

Kopja Informali ta' Sentenza



MALTA

**QORTI TAL-MAGISTRATI (GUDIKATURA  
KRIMINALI)  
KUMPILAZZJONIJIET - NORMALI**

**MAGISTRAT DR.  
HAYMAN MIRIAM LL.D.**

Seduta tal-5 ta' Novembru, 2002

Numru 755/2001

Police ( Inspector Geoffrey Azzopardi)

VS

KHALED MOHAMED EL SAYED EL BELLASY,  
38 years, son of Mohamed and Fatima nee El Bellasy,  
born at Suez, Egypty on the 5<sup>th</sup> July, 1963 and residing  
aboard the ship Marwa M, berthed in Grand Harbour,  
Malta, holder of Egyptian passport number 865907.

Today 5<sup>th</sup> November, 2002.

The Court,

Has seen the charge against the abovementioned Khaled Mohamed El-Sayed El-Bellasy

(1) with having between the 24<sup>th</sup> and the 25<sup>th</sup> November, 2001, within the territorial waters of Malta, as captain of the ship Marwa M registered as Nuku' Alofa (official number 1029) failed to comply with any direction given by the Authority in exercise of its powers under Chapter 352, or failed to comply with any of the provision of this Act or of any regulations made there under, and furthermore

(2) with having in the same place, during the same period and in the same circumstances, as the captain of the ship Marwa M registered as Nuku' Alofa (official number 1029), on its arrival in Malta, failed to produce the documents and/or information requested at law or requested of him by the Malta Maritime Authority: and further more with having,

(3) with having in the same place, during the same period and in the circumstances, as the captain of the ship Marwa M registered as Nuku' Alofa (official number 1029), on its arrival in Malta, failed to anchor, moor or berth your ship to the satisfaction of the Authority and failed to take such additional precautions in severe weather as may be directed by the Authority, and further more with having,

(4) with having in the same place, during the same period and in the same circumstances, as the captain of the ship Marwa M registered as Nuku' Alofa (official number 1029), on its arrival in Malta, failed to make, subscribe, and deliver to the Authority, on the specified forms, a true statement of the information required on the established forms, and furthermore with having,

(5) with having in the same place, during the saem period and in the same circumstances, as the captain of the ship Marwa M registered as Nuku' Alofa (official number 1029), through imprudence, negligence or unskilfulness in your trade or profession, or through non-observance of any regulation, caused damage to a submarine cable to the detriment of the Enemalta Corporation.

Having seen the note transmitted by the Attorney General on the seventh day of August of the current year, seen therein that there might result an offence or offences under the provisions of:

Sections 78, 28, 30 of chapter 352 of the Laws of Malta,  
Port Regulations, 1966 sections 20, 10  
In terms of section 328 of the Criminal Code.

Having seen that the accused had pleaded not guilty as charged.

Having seen that the accused registered his consent to these proceedings.

Having seen all the acts of the case and heard all the submissions tendered.

Considers

The case under examination dates to the days between the 24<sup>th</sup> and 25<sup>th</sup> of November of the year 2001, when due to bad weather conditions the ship Marwa M, mastered by the accused sought refuge and shelter in the Comino Channel. Here it stayed till the next day, being the 25<sup>th</sup> of November when it was spotted by patrol boat 23. The situation was further aggravated because due to its dropping anchor, whether intentionally or not, damage ensued to the electric cable lying on the seabed in the said channel.

That the days in question were preceded by rough seas and weather has not been put to question. In this regard prosecution presented the evidence of France Gauci Chief Meteorologist who testified, albeit about Maltese weather conditions, that on the 23<sup>rd</sup> and 24<sup>th</sup> November the wind was mainly North Westerly force 7 to 8 increasing. This then supports accused's version that he had entered Maltese territorial waters due to distress caused by bad weather conditions.

Accused himself tendered evidence as to how he came to be in Malta, when and how he communicated with the authorities and his involvement with the damage to the aforementioned electric cable.

Mr El Bellasy was spoken to by the experts nominated in the Magisterial Inquiry, he also released a statement to the prosecuting officer and last he chose to give evidence in front of this Court. It is pertinent at this stage to view the accused's version of facts to be able to compare same to the other facts brought as evidence by the prosecution.

