



Criminal Court of Appeal

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

Appeal Nr: 112 / 2021

**The Police
Inspector Frankie Sammut**

Vs

Shane Kayde Rowe

Today the, 23rd May, 2023,

The Court,

Having seen the charges brought against Shane Kayde Rowe holder of Identification number 071698 A, before the Court of Magistrates (Malta) as a Court of Criminal Judicature of having:

Charged with having on the 3rd of August, 2020, at around 09:30am whilst in the vicinity of the petrol station at the Malta International Airport, Luqa, without the intent to kill or to put the life of another person in manifest jeopardy, caused harm to the body or health of another person, Mario Spiteri (ID: 405870 M), or caused such other person a mental derangement in that it caused a permanent functional debility of any organ of the body, or of any permanent defect in any part of the physical structure of the body, or any permanent mental infirmity.

The Court was requested to provide for the safety of the injured person, Mario Spiteri (ID 405879M), for the keeping of the public peace and for the purpose of protecting the injured person from harassment or other conduct which will cause a fear of violence, to issue a protection order against the person charged in terms of Article 412C of the Criminal Code under those conditions the Court deem appropriate.

Having seen the judgement meted out by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 1st of March 2023 whereby the Court in view of the foregoing acquitted the defendant of all of charges.

Having seen the appeal application presented by the Attorney General in the registry of this Court on the 1st of March, 2023 whereby this Court was requested for the reasons indicated below and for those reasons that will be submitted during the Appeal, to vary or reverse the judgement wherein the Court of Magistrates found Shane Kayde Rowe not guilty of the charges brought against him and therefore acquitted him therefrom and instead proceed with finding the accused guilty as charged.

The grounds for appeal of the Attorney General where as follows

That, on the 24th March 2022, the appellant Attorney General received from the Court of Magistrates (Malta) the records of these proceedings.

That the Attorney General is by means of the present application appealing from the said judgement; that the reasons due to which the appellant Attorney General feels aggrieved by the aforesaid judgement of the Court of Magistrates (Malta) are clear and manifest and consist in the following.

That the Attorney General cannot accept that in this case Rowe acted in self-defence, since his actions were not sudden, immediate, and actual.

In the case **Il-Pulizija (Spettur Roderick Agius) vs Mario Zaffarese (Appell Nru: 345/2018)** dated 12th December 2018, the Court of Appeal held:

"Ghalhekk id-difiża trid tkun saret sabiex jiġu evitati konsegwenzi li jekk javveraw ruhhom jikkaġunaw hsara irreparabbli lill-imputat, jiġifieri hsara jew offiża fil-ħajja, gisem u/jew partijiet tal-ġisem tal-imputat jew ta' haddiehor. L-imputat irid jipprova li dak li għamel għamlu, stante li l- istat psikoloġiku li kien jinsab fih f' dak il-mument, ikun attwali, ta' dak il- hin u mhux xi theddida ta' periklu li tkun saret hinijiet qabel, għax dan jista' jagħti lok biss għall-provokazzjoni u mhux difiża legittima. Il- perikolu irid ikun ukoll assolut, cioe' li f' dak il-mument li kien qed isehħ ma setax jiġi evitat b' mod ieħor..."

That thus the Attorney General finds no reason why it should accept that Rowe acted in self-defence when it is very evident that **Rowe consistently persisted in seeking a confrontation with Spiteri up until the moment he pummelled Spiteri;**

That the accused not only did nothing to avoid the confrontation but actually started it, when he suddenly emerged from his car **to confront Spiteri for the violent tapping on his car window;**

That, as the CCTV footage incontrovertibly confirms, soon after Spiteri violently tapped the glass of Rowe's car window, **SPITERI WALKED AWAY;** moreover, as the sworn testimonies of the accused and the *parte civile* confirm, Spiteri never demanded that Rowe exits his vehicle for any physical confrontation to occur; instead, as Spiteri testified, Rowe bellowed in an authoritative manner "*Do not touch my car! Step aside!*" and in response to this, **as the CCTV footage proves,** Spiteri immediately obeyed Rowe's orders and even walked away;

That, **as far as Spiteri was concerned**, the matter ended at the precise moment when he received Rowe's authoritative order; indeed, as Spiteri testifies: "*[I] just moved my hands and went back to my car, trying to fix the ccv problem of the VISA*"; This testimony is attested by the CCTV footage exhibited;

That, after Spiteri walked several metres in the opposite direction of Rowe's vehicle with his back turned against Rowe, it was Rowe who opened his own door²⁴ to exit his vehicle - **undoubtedly to remove the physical constraints (and also protection) afforded by his vehicle and to be able to authoritatively address Spiteri for the violent tapping on his window;**

