



Criminal Court of Appeal

Hon. Judge Dr. Consuelo Scerri Herrera, LL.D., Dip Matr., (Can)

Appeal Nr: 414 / 2021

**The Police
(Inspector Jonathan Cassar)**

vs

**Omisses
Paula Fernandez Romero**

Today the 8th February, 2022

The Court,

Having seen the charges brought against:

1. Omisses

And;

2. Paula Fernandez Romero daughter of Jose' Manuel & Maria Luz nee' Romero born in Mostoles, Madrid, Spain on the 3rd April, 1998 residing 39, Floor 10, Door 4, Pintor Velazquez Street, Mostoles, Madrid, Spain and holder of Spanish Identity Card bearing number 47551367V;

before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having:

On the 2nd May, 2021, between half past six in the morning (06:30am) and seven o'clock in the morning (7am) in St. Julian's, Malta: -

1. Without the intent to kill or to put the life of Ivan Gauci I.D. No: - 97349M in manifest jeopardy, caused harm to his body or health, which bodily harm is considered grievous; Articles 214, 215, 216 (1) (b) , 218 (1) (a) (b) and 222A (1) of Chapter 9 of the Laws of Malta.
2. Wilfully committed any spoil, damage or injury to or upon any movable or immovable property, that is vehicle bearing registration number GVN700 of make Peugeot to the detriment of the Civil Protection Department of Malta which amount of the damage does not exceed two thousand and five hundred euro but exceeds two hundred [sic] and fifty euro (€250) and this in violation of Article 325 (1) (1) of Chapter 9 of the Laws of Malta;
3. Uttered insults or threats to Ivan Gauci I.D.No:- 97349M not otherwise provided for in this code, or being provoked, carried their insults beyond the limit warranted by the provocation;
Article 339 1 (e) of Chapter 9 of the Laws of Malta
4. Wilfully disturbed the public good order or the public peace;
Article 338 (dd) of Chapter 9 of the Laws of Malta.
5. In a public place or a place open to the public were found drunk and incapable of taking care of themselves.
Article 338 (ff) of Chapter 9 of the Laws of Malta

This Court was requested to issue a Protection Order against the accused in order to provide the security to Ivan Gauci I.D. No:- 97349M or for keeping public peace or for protecting the injured person or other individuals from harassment or other conduct

which will cause a fear of violence in accordance to Article 412C of Chapter 9 of the Laws of Malta

Having seen the note of referral for judgement of the Attorney General of the 12th August, 2021, wherein he sent the records of this case for the persons charged to be tried by this Court, having found from the preliminary investigation, that there might result an offence (or offences) under the provisions of:

- (a) Articles 214, 215, 216, 222A (1) of the Criminal Code, Chapter 9 of the Laws of Malta;
- (b) Articles 325 (1) and the third proviso of Article 325 (1) of the Criminal Code, Chapter 9 of the Laws;
- (c) Article 339 (1) (e) of the Criminal Code, Chapter 9 of the Laws of Malta;
- (d) Article 338 (dd) of the Criminal Code, Chapter 9 of the Laws of Malta;
- (e) Article 338 (ff) of the Criminal Code, Chapter 9 of the Laws of Malta;
- (f) Articles 382 A, 383, 384, 385, 386 and 412 C and 412 D of the Criminal Code, Chapter 9 of the Laws of Malta; and
- (g) Articles 15 A, 17, 31, 532 A, 532 B and 533 of the Criminal Code, Chapter 9 of the Laws of Malta

Having seen the judgment meted by the Court of Magistrates (Malta) as a Court of Criminal Judicature proffered on the 1st November, 2021, whereby the Court after seeing the note of referral for judgement of the Attorney General of the 12th August, 2021:

1. Found both defendants not guilty of the contraventions contemplated in Articles 339 (1) (e) and 338 (ff) of the Criminal Code, Chapter 9 of the Laws of Malta, and consequently discharges both the defendants from having committed these offences;
2. After seeing Article 214, 215, 216 (1) (d) , 222 A (1) , 325 (1) (c) , the third proviso to Article 325 (1) and, 338 (dd) of the Criminal Code, Chapter 9 of the Laws of Malta, finds the defendant Ronan Clyde Hamill guilty of the criminal offences

contemplated in these provisions of law, and, after taking into account all the circumstances of the case condemns him to four (4) years imprisonment and to a fine of one hundred Euro (€100) , which must be paid forthwith. If the defendant fails to pay this amount, or any balance thereof, the fine will be converted into imprisonment according to the rate established by law.

3. After seeing Article 214, 215, 216 (1) (d) , 222 A (1) , 42 (e) , 325 (1) (c) , the third proviso to Article 325 (1) and 338 (dd) of the Criminal Code, Chapter 9 of the Laws of Malta, found the defendant Paula Fernandez Romero guilty of the criminal offences contemplated in these provisions of law and, after taking into account all the circumstances of the case condemns her to four (4) years imprisonment and to a fine of one hundred Euro (€100) , which must be paid forthwith. If the defendant fails to pay this amount, or any balance thereof, the fine will be converted into imprisonment according to the rate established by law.
4. In terms of Article 15 A of Chapter 9 of the Laws of Malta, and in terms of Article 24 of Chapter 466 of the Laws of Malta, made applicable to these proceedings by Article 532 A of Chapter 9 of the Laws of Malta, the Court condemns the persons convicted to pay in solidum between them the amount of six thousand Euro (€6000) to Ivan Gauci, as compensation for the damages suffered as a result of the criminal offences committed by the convicted persons. This order shall constitute an executive title for all intents and purposes of the Code of Organisation and Civil Procedure.
5. Moreover, the Court orders the persons convicted to pay in solidum between them to the Registrar all the costs incurred in connection with the employment in the proceedings of all the experts, in terms of Article 533 of Chapter 9 of the Laws of Malta. These costs are to be paid within a period of one (1) week from when the Registrar of the Criminal Courts communicates to them the amount due by them. If the persons convicted fail to pay this amount or part of it within

the time herein prescribed, the amount, or any balance of it, will become immediately due and payable, and in default of payment thereof, the outstanding amount still due shall be converted into imprisonment at the rate established by law.

Having seen the appeal application presented by Paula Romero Fernandes in the registry of this Court on the 16th November, 2021, whereby he humbly requests that this Honourable Court:

- 1) Confirms that part of the appealed judgment wheresoever this absolves the appellant from guilt;
- 2) Consequently, revises the same appealed judgement and revokes such parts thereof where this has found guilty in terms thereof and therefore acquits the Appellant from such guilt and consequent punishment for the reasons above given;
- 3) Alternatively, in the case where this Honourable is unable to acquit the appellant as requested herein, to revise the said appealed judgement by applying a more just and equitable punishment in view of the facts and circumstances of the case.

Having seen the acts of the proceedings;

Having seen the updated conduct sheet of the appealed, presented by the prosecution as requested by this Court.

Having seen the grounds for this appeal are the following:

LEVEL OF PUNISHMENT

The appellant was found guilty in terms of Article 214, 215, 216 (1) (d) , 222A (1) , 42 (e) , 325 (1) (c) , the third proviso to Article 325 (1) and 338 (dd) of the Criminal Code,

Chapter 9 of the Laws of Malta, as co-author in respect of the accusation as above cited for wilful damage to third party property, and insofar as she was held to be an accomplice of her co-accused Ronan Clyde Hamill in terms of the said Article 42 (e) of Chapter 9 of the Laws of Malta.