Captain Bellasy gave evidence in the Inquiry Proceedings. Here he stated that he had no intention of coming to Malta, that once here he had not contacted Valletta Radio, that he had no intention of dropping anchor. He further stated that his anchor fell, because this is infact the accused thesis in this regard, at 1700 hrs. He added thus "I realize that I should have contacted Valletta Radio". On being asked an explanation of how the portside anchor had fallen down, his reply was a curt "I simply don't know". The experts then proceeded to examine the actual anchor on the vessel Marwa M and found that the star board anchor was diligently secured, that is on brake, with a devil's claw and bottle screw. The captain also stated to the experts that on hearing that the anchor had fallen he intended to heave by means of the the windlass, this however resulted damaged. He further stated then when contacted by the Valletta Radio he was ordered to heave and once established that the anchor had fouled with the cable, then ordered to cut anchor.

As aforementioned the accused chose to give his version of facts under oath in Court and thus underwent the expected cross examination in which he was at length questioned about the statement he released to the Police. In his evidence he reiterated that the ship Marwa M had encountered very bad weather on its voyage from Greece to Spain. It was due to the safety of crew, cargo and vessel that he sought calmer waters. On the 24<sup>th</sup> of November being in the vicinity of Malta, he phoned Malta Radio several times receiving no reply. At this stage the vessel also developed problems with her mooring lines and it was at this point that the captain opted to seek the shelter of the calmer waters of the Comino Channel. He

further stated that he did not try to contact turreta again. Once within the safety of the channel he was further informed by his chief officer that the portside anchor had fallen off. He stressed that his intention was never to drop anchor in the channel. He ordered his chief officer to heave anchor by the use of the electric winches and on seeing that these were malfunctioning he ordered that the anchor be heaved manually. Because of fatigue the crew were sent to rest. "We stopped heaving the anchor.". This was at nine o'clock of November the twenty fourth. He further evidenced that to that point no communication had ensued between himself ( Marwa M) and the Maltese Authorities. It was on the morning of the twenty fifth at about 8.30 a.m. that patrol boat 23 discovered the anchored vessel. The officer on board ordered the master to speak to the authorities and enquired with the captain if he had permission to be there anchored. At this point the captain said that on being thus asked he duly informed the officer on the patrol boat about his attempts to contact the authorities the day before, and that he had lost his anchor. At this stage the Maltese officer ordered him to leave that area immediately, that is to heave anchor immediately. It was at this point that the captain managed to contact turreta whereby he informed them on all that had occurred and his problem to depart the area immediately, the anchor still had to be hoisted manually. He was instructed to proceed to his port of call once he had heaved the anchor. He proceeded to heave the anchor by the use of a chain block without however managing any heaving. It was at three o'clock in the afternoon that he was ordered again by the patrol boat to stop heaving because of the possibility that the anchor might have fouled with the underlying submarine cable. At this point the captain queried the patrol boat officer as to why he was not informed originally about the presence of the said cable. He also confirmed that such information was never mentioned to him once he had made radio communication. He was later ordered to cut his anchor. Captain Bellasy also stressed a particular point, in his words, " I forgot something to tell you about the last conversation between me and the tower when the officer in Turretta radio ordered me to heave my anchor and I told

them I can't heave my anchor because of the cable and after that he ordered me to cut my anchor and the last conversation when I am informed that I am now free, he told me I didn't ask you to cut your anchor and told him if you asked me to cut my anchor or I Cut it".

Captain Bellasy also pointed out that the area was not well signed to discourage or rather to disallow anchorage and indicated that the prohibition signs were erected close to the Gozo Ferry thus not visible to the protected area in question. Furthermore he did confirm that since his intention was not to enter Maltese waters he was not furnished with adequate charts.

As aforementioned the cross examination made reference to the statement the accused released to the Maltese Police. He confirmed the weather conditions, the fact that he had lost his anchor and that he ordered this to be heaved manually. He also here stated that the following morning he was approached by a patrol boat and was asked to contact Valletta Radio. At this point he found out the radio was not working and instructed his chief engineer to change a fuse. Once contact was made with Valletta radio he explained that he had lost his anchor. He was instructed to heave anchor immediately. Because of the weight of the same anchor he informed Valletta Radio that he needed more time to heave. At a later stage in the afternoon he was informed by the patrol boat that he was to stop heaving due to the possibility that his anchor might have entangled with a submarine cable.