That while the Attorney General firmly believes that Spiteri had **no right** to violently tap on Rowe's window, it is also our belief that this offence or attempted offence should have been communicated to the Police, and not handled by Rowe - a civilian who, at the time of the offence, was the "safety and training executive" ²⁵ for a particular airline, and who therefore should have instinctively taken the safest route out of this absolutely frivolous, **OBVIOUSLY DANGEROUS**, but easily avoidable encounter;

That, if Rowe genuinely wanted to avoid the danger that Spiteri clearly represented, Rowe would have prevented the matter escalating by remaining in his car, or by not confronting Spiteri who ab initio demonstrated that he was an easily agitated individual, or by calling the Police, or by driving to a nearby petrol station and evade Spiteri completely;

Rowe should not have taken the law in his own hands and emerge from his car to confront and thereby punish Spiteri for the violent tapping on his glass window;

That later, at an advanced stage in the altercation and in the immediate moments before the pummelling began, the CCTV footage clearly shows that **it was actually**

Spiteri who tried to avoid further communication with Rowe; Spiteri gives his back to Rowe several times, and he even preoccupied himself with a different matter altogether, namely he began trying to pay the petrol attendant; that in doing so, Spiteri occupied one of his hands with his VISA card and therefore Spiteri knowingly disabled himself from taking part in any physical fight with Rowe; **indeed, the CCTV footage confirms that Spiteri was not prepared to attack Rowe or even defend himself from Rowe;**

That in reaction to Spiteri's apparent loss of interest in the argument, for some reason, Rowe remained steadfast and continued to heckle him from behind; and this, **even though Rowe fully knew that Spiteri was capable of exhibiting threatening behaviour, such as the violent tapping on his car window;** indeed, Rowe was fully aware that with the right level of confrontation **or PROVOCATION** Spiteri could possibly turn physically violent; indeed, Rowe himself admitted to this very fact:

"[at the moment where Spiteri poked Rowe] the threat of violence had already been present, and he was already escalating over the course of the last ten minutes";

That, these facts indicate that Spiteri was no longer interested in the argument, let alone any physical confrontation with Rowe; it results that **it was Rowe** who wanted Spiteri to remain engaged in the argument, perhaps to find an opportunity to adequately confront, discipline and punish Spiteri for his unsavoury and violent behaviour towards him - in fact, Spiteri described Rowe as acting in an "authoritative" manner when he testified before the Honourable Court of Magistrates;

That, indeed, the Attorney General questions why Rowe continued to argue with Spiteri, even though he saw that Spiteri was an easily agitable individual and matters were "escalating over the course of the last ten minutes", implying that

Rowe knew that Spiteri would inevitably erupt. **What was Rowe waiting for?** Why did Rowe remain within Spiteri 's striking distance if he was so fearful that Spiteri would hurt him or damage his property? Why didn't Rowe stay in his car or drive away as fast as his car could go away from Spiteri or to the nearest police station? Why did Rowe even exit his vehicle, if not to be in a position to confront Spiteri physically for the violent tapping of his glass window? Why did Rowe continue to heckle Spiteri throughout, even while Spiteri began to ignore Rowe and he even preoccupied with paying for his petrol?

Emphasis should also be placed on the fact that, as the CCTV footage confirms, **the pummelling was not contemporaneous with the poke**; that, between the moment when Spiteri poked Rowe on his shoulder and the moment when Rowe began to pummel Spiteri:

- (a) Spiteri **immediately lowered both hands**;
- (b) Spiteri **leaned back** to his original position, and
- (c) according to Rowe's own testimony, 28 Spiteri **even verbally provokes** him by saying: "*There, what are you going to do now?*";

...and all this after Spiteri clearly demonstrated that he was more interested in paying for his petrol and therefore driving away!

That, had Rowe not made a physical confrontation possible by exiting his car after Spiteri violently tapped on his window, and had Rowe not continued to escalate the matter by agitating Spiteri while the latter was ignoring him and trying to pay the petrol attendant for his petrol, and had Rowe grasped at any of the several opportunities to avoid the threat that Spiteri clearly represented from the very start of the altercation, **then Rowe would have arrived to work on that fateful day and none of this would have happened**;

That for the aforementioned reasons, Rowe's actions fail to satisfy the criteria established by the aforementioned case Il-Pulizija vs Mario Zaffarese;

That, without prejudice to the above, the Attorney General also believes that even if this Honourable Court deems that Rowe acted in self-defence, Rowe's decision to pummel Spiteri four (4) times in response to the poke and/or the words "There, what are you going to do now?" was disproportionate;

Thus, upon the evidence produced, this Honourable Court should proceed with finding the accused guilty as charged.

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 heard the parties make their oral submissions before this Honourable Court on the 18th April 2023.