That without prejudice to submissions further on in this appeal application, the fact alone that the Law stipulates in Article 42 of Chapter 9 of the Laws of Malta, that an accomplice in a crime shall be liable to the punishment established for the principal, does not mean that the Court finding guilt of the principal is bound to apply in respect of the accomplice the exact level of punishment that it deems fit to apply to the principal author of the crime. It is humbly submitted that the wording of the law allows to the Court the discretion to apply the same range of punishment contemplated in the applicable provision that regulates the crime of which the parties, author and accomplice are accused.

Hence, given purely for the sake of argument, that the First Honourable Court had sufficient justification to find that the Appellant, was guilty in terms of Article 42 (e) of Chapter 9 of the Laws of Malta, that is, in terms of Articles ...;

42. *deemed to be an accomplice in a crime if he -*

...

(e) incites or strengthens the determination of another to commit the crime, or promises to give assistance, aid or reward after the fact.

It is humbly submitted that even giving the most unfavourable interpretation of the facts presented to the First Court by means of witnesses and CCTV footage, there is ample occasion to accord the minimum penalty contemplated by the Law within the range therein stipulated. This is being humbly submitted because in the worst-case scenario, the Appellant' s influence on the incident cannot but be considered to be of minimal consequence.

The potential levels of complicity in any case range from the minimal to that just short of actual commission of the crime. It is therefore clearly desirable at law and in practice, that different levels of involvement are treated differently, so that effectively the punishment fits the crime.

Nothing prevents the court in such circumstances, as in this case, from applying the minimum level of punishment contemplated by the Court as well as such provisions in terms of Articles 21 and 28A of the Criminal Code, as well as the such applicable provisions in terms of Chapter 446 of the Laws of Malta, in much the same way that such provisions would be applicable in terms of Law where the appellant may have been found guilty as principal of the offences of which she was accused.

GUILT IN TERMS OF Article 214, 215, 216 (1) (d) , 222A (1) , 42 (e) , 325 (1) (c) , the third proviso to Article 325 (1) and 338 (dd) of the Criminal Code, Chapter 9 of the Laws of Malta,

The Appellant humbly submits however that the First Honourable Court had no basis at law or in fact to arrive to the findings of guilt in terms of Article 214, 215, 216 (1) (d) , 222A (1) , 42 (e) , 325 (1) (c) , the third proviso to Article 325 (1) and 338 (dd) of the Criminal Code, Chapter 9 of the Laws of Malta, judgement.

WILFUL DAMAGE

The First Court finds guilt in terms of Article 325 (1) (c) after considering the submissions raised by the Appellant that the areas where damage was found in the vehicle involved did not correspond to the parts of the vehicle shown to have been subjected to kicks by the accused. The Court concludes therefore that the damage was inflicted of the mudguards and in the Court' s opinion was not in excess of €200.

For this reason, the Court did not feel the need to consider the submissions of the Appellant regarding the inadmissibility of the evidence supplied by Natalino Agius. This with respect is not correct.

The objections to the conclusions of Natalino Agius in the report presented by this witness in court, were based also on the fact that this witness was not a court appointed expert in terms of Article 650 of Chapter 9 of the Laws of Malta, but ex parte and therefore not admissible. Once that this evidence was inadmissible, there was in effect no evidence before the First Court that any damage existed at all and therefore no basis even for the First Court to find guilt even in terms of the lesser offence in terms of Article 325 (1) (c) which does not exonerate the First Court from the necessity to appoint experts in all cases where technical opinions are required.

The inadmissibility of the ex parte report would also bring about the consequence that costs in terms of Article 533 of Chapter 9 of the Laws of Malta would not become payable by the accused and would therefore also not subject them to converse of the said amount into a term of imprisonment in default of payment.

For these reasons and for the reasons given in the Appellant' s note of submissions, to which full reference is made, the First Court' s failure to consider such submissions is a grievance from which appeal is also humbly proffered.

GRIEVOUS BODILY HARM

As the First Court correctly submits, the case of the Prosecution here was principally based on the evidence of the injured party Ivan Gauci, an eyewitness account by a certain Catherine Fiorini, and CCTV footage captured by a neighbouring camera.

The appellant' s version of events was of course also brought to the attention of the First Court at defense stage.

The First Court, in its judgement (para. 7) says: “....there is a marked difference between the version of the persons charged and the injured party and the determination of the case depends on the credibility of the evidence brought forward by each party....”

This is generally true.

However, the First Court also had access to “independent” CCTV footage which should have had a determining influence on the First Court’s assessment of the credibility of the evidence. It is humbly submitted that the CCTV footage amply demonstrates that the witnesses Ivan Gauci and Catherine Fiorini are in effect unreliable, even untruthful, witnesses.

On the contrary, the evidence on oath before the First Court and statement of the Appellant to the Police are totally consistent with each other and entirely corroborated by the said CCTV footage. At the very least, these should provide a basis for a strong argument that the case against the appellant has not been proven beyond a reasonable doubt.

The First Court breaks down the incident into three altercations.

The First altercation commences from the point where the appellant’s co-accused is seen in the CCTV footage taking the mobile phone from the hands of the injured party Ivan Gauci.

The act itself where the mobile phone is taken by Ronan Clyde Hamill is actually a sudden snatching movement which, although against the will of Ivan Gauci, does not involve any assault at all or threat thereof, against Ivan Gauci. Importantly here, as the First Court itself duly notes (judgement para. 19) , the Appellant is seen to behave with the utmost calm, slowly walking up to the place where the co-accused and the injured party are engaged. **(Ref. CCTV Footage 9:32 - 9:43)**

The Appellant humbly submits that the CCTV footage at this point as shown, **already clearly demonstrates** that Ivan Gauci is untruthful about how the incident with the co-accused unfolded. This is a clear attempt on behalf of Ivan Gauci to portray himself as the victim of an unprovoked violent attack. In fact, from the CCTV footage as shown, it clearly emerges that the only violent behaviour up to this point was exerted by Ivan Gauci, as an over- reaction to his mobile being snatched from his hands. It is clear from this footage that Ivan Gauci grabs the appellant co-accused Ronan Clyde Hamill from his shirt by the neck and violently drags the said co-accused down to the floor, thereby also falling himself.

This is in direct contradiction to what Ivan Gauci states on oath during his testimony offered on the 1st of September 2021 under cross examination. When asked by the defence lawyer to the co-accused and the Court whether the two accused were walking away from him, he replied “Yes, they were walking away”. Being asked further whether notwithstanding that the accused were walking away from him he nonetheless pulled Ronan Clyde Hamill to the floor, Ivan Gauci states on oath *“I did not pull him to the floor, I just grabbed hold of his shirt, pulled him and he sat down on three (3) steps”*.

This Honourable Court is invited to examine the CCTV footage starting at **9:33 (Minute 9, 33 seconds)** . From this **independent** source of evidence, it cannot be clearer that Ivan Gauci violently dragged Ronan Clyde Hamill to the floor, and not merely caused him to sit down, as he insists on oath.