Questioned about the diversities between what he had submitted to the police in his statement and the version tendered in Court, the accused answered that once he was in safe passing, since he intended only to seek shelter, he was under no obligation to inform the Valletta Port Control. Asked whether he sought permission to enter the Comino Channel through Valletta Port Control he answered " When you asked whether I contacted Valletta Port Control, I answered "No" because I have little English, and contact for me means calling and replying. I called, but there was no reply." He continued, after it was

suggested that he was ill equipped "I considered that in my mind and then I asked Valletta Port Control. I asked them many times, nobody replied. Also I went inside territorial waters without anybody noticing by radar.". He further insisted that he had tried to contact Valletta Port Control on the 24<sup>th</sup> and his problem with the fuse arose on the 25<sup>th</sup>, thus rebutting that suggested by the prosecution that he was changing the version of facts. The accused also insisted that he had informed the prosecuting officer about his attempt to contact Port Control but the latter had omitted this from the statement.

Considers:

The pertinent questions that arise immediately at this stage are:

Did the anchor actually fall or was it intentionally dropped in the Comino Channel?

Did Captain Bellasy really try to contact Maltese port control in vain?

Most important of all when and why was the cable damaged?.

It was established by Enemalta Engineer Carmel Scerri that he had received a phone call at circa 9.35 am on the 25<sup>th</sup> November informing him that the island of Gozo had no electricity service. It was later that the fouled cable was discovered and the involvement of the Marwa M therewith established when divers actually did an on site inspection. Lieutenant Jeffrey Curmi had in fact conducted the said dives during which the damage to the cable was videoed and the position of the anchor in relation to the cable established. On viewing the said video it transpired that the anchor was not positioned as to be on the cable but it is clear that the anchor actually caught the cable. Thus Lieutenant Curmi gave evidence to the effect that as can be seen on the video the seaweed surrounding the anchor had been flattened to a radius of one to two feet as evidenced by the Court from the actual video viewing. This flattening of the seaweed actually suggests that the

anchor was at some stage in time actually dragged along the seabed and thus caught the cable.

Staff Sergeant Alexander Cutajar is the person who in the morning of the twenty fifth intercepted the Marwa M. Cutajar was on patrol boat 23. He was the first to speak to its captain, that is the accused who on his part furnished the sergeant with all the required details. Cutajar testified that El Belassy had told him that he had dropped anchor on Saturday at 17.00 hrs, that he had not sought and therefore not granted any permission to drop anchor, informed him of his port of call and cargo. Cutajar continued that the captain had told him that he was about to heave anchor due to amelioration in the weather conditions. This information Cutajar relayed to the Turretta. Infact Cutajar was for the whole of the incident the go in between the Marwa M and the Port Authorities, thus being frequently at the vessel's side. For this reason he later referred to the Marwa M the Port Tower's instructions to heave anchor and proceed to sea. It was after receiving this instruction that the sergeant was informed by the captain that he was encountering a problem in heaving the anchor. An hour later the captain informed him that he had got the anchor up but had lost it again. This was about 10.30 a.m.

Sergeant Cutajar did infact confirm that there was an attempt by the captain to heave his anchor, a fact confirmed by the same official in view of the movement of the anchor chain.

Sergeant Cutajar also exhibited the log book marked P23 Log Book. The relative logging reads.

"location South Comino .....intercept vessel MARWA M on anchor from 24.11.01. Time 1500 due to bad sea conditions." ( 25.11.01 08.45)

" Location South Comino Ch vessel Marwa M dropped anchor due to fault in winch. From vessel's captain need 1 hr to repair fault".



Asked if after being given the instruction to heave anchor and move out of the area, if the captain had actually indicated trouble with the winch, the seargent answered no, infact according to this witness the captain had attempted to heave anchor and only later informed him that he had some problems with the winch.

At this stage in time, the Court, once referece has been made to the log book pertaining to patrol 23, must comment on two other log books exhibited in which are recorded loggings minuted by the Valletta Port Control, namely the VHF and the log book. As was visually established by all parties concerned as well as by the Court expert Mr Bajada the said log books showed missing pages in the dates relevant to the case under examination. A Magisterial Inquiry was infact ordererd to investigate the actual tampering of the said log books. Futhermore before these actual log books were exhibited a summary of the communications between the Port Control and Marwa M was presented in Court by a certain Mr Anthony Vella. For obvious reasons the Court asked to be presented with the actual CD recording and was firstly informed that it was not readable, a fact disproved by Mr Bajada who duly presented the transcripts of the edited recordings. When the whole CD was requested by the Court, the one exhibited containing only preselected conversations selected by the port authorities' officials not on any Court order, the Court was informed that the same CD had been inadvertently erased. The totality of these unfortunate incidents coupled with the fact that when the port officials were questioned about the state of the log books, although admitting that there state was not "normal" had no viable explanation for the obvious missing pages, leaves no choice to the Court but to disregard these documents, their veracity being put to question.

