa car li r-reat kontinwat, bhala finzjoni legali, huwa biss cirkostanza ta' fatt illi, meta tigi stabbilita, tinduci eccezzjoni ghall-konkorrenza tar-reati u l-kumulu ta' pieni relattivi.
>
> Anki kieku kellu jigi accettat li l-kontinwita' hija cirkostanza aggravanti, u li din ghandha tittiehed in konsiderazzjoni sabiex tigi ffissata l-piena applikabbli ghall-finijiet tal-preskrizzjoni, xorta wahda din il-Qorti ma tistax tasal ghall-konkluzzjoni li dik il-piena hija sostenibbli jekk is-singoli reati jkunu diga' jinsabu preskritti skond it-terminu ordinarju stabbilit ghalihom mill-Kodici. Altrimenti, kull konkluzzjoni differenti twassal ghall-assurdita' legali li jigu maghqudin bil-kontinwita' reati li jkunu individwalment impunibbli ghaliex gia preskritti u fejn in-ness ta' l-istess rizoluzzjoni essenzjali ghar-reat kontinwat, ikun gie, ma' kull skadenza preskrizzjoni ghar-reat individwali, irrevokabbilment miksur jew eliminat.
>
> L-kontinwita' fir-reati tigi konsidrata bhala mitigazzjoni tal-piena li altrimenti tkun kumulattiva. Ma tistax il-prosekuzzjoni tuza l-element tal-kontinwita' biex dak li altrimenti jkun preskritt takkwistah bhala ma huwiex fuq is-semplici bazi li minhabba l-kontinwita' l-piena applikabbli tista' u mhux

[12] Decided on the 29th October 2018
[13] Emphasis of this Court.
[14] Decided on the 19th December 2019.

necessarjament ghandha tigi awmentata bl-gradi li hemm imsemmi fl-art. 18 tal-Kodici Kriminali.

32. It is clear therefore that for Article 18 to be applied correctly, the conduct of the offender must necessarily be such as to repeatedly breach the same provision of the law over a period of time. The offender must also act with the same intent on each of these occasions. However an important principle emerging from Maltese case law is that in order for a Court of Criminal Justice to consider the application of the provisions of article 18 of the Criminal Code in a given case, the Prosecution must first of all charge the defendant with having committed the offences in the charge sheet as qualified by the criteria set in the said article. Hence in the appeal proceedings **Il-Pulizija vs Joseph Cini** decided by this Court, differently presided on the 5th July 1996:

> Bhalma l-paragrafi t' l-artikolu 17 tal-Kodici Kriminali (re: konkors ta' reati u ta' piena) ma jistghux jittiehdu in konsiderazzjoni u jigu applikati mill-Qorti jekk il-prosekuzzjoni ma tressaqx aktar minn imputazzjoni ta' reat wiehed fl-istess kawza, hekk ukoll jekk il-prosekuzzjoni ma tkunx ikkontemplat id-diversi infrazzjonijiet bhala reat kontinwat u gabithom kollha fl-istess kawza bhala tali reat kontinwat, il-Qorti necessarjament, trid taghti sentenza separata f'kull kawza ossia ghal kull infrazzjoni jew ghall-infrazzjonijiet migjuba f'dik il-kawza. L-uniku rimedju li tipprospetta l-ligi hu li jekk il-Qorti tara li d-diversi infrazzjonijiet f'kawzi separati kellhom jigu ttrattati bhala reat kontinwat f'kawza wahda, l-Qorti ghandha timmodera u tadegwa l-piena ghac-cirkostanzi.

33. It is clear that in this case the Prosecution did not charge the appellant with having committed the offences brought against her as qualified by the criteria mentioned in article 18 of the Criminal Code. This is also reflected in the judgment of the first court where correctly did not apply the provisions of the said article 18 to the case at hand and therefore rightly did not mention it in the operative part of its judgment. After all even the appellant concedes the fact that the first court did not mention this article in its judgment. However in view of the above, this Court fails to see how the appellant could claim, a fol 333, that the appellant was charged and found guilty of the offences in question as qualified by the criteria mentioned in article 18 of the Criminal Code when in point of fact no such thing results from the charge sheet or from the judgment of the first court.