The Appellant maintains that at this point, as also clearly emerges from the CCTV footage above cited, she very calmly approaches the two men and that while doing so, with a view to stopping the incident, she received two blows to her head. Such assault is corroborated by CCTV at **9:44 (Minute 9, 44 seconds)** whereby her hair is seen flying backwards as a consequence of the blow received. At no point in her statement or during her testimony does the appellant claim to have been seriously injured by these

blows, but she maintains that they did indeed happen and that **this was the reason why her demeanour is seen to have changed completely from that calm approach as seen before CCTV footage at 9:50**. The Appellant at this point, while Ivan Gauci is walking away, is seen to confront him and this because she was struck as she maintains.

The First Court takes issue with the allegation of the appellant that she was struck by Ivan Gauci, because upon a medical examination there appeared to be no trace of any visible injury to her head. The First Court maintains that the Appellant is not credible when she mentions that she was struck because in the First Court's opinion, there should have been a visible sign of this. This conclusion by the First Court is with respect unfounded and not supported by medical opinion as to the length of time it would take for visible signs of such minor blows to appear on the recipient's body. Moreover, the First Court remarks that there are many reasons why the appellant's hair is shown to fly backwards, and being struck as the Appellant maintains is not necessarily the only reason.

It is strange to say the least why the First Court, when faced with blatant untruthfulness by Ivan Gauci as to how the first altercation took place, chose not to give credence to the Appellant's version which is so clearly borne out beyond the balance of probabilities both by the movement of the Appellant's hair and also by her change in attitude, **that is from a very calm approach to a sudden reactional and confrontational one.**

It is humbly submitted that the First Court accepts the account given by Ivan Gauci of the incident up to this point, which is inaccurate to say the least, since the facts as emerging from the CCTV footage clearly contradict the facts stated.

The First Court notes that *"Defendant Hamill hit him on the head and when he turned round he hit him again on the face and then threw him to the ground and the defendants started kicking him on the ground. He said at one point that he saw the boot of Romero going straight*

into his stomach. He managed to get loose and started walking as fast as he could away from them...."

This excerpt taken from the court' s understanding of Ivan Gauci' s account of the incident, as per his evidence given on the 21st June, 2021, refers to what the First Court itself describes as the second altercation. The CCTV footage covering this part of the incident clearly shows that contrary to what Ivan Gauci maintains, at no time was Ivan Gauci on the floor. On the contrary, the co-accused Ronan Clyde Hamill is seen on the floor after he intervenes on account of Ivan Gauci pushing the appellant, and he is repeatedly punched while on the floor by the same Ivan Gauci. At no time is Ivan Gauci at this point being kicked in his ribs or anywhere else. The appellant, as she maintains, is clearly seen to be trying to pull Ivan Gauci off the co-accused and in turn also, coming in between the two men to push one off the other.

The facts as above noted by the First Court are accurately taken from the evidence given by Ivan Gauci under oath during the sitting held on the 21st June 2012. Once again, it is clear that Ivan Gauci is being untruthful about what really happened. He is trying to exaggerate facts and to give an interpretation which is not borne out by the independent evidence resulting from the CCTV footage.

It is important to note that in spite of his clearly slanted version of events, Ivan Gauci never once says that the appellant in some manner restrained him so that he could more easily be beaten, or be placed at a disadvantage in the altercation, nor does he mention any factor which would tend to suggest that the appellant did anything to encourage the co-accused to attack Ivan Gauci.

The Prosecution' s witness Catherine Fiorini describes in great detail what she considers a very violent incident, whereby she saw her neighbour Ivan Gauci grabbed by the neck from behind by a young man who she identified as the Appellant' s co-accused. She graphically describes the beating and Ivan Gauci' s shouts of pain and pleas for mercy as he was being beaten. During her testimony, she actually

demonstrated how the beating took place by herself standing behind the prosecuting officer and placing her arm around his neck. This witness was equally graphic and specifically indicated by reference to a photograph as to the part of the road where the alleged incident took place. This witness lives in the immediate vicinity of the place where the incident took place and is therefore well acquainted with the area.

The part of the road indicated by this witness and marked for this purpose on a photograph which forms part of her evidence, refers to an area totally different to that where the so-called third altercation takes place. The First Court refers to this blatant inconsistency as “.....not tally (ing) completely with the independent evidence contained in the CCTV footage.....”, but nonetheless credits this witness with being consistent in that she saw defendant Hamill throwing Ivan Gauci on the ground and beating him.

The First Court concludes that this witness actually gave an account of what she saw happening in the third altercation, which in fact took place several metres further down the road from where the witness on oath indicated that the beating of Ivan Gauci took place. From this, one per force, concludes that the First Court accepts the witness Fiorini as an eye witness to the third altercation.

The First Court underplays Catherine Fiorini’ s insistence that the Appellant had no involvement at all in the incident. The witness maintains that the Appellant had absolutely no part in the violent incident that she witnessed between the co-accused and her neighbour Ivan Gauci. In this, the witness was also very consistent.

It is therefore humbly submitted that once the First Court concluded that Catherine Fiorini’ s graphic description of the incident referred to the third altercation, it should logically follow that this witness’ s consistency about the appellant’ s non-involvement in any manner with the violence which she described must also be accepted.

The First Court in its conclusions regarding the reasons for finding the Appellant guilty of complicity, with respect commits a series of inconsistencies. In Para. 40 of the judgement, the Court holds “.....She was certainly an accomplice in this third altercation because through her behaviour she incited and strengthened the determination of Hamill to give another beating to the injured party in terms of Article 42 (e) of the Criminal Code”.

The First Court could find nothing about the third altercation where the Appellant could in some manner be involved in the incident that may have led to injuries suffered by Ivan Gauci. Nor does the First Court in point of fact impute any punishable criminal behaviour by the Appellant in the First and Second Altercation but limits the Appellant’ s involvement to the Third altercation.

The First Court, to justify its findings of guilt by complicity, cites local jurisprudence from where it results that there can be no complicity by inaction, but negative acts that clearly indicate participation in the commission of the crime would amount to complicity.

The First Court in Para. 42 of its judgement states “....the Court has no doubt that at that point in time (when the Appellant said that she went to separate the two since the injured party was hitting defendant Hamill) the ribs of the injured party had already been fractured.....”.

The Court here clearly tries to dismiss the usefulness of any positive intervention by the Appellant to hinder any damage, since the Court maintains that the damage had already been done.

This with respect is a totally gratuitous conclusion by the First Court which therefore instead of applying the benefit of the doubt to the Defendant, based its decision on a belief that does not emerge anywhere from the facts of the case.

It is humbly therefore submitted that there is absolutely no basis for the First Court's conclusion that the Appellant's behaviour supplied such negative acts beyond any reasonable doubt.

The acts which the First Court attributes as an element of complicity can far more easily and logically be interpreted as a strong desire by the Appellant to disassociate herself from any violence and/or to prevent or diffuse such violent incident. Her presence in no way facilitated the commission of a crime, nor strengthened or incentivised said crime.

In order for a party to be held guilty as an accomplice, it is necessary that there is proof beyond a reasonable doubt of the intention to participate or influence the commission of a crime.

This is totally absent in the case against the appellant.

It would indeed be an unfortunate interpretation of the facts to say the least if the intervention of a third party to a violent altercation, which would necessarily involve some pushing and pulling of the persons involved, would come to mean that such intervention would expose the intervening third party to the dire consequences contemplated a Law.

As a consequence, the Appellant should not be held bound to compensate Ivan Gauci for moral damages in terms of the appealed judgement.