What has been established though is that the vessel Marwa M entered our territorial waters and was here present for seventeen hours at least before anyone become aware of its presence. In this day and age where because of past and more recent incidents the world has

become strikingly very conscious of national security, such lack of it leaves much to be desired and deserves further interrogation and action by the competent authorities.

Futhermore even if for one moment the captain's version was to be believed in its totality, or rather whether the anchor was intentionally dropped or dropped incidentally, the timing of loss of electricity in Gozo follows the order given to the Captain to heave anchor and his futile attempt to do so because of winch problems. Infact Harbour Master Captain Richard Degabriele confirmed on oath that instructions were given to the ship to leave. " Obviously we asked through Palace Tower the master to heave anchor and leave, he said that he couldn't heave up his anchor for a reason which he did not elaborate on, assumingly it was stuck to something" ( a fol 252). At this stage an obvious question arises, the authorities were surely aware before the order to heave was issued that the vessel was anchored in the Comino Channel. The authorities due to the nature of their work are very much aware of the restrictions governing such area also because of the existence of submarine cables, so why one would ask was such a haste order trasmitted without due confirmation of any possible complications if one is aware of the probabily of such. The answer is rhetorically obvious, this is a one off case, practise does make perfect, although one hopes that it is irrepetible. The mute point is one however, does all this exculpate the captain from the charges brought against him?.

The uncontested facts are that the port of call was definietly Spain, the ship encountered rough seas and sought shelter in the Comino Channel but the vessel was not equipped with the proper charts in respect of this area obviously because this area was not on its schedule. Most definetly the captian when asked furnished all the required information to the competent local authorities. What remains contested is, did the captain attempt to contact the authorities, did the anchor fall or was it dropped. That the captain sought shelter from rough weather is

understandable, that he ventured into unknown waters without proper guidance questionable.

At this stage the Court refers to the report drawn up by the Court appointed Nautical Expert Captain Mario Grech. A fol 48 one finds a sequence of events with which the Court is in full agreement. Captain Grech arrived to his conclusions after he had heard the accused a tempo vergine and inspected the vessel in question. At this stage it is pertinent to make a lengthy reference to Captain Grech's conclusions.

"The master by his own admittance, never called Valletta Port Control or Malta Radio when approaching Malta on Saturday 24/11 to request permission to approach the coast to seek shelter. " One must remember that as above premised when a brief succinct of accused's version was exposed, the accused thus stated and it was later under cross examination that he gave a different version about his contact with the Maltese authorities distinguishing between his understanding in English of the word contact and reply.

Captain Grech continues "Further more, he never made any contact with the authorities subsequent to the alleged incident at 1700hrs on Saturday, until he was contacted by AFM patrol boat at around 0845hrs on Sunday morning". Frankly speaking the Court cannot understand, if it is to be believed that the Captain had attempted contact but failed on the 24<sup>th</sup>, why no other attempt was made by him till he was, as said, discovered by the patrol boat on the following day. Captain Grech continues his report by thus commenting the accused "...was imprudent not to seek advice from the authorities. This imprudence verges on the negligence when he proceeded so close to the coast without the necessary knowledge or advice. Furthermore he persistently failed to inform the authorities about the alleged incident in which the port anchor fell off. This is especially so if one were to accept the master's version that the anchor fell off, as this constitutes an incident, which being in the territorial waters of a country

becomes reportable to the nearest coast radio station (Malta Radio).”.

Captain Grech further discusses the veracity of the theory of the anchor falling off putting this into question considering that the starboard anchor was secured properly “brakes on the anchor windlass, putting on the compressor bars, and securing and tightening the devil’s claw”. Captain Grech considered the efficiency and effectiveness of such lashing by the fact that no such problems were encountered during the severe pounding the vessel received due to bad weather. As reproduced above Captain El Bellasy on being questioned how the port side anchor fell, simply answered “I don’t know”. To aggravate matters as Captain Grech also pointed out the accused failed to keep the necessary logging of these events.