Considers,

This is an application of appeal filed by the Attorney General based on the fact that she did not agree with the judgement given by the courts of first instance when it upheld the defence of self-defence brought forward by the accused and thus is asking this Honourable Court to revoke the judgement and find the accused guilty of the charge brought forward against him

Now it has been firmly established in local and foreign jurisprudence that both in cases of appeals from judgements of the Magistrates' Courts as well as from judgements of the Criminal Court, with or without a jury, the Court of Criminal Appeal will most reluctantly disturb the evaluation of the evidence made by the

Court of first instance, if it concludes that that Court has reached a reasonable judgement which is also legally well-founded. In other words, this Court does not replace the discretion exercised by the Court of first instance 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 and this both factually as well as legally, then 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” judgements of the Court of Criminal Appeal in the cases : The Police Vs Stranjinja Rajkovic¹ ,Ir-Repubblika ta’ Malta vs. George Azzopardi²; Il-Pulizija vs. Carmel sive Chalmer Pace³; Il-Pulizija vs. Anthony Zammit⁴ and others.)

In a judgement delivered by the Court of Criminal Appeal in the names Ir-Repubblika ta’ Malta vs. Ivan Gatt⁵, decided on the 1st December, 1994, 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 duty of this court is to respect that discretion and that evaluation of the evidence even if in the evaluation conducted by this Court, for argument’s sake, this Court comes to a conclusion different from the one reached by the jury. Such discretion will therefore not be disturbed and replaced by its own unless it is evident that the jurors have made a manifestly wrong evaluation of the evidence and consequently that they could not have reasonably and legally have reached that conclusion.⁶

¹ Decided 29th October 2018 by the Criminal Court of Appeal

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

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

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

⁵ Decided on the 1st. December, 1994 by the Criminal Court of Appeal

⁶ Ir-Repubblika ta’ Malta vs. Mustafa Ali Larbed” decided on the 5th July, 2002

Therefore, this court has to revise the evidence brought forward by the parties to see whether the judgement reached by the first court was safe and satisfactory. Thus, in so doing it will have to make reference once again to the all the witnesses that gave their deposition and to all the other evidence brought forward by the parties.

Considers further: _

Mario Spiteri gave evidence on the 6th July 2021 states that on the 3rd August 2020 at about 9.00a.m - 9.15 a.m. he was heading to work and he went to the sky park fuel station to take fuel. He was driving vehicle registration number KOR304 Corando Jeep. As he approached the station, he claims that he had to stop as there was a car manoeuvring and this obstructed his passage. He claims that the other car was on the wrong side of the road. He states that the driver of the car was not able to drive the car and thus took ages to manoeuvre the car. In the meantime, he heard someone hooting the horn of his car from his behind, however he did not take any notice of the person. He simply waiting for the road to clear and then drove onto the fuel pump.

The moment he parked his car, the accused stopped near him and started doing hand gestures. He says he could not state what type of gestures as both his car and that of the accused have tinted glass so he could not see well. He says he saw someone waiving his hands and he exclaimed '*xi gralu dan, raqad mikxuf?*'.. The person started hooting again and drove '*billi ghaqqad ir-roti*'. He says that the accused spun the wheels in a dangerous fashion. He then says he had problems with his Revolut card then he inserted the wrong ccv number of his visa card. He then went to knock gently at the window of the driver's side to explain why all this drama was there since he could not drive away due to another car being in front of him. He states that the driver being the accused started shouting immediately and said, '*Do not touch my car, step aside, do not touch my vehicle*' and he replied '*ok*'. He moved his hands and went back to his car and tried to fix the ccv problem he had.

The accused then got out of his car wearing his mask and mumbled something about his driving. He does not recall whether he called him '*stupid*' or '*idiot*.' He said 'Don't be an idiot'. Then the accused replied, and the witness said 'idiot, idiot, idiot' He explains that the accused then told him 'You are calling me an idiot because of my skin colour'. He confirms as asked by the court if the accused thought he was being called stupid because of a racial motivated comment and not because he was hooting. He then told him that he did not care as to whether his skin was black, grey, white yellow or pink. In fact, he thinks he mentioned all the colours of the rainbow. He admits calling him stupid or idiot many times. The accused then started moving towards him again. He got out of his car because his Jeep was high so as to arrange it and then the petrol attendant turned up and he told him to give him forty euros worth of petrol. He then says that the accused told him 'Come on hit me'. Asked if there were any other persons who saw the incident he says there was the petrol attendant and an unknown woman. He says that the accused was very calm not aggressive and collected. He had his hands down over his abdomen and looked very authoritative. Though he repeats that he was not aggressive. Though he claims that he was telling him 'Come on hit me' He was shutting him off All of a sudden he went to hand over his visa to the petrol attendant and the accused went next to him and told him 'Come on hit me hit me'. Then he says that he saw a black shadow and he was knocked out of his senses. He fell on the floor. Though he does not recall how long he was on the floor for. He says that the accused broke his jaw from both sides when punched in the face. He says the punch was so hard he was out of his senses. He specifies and states he was hit on the left lower part of the jaw.