Now therefore the Court Considers:

Even though it is not clear, it seems that one of the appellant's grounds of appeal concerns the First Court's wrong evaluation of evidence. In this regard, it has been firmly established in both local and foreign case law that the Court of Appeal does not

disturb the evaluation of the evidence made by the Court of first instance, if it concludes that that Court could have reached that conclusion reasonably and legally.

In other words, this Court does not replace the discretion exercised by the First Court in the evaluation of the evidence but makes a thorough examination of the evidence to determine whether the Court of first instance was reasonable in reaching its conclusions. However, if this Court concludes that the Court of first instance could not have reached the conclusion it reached on the basis of the evidence produced before it, than that would be a valid – if not indeed a cogent reason – for this Court to disturb the discretion and conclusions of the Court of first Instance (confer: “inter alia” the cases Il-Pulizija vs. Raymond Psaila et.¹ ; “Ir-Repubblika ta’ Malta vs. George Azzopardi”² ; “Il-Pulizija vs. Carmel sive Chalmer Pace”³ ; “Il-Pulizija vs. Anthony Zammit”⁴ “Il-Pulizija vs Julian Genovese”⁵ and others.

This Court also refers to what was held by LORD CHIEF JUSTICE WIDGERY in “R. v. Cooper” ([1969] 1 QB 276) (in connection with section 2 (1) (a) of the Criminal Appeal Act, 1968) :-

“assuming that there was no specific error in the conduct of the trial, an appeal court will be very reluctant to interfere with the jury’s verdict (in this case with the conclusions of the learned Magistrate), because the jury will have had the advantage of seeing and hearing the witnesses, whereas the appeal court normally determines the appeal on the basis of papers alone. However, should the overall feel of the case – including the apparent weakness of the prosecution’s evidence as revealed from the transcript of the proceedings – leave the court with a lurking doubt as to whether an injustice may have been done, then,

¹ Decided by the Court of Criminal Appeal on the 12th May, 1994.

² Decided by the Court of Criminal Appeal on the 14th February, 1989.

³ Decided by the Court of Criminal Appeal on the 31st May, 1991.

⁴ Decided by the Court of Criminal Appeal on the 31st May, 1991.

⁵ Decided by the Court of Criminal Appeal on the 31st July, 2008.

*very exceptionally, a conviction will be quashed.” (Confer also :
BLACKSTONE’S CRIMINAL PRACTICE (1991) , p. 1392)*

In the judgments **Il-Pulizija vs Anthony Debono**,⁶ **Il-Pulizija vs Noel Borg**,⁷ **Il-Pulizija vs Brian Barbara**,⁸ **Il-Pulizija vs Therese Attard Flores**⁹ and others, all make reference to the case in the names **Ir-Repubblika ta’ Malta vs. Ivan Gatt**,¹⁰ where it was held that the exercise to be carried out by this Court in cases where the appeal is based on the evaluation of the evidence, is to examine the evidence, to see, even if there are contradictory versions – as in most cases there would be – whether any one of these versions could be freely and objectively believed without going against the principle that any doubt should always go in the accused ’s favour and, if said version could have been believed and was evidently believed by the jury, the function, in fact the duty of this court is to respect that discretion and that evaluation of the evidence.

This Court has accordingly evaluated the evidence, including the testimonies of the witnesses who testified anew with a view to establishing whether the Court of first instance could have legally and reasonably decided the way it did. Since the case against the co-accused is still *sub judice*, the Court will not make reference to his statement released to the police or his testimony given before the First Court. The Court makes reference to the judgment in the names **Il-Pulizija vs Omisses, Anthony Galea**.¹¹

“Id-difiza tal-imputat sostniet li l-istqarrija tal-ko-imputat ma hiex ammissibbli bhala prova f’din il-kawza. L-artikolu 658 huwa pjuttost car fir-regoli li jistabbilixxi dwar meta u fejn stqarrija ta’ ko-akkużat hija ammissibbli bhala prova favur jew kontra ko-akkużat ieħor, u f’liema kontest ko-akkużat jista’ jixhed fil-konfront ta’ ko-akkużat ieħor.

⁶ Decided by the Court of Criminal Appeal on the 3rd September, 2021.

⁷ Decided by the Court of Criminal Appeal on the 23rd September, 2021.

⁸ Decided by the Court of Criminal Appeal on the 23rd September, 2021.

⁹ Decided by the Court of Criminal Appeal on the 14th October, 2021.

¹⁰ Decided by the Court of Criminal Appeal on the 1st December, 1994.

¹¹ Decided by the Court of Magistrates as a Court of Criminal Judicature on the 25th March 2019.

Dak enunċjat fl-Artikolu 636(a) u (b) tal-Kodiċi Kriminali, u anke minn ġurisprudenza tal-Qrati tagħna juru fejn ix-xhieda tal-ko-akkużat ma tikkostitwixxi ebda prova, la kontra u lanqas favur l-akkużat jew l-akkużati l-oħra, u b'hekk mhux ammissibbli bħala tali.

Din ir-regola hija desunta a contrario sensu minn dak li jipprova l-paragrafu (b) tal-artikolu 636, fis-sens li l-ko-akkużat isir xhud kompetenti fir-rigward ta' ko-akkużat, biss wara illi l-kaz fil-konfront tiegħu ikun ġie definittament deċiż.

Fil-kaz odjern, il-kaz kontra l-ko-akkużat Gilbert Galea ghadhu mhux deciz. Id-difiza ssostni li hawn tapplika r-regola indikata, u b'hekk dak kollu li qal il-ko-imputat mhux ammissibbi fil-konfront ta' xulxin.

Il-Qrati tagħna kellhom l-opportunità li jippronunzjaw ruħhom fuq dan il-prinċipju f'diversi każijiet fosthom Sua Maesta r-Re vs Carmeo Cutajar ed altri,. Qorti Kriminali 18 ta' Jannar, 1927; Il-Pulizija vs Toni Pisani Appell Kriminali 11 ta' Novembru, 1944; Il-Maesta tiegħu r-Re vs Karmenu Vella, Qorti Kriminali 3 ta' Dicembru, 1947; The Police vs Alfred W. Luck et, Appell Kriminali 25 ta' April, 1949; Ir-Repubblika ta' Malta vs Faustino Barbara, Appell Kriminali 19 ta' Jannar, 1996; Il-Pulizija vs Nasher Eshtewi Be Hag et, Appell Kriminali 2 ta' Frar, 1996; Il-Pulizija vs Carmelo Camilleri u Theresa Agius, Appell Kriminali 11 ta' Lulju, 1997, u r-Repubblika ta' Malta vs Domenic Zammit et Appell Kriminali 31 ta' Lulju, 1998, Ir-Repubblika ta' Malta vs Ian Farrugia, Qorti Kriminali Digriet Datat 22 ta' Dicembru, 1998.

Din ir-regola giet interpretata u estiza mill-gurisprudenza biex anki tkopri kazijiet fejn persuni li jkunnu akkuzati bl-istess reat imma fi procedure separati ma jkunux meqjusa bhala xhieda kompetenti u producibbli kontro ko-akkuzati jew ko-imputati oħrajn, hlief meta lprocess tax-xhud ikun gie deciz definittivament.