34. The Court is therefore rejecting the appellant's second grievance.

IV. The Punishment imposed by the Court of Magistrates (Malta)

35. That the appellant contends that the punishment imposed by the Court of Magistrates (Malta) is excessive. In this regard this Court makes reference to the Court of Criminal Appeal judgment of **The Republic of Malta vs. Kandemir Meryem Nilgum and Kucuk Melek** decided on the 25th August 2005:

> It is clear that the first Court took into account all the mitigating as well as the aggravating circumstances of the case, and therefore the punishment awarded is **neither wrong in principle nor manifestly excessive**[15], even when taking into account the second and third grounds of appeal of appellant Melek. As is stated in Blackstone's Criminal Practice 2004 (supra):
>
> "The phrase 'wrong in principle or manifestly excessive' has traditionally been accepted as encapsulating the Court of Appeal's general approach. It conveys the idea that the Court of Appeal will not interfere merely because the Crown Court sentence is above that which their lordships as individuals would have imposed. The appellant must be able to show that the way he was dealt with was outside the broad range of penalties or other dispositions appropriate to the case. Thus in Nuttall (1908) 1 Cr App R 180, Channell J said, 'This court will...be reluctant to interfere with sentences which do not seem to it to be wrong in principle, though they may appear heavy to individual judges' (emphasis added). Similarly, in Gumbs (1926) 19 Cr App R 74, Lord Hewart CJ stated: '...that this court never interferes with the discretion of the court below merely on the ground that this court might have passed a somewhat different sentence; for this court to revise a sentence there must be some error in principle." Both Channell J in Nuttall and Lord Hewart CJ in Gumbs use the phrase 'wrong in principle'. In more recent cases too numerous to mention, the Court of Appeal has used (either additionally or alternatively to 'wrong in principle') words to the effect that the sentence was 'excessive' or 'manifestly excessive'. This does not, however, cast any doubt on Channell J's dictum that a sentence will not be reduced merely because it was on the severe side – an appeal will succeed only if the sentence was excessive in the sense of being outside the appropriate range for the offence and offender in question, as opposed to being merely more than the Court of Appeal itself would have passed."2
>
> This is also the position that has been consistently taken by this Court, both in its superior as well as in its inferior jurisdiction.

36. The principle in **Kandemir** was also embraced by the Court of Criminal Appeal in **Ir-Repubblika ta' Malta vs. Marco Zarb**, decided on the 15th December 2005 that being that, a Court of

[15] Emphasis of this Court.

Criminal Appeal does not overturn a judgment given by the Court of Magistrates by reason of the fact that the punishment as inflicted by the latter is greater in quantum than that which would have been imposed by the former. For a judgment of the Court of Magistrates to be overturned, the appellant must prove that the punishment handed down by the First Court was either wrong in principle or was manifestly excessive.

37. The Court of Magistrates (Malta) fined the appellant two thousand five hundred Euros (€2,500) and disqualified her from obtaining a driving licence for a period of one year from the date of the judgment. This punishment, is clearly neither wrong in principle nor is it outside the parameters prescribed at law. Given that this Court is going to overturn that part of the judgment of the first court wherein it found the appellant guilty of the first charge, it has to revise the punishment meted out in the said judgment in order to reflect this change.

38. However given also that the appellant is still going to be found guilty of the second and third charges brought against her, it is not possible for this Court to make significant changes to the punishment meted out, and this for the following reasons :

i. Article 3(1)(2) of Chapter 104 of the Laws of Malta, even as it stood on the relevant date, carried a punishment – in the case of a first offence - to a fine (multa) of not less than two thousand and three hundred and twenty- nine euro and thirty-seven cents (€2,329.37) but not exceeding four thousand and six hundred and fifty-eight euro and seventy-five cents (€4,658.75) or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment;

ii. According to article 3(2A) of Chapter 104 of the Laws of Malta a person convicted of an offence under this article shall (unless the court for special reasons thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification) be disqualified from holding or obtaining a driving licence for a period of twelve months from the date of the conviction. In this particular case no special reasons in terms of law allowing the Court not to inflict the term of disqualification of the licence are applicable. This is further

compounded by the fact that according to article 3(2B) of the said law the provisions of article 21 of the Criminal Code and of the Probation Act, shall not apply in respect of any offence against the provisions of this article;

iii. Regulations 14(3) and 44(7) of S.L. 368.02 provide for the impostion of a fine in case of a driving a motor vehicle without being covered by a vehicle licence not exceeding two hundred thirty five euro (€235) or imprisonment for a term not exceeding three months.

39. In this particular case the provisions of article 17(f) of the Criminal Code may be applicable in favour of the appellant. However this, again, cannot bring about any drastic change in the punishment that has to be applied in terms of law.

Decide

Consequently, in view of the above, this Court is upholding the appeal in part such that while it confirms that part of the appealed judgment wherein it :

i) acquitted the appellant from the finding of guilt for the fourth charge;
ii) found the appellant guilty of the second and third charges;

it varies the said judgment by revoking that part wherein :

iii) it found the appellant guilty of the first charge;
iv) it meted out the punishment of a fine of two thousand five hundred euro (€2,500);

and therefore, this Court instead is

v) aquitting the appellant from the first charge;

vi) meting out the punishment of a fine of two thousand three hundred and fifty euro (€2,350);

vii) and saving the abovementioned changes, it confirms the appealed judgment.

Aaron M. Bugeja
Judge