Considers:

Defence has stressed a lot on the fact that the supply of electricity to Gozo was interrupted after the captain duly obeyed orders issued by the local competent authorities to heave anchor. Thus defence contends that the involuntary damage to the cable is imputable to the authorities and not to the accused. However even if the Court is to believe that the anchor actually fell, the fact that the master failed to notify the competent authorities of such a fact is the major contribution to the actual incident. In fact had communications with the authorities been effected in the proper time this incident would have been totally avoided. The amount of time that transpired from the moment the vessel entered the channel till the morning after when it was discovered impute towards the captain’s lack to communicate with the authorities in such a long span of time. The version tendered with regard to fuse problem is feeble as an excuse and at most is indicative of the fact that the captain did not attempt communication otherwise he would have realised beforehand the presence of the problem. In fact the Court is more inclined to believe that the captain dropped anchor seeking shelter rather than believing that he

intended to just drift in the Channel. Likewise the Court is of the opinion that the local authorities were hasty in urging the captain to heave anchor, they being fully aware of his position and the underlying submarine cables. Infact although in the opinion of the Court it has been sufficiently proved that the captain had attempted to heave his anchor before so ordered by the local authorities, however the actual damage was done when he attempted the second heave on the Port Authorities instructions. This is attributable to the time of the electricity failure in Gozo. Therefore although on one side the negligence of the captain is apparent in the fact that he approached a coast without proper information, on the otherhand the authorities fully aware of the vessel's bearings ( vide log book P23 25/11/01 entry by seargent Cutajar that reads also the vessel's bearings on anchor being N36°00'04 E014°20'44.) these readings being recorded prior to the order to heave was tendered, definetly contributed to this incident. The Court therefore is of the opinion that although the accused is guilty under section 328 of the Criminal Code, however the lack of prudence excercised by the authorities when ordering the captain to heave anchor without first establishing the safety of such decision contributed to the damage that ensued to the submarine cable.

Article 28 of chapter 352 of the laws of Malta speaks of regulations regarding Maltese territorial and inland waters, whereas section 30 of the same chapter obliges the master of any ship arriving in Malta from any place beyond the seas to produce to the authority the therein required information and this by the emphatatic use of the word "shall" and without specifying as it does in the second part of the section, any request from the authority. Therefore it is incumbent on any Master of a ship arriving in Malta to contact the competent authorities and produce thereto the required documentation and information.

The regulations to which reference has been made by the Attorney General are the Port Regulations, 1966, namely regulations 10 and 20. Regulation 10 also speaks of information that the master shall at once deliver. One

notes the use of the words "at once". On the other hand regulation 20 speaks of berthing and mooring a ship to the satisfaction of the superintendent (then). Again this section indirectly imposes on the master of a vessel communication with the authorities otherwise no satisfactory directions to the vessel can be given. It would be highly rhetorical to argue after having read the said sections that no orders were disobeyed if none were given once no communication was made with the authorities, leaving the authorities blind to one's presence. The excuse given by the Captain albeit true of why he had to approach our coast line without being properly equipped, adds a greater obligation on his part to communicate with the Port authorities to be thus guided in unknown waters.

The Court therefore although sympathising with the incidents the Captain and his crew went through finds him guilty as premised after due examination of the said sections.

The damage that ensued to the cable was so considerable that the Court was told that it was irreparable and therefore has to be replaced. Section 328 of the Criminal Code does not attach the quantum of damages to the severity or otherwise of a crime, although frankly speaking the damages mentioned exceed by far the punishment contemplated in the said section. However once we uphold strongly in Criminal Law the maxim in dubio pro reo it must be pointed out that only an estimate of the damages was presented in the Inquiry and this was never confirmed on oath in the case. Furthermore although the Court is convinced that all that ensued stems from the fact that the accused did not act with diligence when he failed to inform the local authorities of his problems, as aforesaid the same authorities added to the original sin and this fact should be taken into consideration when awarding punishment.

Seen also section 78 of chapter 352 and section 17 of chapter 9, having considered all the circumstances of the case the Court does not think it apt to inflict on the captain an imprisonment sentence, and taking everything into

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consideration, inclusive what the Court considers to be a contribution to the incident, fines the accused the sum of Lm2000.

Magistrate M.Hayman