Il-Qorti tal-Appell Kriminali fis-sentenza fl-ismijiet "Il-Pulizija vs Omissis u Saada Sammut" spjegat li:

"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 għallgurisprudenzahemm citata, rriteniet li persuna li tkun akkuzata, kemm bhala komplici kif ukoll bhala koawtur, bl-istess reat migjub kontra dak l-akkuzat liehor ma tistax tingieb bhala xhud favur jew kontra dak lakkuzat liehor sakemm il-kaz tagħha 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 oħrajn.) L-unika eccezzjoni għal dir-regola hi proprju dik kontenuta fl-art. 636 (b) li tirrendi tali xhud kompetenti biex jixhed għalkemm ikun imputat talistess reat li fuqu tkun mehtiega x-xhieda tieghu, meta l-Gvern ikun wegħdu jew tah l-impunita' sabiex hekk ikun jista' jixhed."

Il-Qorti taghmel referenza ukoll ghad-digriet imsemmi fid-decizjoni appena kwotata liema digriet inghata fit-22 ta' Dicembru 1998 fil-kawza "Ir-Repubblika ta' Malta vs. Ian Farrugia", fejn il-Qorti Kriminali qalet hekk:

"Il-gurisprudenza hi cara fuq dan il-punt: persuna li tkun akkuzata, kemm bhala komplici kif ukoll bhala ko-awtur, blistess reat migjub kontra akkuzat iehor ma tistax tingieb bhala xhud favour jew kontra dak l-akkuat l-iehor sakemm il-kaz taghha ma jkunx gie definittament deciz. Dan il-principju japplika sia jekk dik il-persuna tkun giet akkuzata flistess kawza tal-akkuzat l-iehor - b'mod li jkun hemm "ko-akkuzati" filveru sens tal-kelma - u sia jekk tkun akkuzata fi proceduri separat."

The appellant released a statement to the police on the 2nd May 2021. She was given all his rights according to law and chose not to consult with a lawyer or to have a lawyer present during the interrogation. She stated that she was in Malta on holiday and was about to leave the following day. She confirmed that she understood the English language and she did not wish to inform his embassy regarding her arrest. Asked what had happened that morning, the appellant said that she and the co-accused saw a car and tried to make a joke and hit the car once on the passenger door and an old guy started filming them. They told him to stop it but he did not listen to them and got aggressive. The co-accused tried to stop him by taking away his phone. She tried to calm down the situation and he punched her. Her friend was mad, but she did not remember what he did. She remembered trying to separate them on the floor. She stated that she considers her friend's action as self-defence. Told that the alleged victim was suffering from several broken ribs, she stated that she did not do anything and that she does not believe that he had multiple broken ribs. Asked whether she punched the alleged victim, she stated that she just pushed him to defend herself. Asked whether she saw her friend fighting with the man she replied in the affirmative,

but she said that she did not see him kicking the man. Asked how she got the laceration on her small finger she said that she did not know but she had something on the right side of her forehead which she did not tell the doctor about. Asked where the alleged victim was when she returned for the bag, she stated that she did not remember. Asked whether the alleged victim was on the ground and Ronan assaulted him she replied that she does not want to answer. In the end of the statement, she asked whether he was normal.

Inspector Jonathan Cassar¹² testified on the 12th May, 2021 where he said that on the 2nd May, 2021 at around 6.30am they received a call that in Triq il-Kbira, St. Julians there was a fight between some individuals. They found Ivan Gauci laying on the floor and unable to move and also unable to give his testimony. A witness with the name Katerina Fiorini explained to the police that Mr Gauci was beaten up by a male person and she also provided them with a description and in fact some minutes later both the accused were apprehended. The police managed to gather that both the accused damaged a Civil Protection vehicle bearing registration number GVN-700 and whilst they were damaging the vehicle Mr Ivan Gauci approached them and was filming them damaging the vehicle and basically a fight ensued and he was beaten up. It transpired later that he had suffered from seven broken ribs but was not in danger of loss of life.

Both the accused released a statement on the 2nd May, 2021. Mr Hamill was taken to the health centre and he was certified as suffering from slight injuries, bruises on his knuckles. The CCTV shows that that Mr Gauci was approached by the two accused. Mr Hamill took Mr Gauci's phone and a fight ensued. However, the fight which was visible on the footage would barely cause any injuries to any of them. From the footage, one can see that in a place which is not captured by the footage Mr Ivan Gauci left and he was approached by the two individuals and what happened is unknown because it was not captured in the footage. The witness Ms Fiorini saw Mr Hamill kicking Mr Gauci but the latter stated that he was beaten up by both the accused.

¹² Fol. 38 of the acts of the case.

Cross-examined by the defence, he stated that the footage came from a certain Joanne Cassar.

Catherine Fiorini¹³ testified on the 12th May, 2021 and said that on the 2nd May, 2021 she heard crying and shouting and so she looked out in the street from her bedroom window overlooking Main Street St. Julians. It was about 6.30am and she saw a tourist who got hold of a Maltese guy from his back and with his arm he was holding him from the neck and hitting as hard as he can. He was hitting his face and the top part. After hitting him, he left and this guy went to go down the road to the front where he lives and the tourist followed him, gave him another good hiding, dropped him on the ground and kicked him as hard as he could. Asked by the Court whether she had seen all this herself, she replied 'Not all. Half of it. In the end. But the police told me what was happening'. She confirmed that she witnessed all the first part and was on the street for the second part. She missed a bit of the second part because she went out of the house. She stated that she only saw the two men fighting and that the girl did not do anything.

Ms Fiorini¹⁴ testified once again on the 18th August, 2021. She stated that the girl was standing under her window and was just looking at the fight. When she left the bedroom window the elderly man was walking home and when she went out of the house, the victim was lying on the floor and there was no more fighting. She stated that she did not call the police herself.

On the 1st September, 2021 Ms Fiorini¹⁵ testified once again and stated that she saw the incident happening in front of her. She was one storey high. She saw the way he held him and the way he was hitting him. She could hear the person crying and shouting and she started shouting as well and telling him 'if you are not going to go away I am

¹³ Fol. 56 of the acts of the case.

¹⁴ Fol. 360 of the acts of the case.

¹⁵ Fol. 379 of the acts of the case.

going to call the police!’ she stated that she knows the victim as he lives three doors away from her. She confirmed that she did not see how the incident had started. She did not see the victim pulling the accused to the floor. She stated that the victim could not do anything.

Donald Tabone¹⁶ testified on the 21st June,2021 where he stated that he was appointed as a court expert to analyse the contents of the USB disc and also to extract some stills. He presented his report to the Court.

Ivan Gauci¹⁷ testified on the 21st June, 2021 where he stated that he was walking in the morning between 7.00am and 8.00am and he heard some banging and so he looked around and saw two people, with the man kicking the car. He told them ‘Please will you stop it!’ and he kept kicking it. He got his mobile out, went near them and started taking pictures of them. The man was telling the woman not to look at him but he managed to take some photos. The man managed to take his mobile and he was going away with it. He tried to stop him, but he just pulled his hand up both of them and the man managed to sit on three steps and I took my mobile from him. He saw the woman coming aggressively towards him and he pushed her so that he could leave and all of a sudden, he got a brick hit on his head. When he turned round, he hit him again on his face and threw him on the floor. The man was the one who hit him first. When he fell on the ground, the man started kicking him in the face. When he put his head down, he saw the woman’s shoes going into his stomach and then he was kicking him all over. Somehow, he managed to get hold of his leg because of his two knee replacements he couldn’t get up from the floor when he fell. He was telling them to let him go and in turn he will not go to the police. The man did not listen to him and somehow, he got loose and started walking fast but the man followed him and got hold of him again. He threw him on the floor, hitting him and kicking him again. He stated that he was in a lot of pain and was screaming. He got up and he left him on the

¹⁶ Fol. 88 of the acts of the case.

¹⁷ Fol. 224 of the acts of the case.

floor. He confirmed that the incident took place in Main Street, St. Julians. During the fight they also damaged his reading glasses.

Mr Gauci¹⁸ testified once again on the 1st September, 2021 and he confirmed that when he first saw the accused, they were about two to three metres away from him and they were walking away. Asked whether he pulled the accused to the floor he replied that he grabbed his shirt, pulled him and sat down on the three steps. He just wanted to grab his mobile and he did. As he turned around to go, the woman was approaching him aggressively and he pushed her. As soon as he did, he hit him on his neck. He punched him and as soon as he turned around, he punched him again on his face. He threw him on the floor and started kicking his head with their shoes. He saw the woman shooting in his stomach when he tried to cover his face and head. He stated that the accused wanted to kill him not hurt him because the first time he hit him enough.

PC 2415 Chloe Marie Bonello¹⁹ testified on the 5th July, 2021 and said that she was present for the statement of Paula Romero Fernandez and recognised the signatures. She also stated that she was present when Ms Fernandez renounced to her right to legal assistance.

Dr Mario Scerri²⁰ testified on the 5th July, 2021 and stated that he was instructed by the Court to examine Ivan Gauci and he examined him on the 1st July, 2021. He stated that Mr Gauci suffers from chronic bronchitis and emphysema and so this toppled him over. By time he will be fine but he is still in pain. Due to his age bones take longer to heal and the muscle takes longer to calm down.

Dr Scerri²¹ testified once again on the 1st September, 2021 where he stated that he confirmed at hospital that the alleged victim really sustained fractures of his ribs and

¹⁸ Fol. 385 of the acts of the case.

¹⁹ Fol. 290 of the acts of the case.

²⁰ Fol. 292 of the acts of the case.

²¹ Fol. 377 of the acts of the case.

he also confirmed that he suffers from COPD, chronic obstructive airway disease. The fracture was compatible to blunt trauma which is any insult to the body brought about by something which is not sharp and which is not pointed. In this case a fall contributes to blunt trauma. He said that the injuries which the victim sustained are compatible with a fall because the ribs were broken in two pieces and that would be compatible with a fall. If the alleged victim received a blow, probably the fracture would be a single blow. The alleged victim sustained two fractures in two ribs and so every rib sustained two fractures and probably it is due to the fall.

Dr Francesca Spiteri²² testified on the 5th July, 2021 and stated that she is a doctor working within the Emergency Department at Mater Dei. She confirmed the medical certificate issued by herself and stated that Mr Gauci's injuries are classified as grievous.

Karen Cremona²³ testified on the 5th July, 2021 and stated that she was a manager at the Land Transport Directorate within the Authority for Transport Malta. she confirmed that the vehicle bearing registration number GVN 700, white Peugeot 308 is registered on the Civil Protection Department and it has been so registered since 9th September, 2009.

Dr Kenneth Falzon²⁴ testified on the 5th July, 2021 and he stated that he's a doctor and was working at the Floriana Health Centre. He said that he examined Ms Fernandez two times. The first time he found a laceration on her right small finger and the second time she returned complaining of pain and an injury on her right temple. The second time round she stated that the old gentleman hit her. The first time she told him that she had no injuries. He stated that she was wobbly, slurring her words and did not look sober but he did not have any tests to confirm his observations.

²² Fol. 303 of the acts of the case.

²³ Fol. 305 of the acts of the case.

²⁴ Fol. 311 of the acts of the case.

Natalino Agius²⁵ testified on the 9th July, 2021 and confirmed the report he drew up upon estimating the damages of the civil protection department vehicle. The Civil Protection Department had asked him to compile the said report.

Dr Mark Debrincat²⁶ testified on the 9th July, 2021 and stated that he is a medical doctor working at the Floriana Health Centre. He said that he examined Ronan Clyde Hamill and noticed two abrasions, one under the thumb and one between the left second and third knuckle. He confirmed the certificate that was drawn up by himself and the contents therein.

PS 2189 Amy Mawdsley²⁷ testified on the 9th July, 2021 and stated that on the 2nd May, 2021 she was on duty at the St. Julians Police Station and around 6.45am she received a call that there was an argument going on in Main Street St Julians amongst three people. She did not report on site but the report was drawn up by herself. She stated that PS 1440 was in charge of people at the site. She recognised the two defendants because they were brought to the station and she was there compiling the report.

PS 1440 Sergio Spiteri²⁸ testified on the 9th July, 2021 and stated that on the 2nd May, 2021 at around 6.34am they received a call that there was an argument going on in Main Street St Julians. He reported on site and found Ivan Gauci shouting in pain. He told them that he had an argument with two persons and they ran up the road. He stayed with Mr Gauci until the ambulance came for him and other police officers went to look for the defendants who he recognised in Court. Inspector Cassar then told him to take the defendants to the lock-up for further investigation.

He explained how Mr Gauci told him that his attackers where a female and a male. The female was wearing a white skirt and long boots with heels. They both ran up the

²⁵ Fol. 330 of the acts of the case.

²⁶ Fol. 332 of the acts of the case.

²⁷ Fol. 334 of the acts of the case.

²⁸ Fol. 342 of the acts of the case.

road, where the other police officers found them. Mr Gauci told him that they were kicking the car.

Joanne Cassar²⁹ testified on the 9th of July 2021 and stated that it was a Sunday morning about 5.00am- 5.30am and they were woken up by a lot of screaming in Main Street, St. Julians. She saw two youngsters kicking an old man and she took her CCTV to the police station. She confirmed the CCTV she handed the police and remarked that the time on the CCTV is about an hour out. Lastly, she confirmed that she is the owner of the cameras, one overlooking Main Street and one overlooking Carmel Street.

PC 987 Donald Joseph Sultana³⁰ testified on the 18th August, 2021 and stated that he recognises the statement of Mr Hamill and the signatures on it. He also recognised the document for the refusal of legal assistance and the signatures on it.

Paula Romero Fernandez³¹ testified on the 9th September, 2021 and said that she and her friend were going to their hostel with the name 'Inhawi' and they passed through Main Street. They saw a civil protection car and her friend kicked the car, then she kicked it, then her friend kicked it again. There was an elderly person and he was shouting in Maltese and they did not understand what was he saying. Her friend put his hand up as a sign of peace, continued walking and ignored him. However, this elderly person started running after them and was recording them with his mobile. He was aggressive and her friend took his mobile. The elderly person grabbed him from his shoulder and started shaking him up forcibly, physically turning his body around and dropped him on the floor. The elderly person fell on the floor as well. She was very calm and was just approaching them. While they were on the floor, Ronan gave him back his mobile. She approached her friend to help him up but the elderly person hit her. She stated that he punched her on the forehead. When he did this she asked him 'Why are you doing this to me?' and he hit her once again. She kept approaching

²⁹ Fol. 346 of the acts of the case.

³⁰ Fol. 358 of the acts of the case.

³¹ Fol. 394 of the acts of the case.

him and telling him 'Why are you doing this to me? Why are you hitting me?' He pushed her and Ronan went to defend her. The elderly person grabbed her friend and dropped him on the floor again and he started punching him on the face. She said that she approached them to try and separate them. she managed and the elderly person grabbed her neck. When Ronan saw this, he stood up and went to help her. At that moment the elderly person's prescription glasses dropped on the floor. He picked them up and put them on again. At that moment he left and at that moment everything calmed down but the elderly person turned and started to insult them. He was speaking in Maltese and said that he was going to the police. She told him 'very good, go to the police' and she was trying to fix her contact lenses. When she turned, she saw her friend on top of the elderly person trying to calm him down. She ran towards them so as to stop this and take Ronan off this elderly person. She wanted to have a look to see how this elderly person was and her friend told her that they should leave. Her friend turned back to check how the elderly person was and when he returned back, he told her that he was acting. She then picked up her bag and left. Shortly after the police arrested them.

Asked about the woman who testified in Court, she said that she recognised her as she was looking through her window. She told her something, but she did not understand her. Referring to the CCTV footage at 09.40 she stated that the movement of her hair at the time was due to her being punched by the elderly person. Asked by the prosecution why she threw her bag on the floor when approaching the alleged victim, she said that her backpack slid from her arms and whilst she was walking it dropped off. She said that the first time she went to hospital she did not want to go because she only had a small injury on her finger. Then when she was giving her statement, she had a very big headache and felt a bump on the right side of her forehead. When she went back to the health centre, the doctor who had examined her previously did not check on her again.

Considers,

It is very much apparent that the Court here is faced with conflicting evidence. It true that in the eventuality of conflicting evidence the court should proceed to acquit the accused but as was held in the leading case in the names Il-Pulizija v Charles Ducker³² the court may believe some and discredit others it held the following: -

"Conflicting evidence per se, does not necessarily mean that whoever has to judge may not come to a conclusion of guilt, whoever has to judge may, after consideration of all the circumstances of the case, dismiss one version and accept as true the opposing one."

It is likewise true that according to article 638(2) of Chapter 9 of the Laws of Malta "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."

From the evidence brought before it, this Court can see that while the appellant was calm and just standing in the street staring at the fight most of the time, there were particular instances where she took an active part in the fight. This can clearly be seen from the CCTV footage. When the alleged victim is trying to move away, following the first argument, it is she who walks directly to him instead of deciding to part ways and put an end to it. In her testimony before the First Court, the appellant stated that her bag slid off her shoulders, however, it can be clearly seen that she removed it herself while heading towards the alleged victim. It is apparent that here she is not calm and constantly moving forward towards the alleged victim. She also aids her friend during the second altercation when the latter is seen fighting and holding the alleged victim.

³² Decided by the Criminal Court of Appeal on the 19th May 1997.

While it is true that there are some glimpses of the fight which do not show in the footage, the mannerisms of the appellant and how the argument actually developed makes this Court believe that the testimony of the alleged victim is more plausible than that of the appellant. Mr Gauci was only taking pictures as evidence of the appellant's wrongdoing when kicking and damaging the civil protection's car. This case escalated because of the appellant and her friend's attitude towards him. Such actions are surely deplorable and unacceptable in our society.

Moreover, the Court agrees with the First Court when it concluded that the appellant was an accomplice in terms of Article 42(e) of the Criminal Code. This Article stipulates that a person shall be deemed an accomplice if he incites or strengthens the determination of another to commit the crime or promises to give assistance, aid or reward after the fact. The Court here refers to the case in the names **Il-Pulizija vs Kris Farrugia**³³ where the Court pronounced itself accordingly when it comes to complicity in an offence:

Illi l-istess Professur Mamo fuq dan il-punt jghid:

“Now, the notion of participation in an offence implies that one and same is the offence committed, the subjects responsible therefore are several, and consequently, there must be fulfilled in respect of each of them, the conditions required to constitute the subject of an offence. The two or more persons concurring in the offence must be shown to have intended one and the same offence and to have done something towards committing it. . . .

a defendant charged as an accomplice must be proved to have done something in furtherance of a common purpose i.e. he must procure, incite or, in some other way specified in the law, encourage or assist in the act done by the principal...In order

³³ Decided by the Court of Magistrates on the 31st January, 2022.

that it may be said that a man has concurred in an offence committed by another, it is necessary that he should have done some effort for the offence to be committed so that a causal connection can be traced between such an effort and the commission of the offence"

Illi fil-Pulizija vs. Kenneth Ellul (deciz nhar il-15 ta' Jannar 2015) fuq dan il-punt inghad:

"jrid jirrizulta "a common design" li gie mfisher "the two or more persons concurring in the offence must be shown to have intended one and the same offence and have done something towards committing it." Kwindi jrid jigi ippruvat minghajr dubbju dettat mir-raguni illi l-appellant kellu l-istess intenzjoni u hsieb tal-awtur principali ta' dan ir-reat illi ghamel atti preparatorji u jwettaq ir-reat".

Di piu' fir-Repubblika ta' Malta vs Meinrad Calleja (deciz fit-3 ta' Mejju 2000) intqal aktar:

"il-komplicita' hija essenzjalment il-partecipazzjoni ta' aktar minn persuna wahda fil-kommissjoni ta' reat. Biex ikun hemm il-kompartecipazzjoni fis-sens tal-Artiklu 42 tal-Kodici Kriminali taghna, hu mehtieg illi l-partecipanti jkunu agixxew materjalment (u b'wiehed mill-modi imsemmija f'paragrafu (a) sa (e) ta' dan l-Artiklu), b'determinazzjoni kriminuza komuni jigifieri meta l-mohh ta' kull wiehed minnhom kien dirett ghall-kommissjoni ta' l-istess reat.' ... 'Illi sabiex ikun hemm din iddeterminazzjoni kriminuza komuni, mhux mehtieg li lkomparticipi fir-reat ikunu tkellmu bejniethom jew addirittura ltaqghu; il-komunanza fid-determinazzjoni tista' anke ssehh permezz ta' terz li jinterponi ruhu...".

Even though in the third altercation it was not proven beyond reasonable doubt that the appellant was violent towards the alleged victim or that she physically assisted her friend in beating him up, she was certainly an accomplice because her behaviour incited and strengthened the determination of her friend to injure the alleged victim.

Considers,

The appellant in her appeal application stated that she should not be found guilty in terms of Article 325 of the Criminal Code. She is stating that since Natalino Agius is an *ex parte* expert, his report is inadmissible and therefore no evidence was brought before the First Court that any damage existed. This Court disagrees and reference is made to both the CCTV footage, where the appellant is seen kicking the car and a photo exhibited as part of Dok. IG1, folio 234 of the acts of the case which were exhibited to the Court by the alleged victim Ivan Gauci. This photo clearly shows the damage done on the side of the car. This Court opines that an impartial expert should have been appointed by the Court to give an estimate of the damages caused by the appellant. However, this Court thinks that the First Court was just in limiting the expense to repair the dent to two hundred euros (€200.00).

The appellant also argues that the inadmissibility of Mr Agius' report would bring about the consequence that costs in terms of Article 533 of the Criminal Code would not become payable by the accused. This Court also disagrees with this since besides being an *ex-parte* expert, Mr Agius was not the only expert who testified in this case as the First Court had also appointed Mr Donald Tabone and Dr Mario Scerri.

Considers further,

The Court now comes to the appellant's last ground of appeal relating to excessive punishment. The appellant insists that even though an accomplice in a crime can be liable for the punishment established for the principal, it does not mean that the Court is bound to apply in respect of the accomplice the exact level of punishment that it deems fit to apply for the principal author of the crime.

It was stated in the case in the names **The Police vs William Anthony Adams**:³⁴

'It is not the function of this Court as a Court of appellate jurisdiction to disturb the discretion of the First Court as regards the quantum of punishment unless such discretion has been exercised outside the limits laid down by the law or in special circumstances where a revision of the punishment meted out is manifestly warranted.'

However, this Court thinks that the First Court's punishment towards the accused was manifestly excessive and disproportionate when one considers her involvement in the case compared to her friend's involvement, the co-accused.

In the judgment in the names **Il-Pulizija vs Mario Spagnol Omisses**³⁵ it was held:

"Illi dwar it-tieni aspett tal-aggravju in ezami li jirrigwarda n-nuqqas ta' proporzjonalita', ssir riferenza ghal dak li gie deciz minn din il-Qorti kif preseduta fl-appelli kriminali: "Il-Pulizija vs. Aronne Cassar" u "Il-Pulizija vs. Noel Frendo " [decizi 28.10.2004] , fejn din il-Qorti ghamlet riferenza ghall-insenjament tal-Qorti tal-Appell Kriminali (kolleggjali) fis-sentenzi taghha fil-kawzi "Ir-Repubblika ta' Malta vs. Omissis u Brian Godfrey Bartolo" [14.11.2002] u "The Republic of Malta vs. Omissis and Perry Ingomar Toornstra" [12.6.2003], f' liema zewg sentenzi gew citati b'approvazzjoni brani mill-BLACKSTONE'S CRIMINAL PRACTICE u minn ARCHBOLD , "Criminal Pleading , Evidence and Practice" , li jezaminaw x' jghidul-Qrati Inglizi f' sitwazzjonijiet simili, biex wiehed jislet certi linji ta' gwida.

Hekk fil-BLACKSTONE'S 2001, (para. D22.47 p.1650) jinghad :-

³⁴ Decided by the Court of Criminal Appeal on the 26th February, 2019.

³⁵ Decided by the Criminal Court of Appeal on the 6th January 2005.

*“A marked difference in the sentences given to joint offenders is sometimes used as a ground of appeal by the offender receiving the heavier sentence. The approach of the Court of Appeal to such appeals has not been entirely consistent. The dominant line of authority is represented by **Stroud** (1977) 65 Cr App R 150. In his judgement in that case, Scarman LJ stated that disparity can never in itself be a sufficient ground of appeal – the question for the Court of Appeal is simply whether the sentence received by the appellant was wrong in principle or manifestly excessive. If it was not, the appeal should be dismissed, even though a co-offender was, in the Court of Appeal’s view treated with undue leniency. To reduce the heavier sentence would simply result in two rather than one, over-lenient penalties. As his Lordship put it, ‘The Appellant’s proposition is that where you have one wrong sentence and one right sentence, this Court should produce two wrong sentences. That is a submission which this Court cannot accept.’ Other similar decisions include **Brown** [1975] Crim LR 177, **Hair** [1978] Crim LR 698 and **Weekes** [1980] 74 Crim App R 161..... However, despite the above line of authority, cases continue to occur in which the Court of Appeal seems to regard disparity as at least a factor in whether or not to allow an appeal (see, for example, **Wood** (1983) 5 Cr App R (S) 381). The true position may be that, if the appealed sentence was clearly in the right band, disparity with a co-offender’s sentence will be disregarded and any appeal dismissed, but where a sentence was, on any view, somewhat severe, the fact that a co-offender was more leniently dealt with may tip the scales and result in a reduction.*

Most cases of disparity arise out of co-offenders being sentenced by different judges on different occasions. Where however, co-offenders are dealt with together by the same judge, the court may be more willing to allow an appeal on the basis of

disparity. The question then is whether the offender sentenced more heavily has been left with 'an understandable and burning sense of grievance' (Dickenson [1977] Crim LR 303). If he has, the Court of Appeal will at least consider reducing his sentence. Even so, the prime question remains one of whether the appealed sentence was in itself too severe. Thus, in NOOY (1982) 4 Cr App R (S) 308, appeals against terms of 18 months and nine months imposed on N and S at the same time as their almost equally culpable co-offenders received three months were dismissed.

Lawton LJ said :

"There is authority for saying that if a disparity of sentence is such that appellants have a grievance, that is a factor to be taken into account. Undoubtedly, it is a factor to be taken into account, but the important factor for the court to consider is whether the sentences which were in fact passed were the right sentences."

ARCHBOLD (2001 para. 5-174,p.571 jikkumenta hekk :-

*"Where an offender has received a sentence which is not open to criticism when considered in isolation, but which is significantly more severe than has been imposed on his accomplice, and there is no reason for the differentiation, the Court of Appeal may reduce the sentence, but only if the disparity is serious. The current formulation of the test has been stated in the form of the question: "would right-thinking members of the public, with full knowledge of the relevant facts and circumstances, learning of this sentence consider that something had one wrong with the administration of justice ?" (per Lawton LJ in **R. v Fawcett** , 5 Cr. App. R. (S) 158 C.A.). The Court will not make comparisons with sentences passed in the Crown Courts in cases*

unconnected with that of the appellant (see R. v. Large, 3 Cr. App. R. (S) 80, C.A.) There is some authority for the view that disparity will be entertained as a ground of appeal only in relation to sentences passed on different offenders on the same occasion : see R. v. Stroud, 65 Cr. App. R. 150 C.A. It appears to have been ignored in more recent decisions, such as in R. v. Wood ... Fawcett, ante and Broadbridge, ante. The present position seems to be that the court will entertain submissions based on disparity of sentences between offenders involved in the same case, irrespective of whether they were sentenced on the same occasion or by the same judge, so long as the test stated in Fawcett is satisfied."

Even though the Court is convinced beyond reasonable doubt that the appellant had the intention to participate and influence the commission of this crime, her involvement was less than that of the co-accused and so a mitigation in punishment is merited.

Furthermore, it must be emphasised that the First Court in its judgment ordered that the total amount of six thousand euros (€6,000) in damages and the costs incurred in connection with the employment in the proceedings of all the experts, in terms of Article 533 of the Criminal Code should be paid by the appellant and his friend, the co-accused, *in solidum*. Here, this Court disagrees with the First Court in the sense that in penal law the co-accused cannot be held liable to pay for damages *in solidum*.

Consequently, this Court confirms the judgment of the First Court where it found the appellant guilty of the charges brought against her and revokes it wherein appellant was condemned to four (4) years imprisonment and to a fine of one hundred Euro (€100) and instead condemns the appellant to two (2) years imprisonment and to a fine of one hundred Euro (€100). This Court is also revoking the part of the judgment whereby the accused was ordered to pay the victim six thousand euro (€6,000) and the costs incurred in connection with the employment in the proceedings of all the

experts, in terms of Article 533 of Chapter 9 of the Laws of Malta *in solidum* and instead condemns the appellant to pay the amount of two thousand euros (€2,000) in damages in favour of Mr. Ivan Gauci and also pay half of the costs incurred in connection with the employment in the proceedings of all the experts, in terms of Article 533 of Chapter 9 of the Laws of Malta.

(ft) Consuelo-Pilar Scerri Herrera
Judge

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Nadia Ciappara
Deputy Registrar