Someone then called the police. The incident took no longer than two or three minutes Today he has two plates on his left side and another two plates on his right side. He went through four operations. He explains that they stapled his jaw to limit movement then they placed a brace so that he would keep his mouth shut. He says he lost two teeth in due course. He claims he was under the care of Mr Alex Azzopardi and Dr time Vella Briffa.

PC 18 Mark Falzon gave evidence on the 6th July 2021 and said that on the 3rd August he was working at the MIA police station when he received a phone call wherein, he was informed anonymously that there were two persons who had an argument. RPC 3150 and himself went to the petrol station near Mc Donald's and he found two male persons near their cars. He spoke to the accused and RPC 3150 went over to speak to Mario Spiteri to establish what had happened. He then went near his colleague RPC 3150 and heard Mario Spiteri state that he was hurt on his jaw, and he saw blood coming out of his mouth as he spoke. He says that he recognised the accused who did not want an ambulance. He was instructed to go to the police station to give his version of events about what had happened before he gave him the right to speak to a lawyer and he refused such right. He signed the relevant declaration of refuse. He then gave his version of events.

At about 14.10 p.m. they informed the inspector and PS 63. At 16.10 .m PC 1486 called Mario Spiteri on the phone to ask after his medical condition and he told them that he had grievous injuries and that he was going to be operated. Inspector Frankie Sammut then instructed them to go to Mater Dei to get his version of events. When he went to hospital, he found Mario Spiteri and gave him his right to speak to a lawyer though he refused too and also signed a declaration of refuse. He then gave version of events to the Inspector who was involved in the investigation The version of events is in the PIRS report.

Inspector Frankie Sammut gave evidence on the 6th July 2020 and confirmed that on the 3rd August 2020 he was informed by PC 18 that there was an argument at the petrol station of Malta International Airport and that one of the persons was injured. He then went to see what had happened to this person to see what his medical condition was like. He also told them to bring the CCTV cameras installed at the petrol station. The persons involved were Mario Spiteri and the accused whom he recognised in court. They also spoke to Elaine Pizzuto who is the owner of the petrol station who brought them the footage on a USB which he presented in court and is marked as dok FS. He also asked the Forensic Dept of the police to make a copy which was presented to the court and marked as dok FSCD. He also presented the two declarations of refusal of Mario Spiteri and that of the accused He also took the

statement of the accused on the 27th November 2020 and this is exhibited at fol 8 to 10. He also confirmed the medical certificate exhibited at fol. 11 which was brought over to him by the police officers. During the interrogations the accused was assisted by Dr Roberta Bonello. He confirmed that proceedings were also taken against Mr Spiteri at District level.

On the 1st November 2021 the witness exhibited a copy of the conviction sheet of the accused which was marked as dok FS2.

RPC 3150 Luciano Bezzina gave evidence on the 6th July 2021 and confirmed that on the 3rd August 2020 they had an anonymous phone call at about 9.30 a.m. where they were informed that at the MIA petrol station there were two people having an argument. Together with PC 18 Mark Falzon they went on site. He recognised the accused present in court as well as the *parte civile* Mario Spiteri. He went to speak to Mario Falzon whereas his colleague went to speak to the accused. He saw that Mario Spiteri had blood running out of his mouth. He told him that he had been knocked out by three punches in his face. He says that the accused was driving car registration number BOL 500 and had passed around him and then they had cross insults between each other. He said that the accused did not stop behind Spiteri. Spiteri's car was on the first petrol pump whereas the accused went to another pump. He remembers that the accused told Spiteri 'You can say anything you like but do not touch me' This is what Spiteri told the witness that the accused had told him Spiteri then told him that he poked the accused on his shoulder, and this is when Spiteri ended up punched three or four times

Asked if he were the police who wrote the PIRS report he says no it was PC 1486 Gordon Portelli. He states that Mario Spiteri did not want medical assistance.

Elaine Pizzuto gave evidence on the 23rd September 2021 who confirmed that she is not the owner of the petrol station but an employee. Asked if she remembered the incident in question, she states that she does not remember what happened exactly though the police had asked her for the recording and she passed them a

copy of the CCTV. In fact, she recognises the pen drive exhibited in these proceedings marked as do FS as the recording she handed over.

Dr David Mifsud gave evidence on the 23rd September after having been appointed by the court to examine Mario Spiteri. He says that Mr Spiteri was involved in an assault in August 2020 when he was punched on the left side of his face and lost consciousness. He had two fractures of the mandible being the lower jaw. There was a fracture on the right side. He had several fractures as explained by him and thus the patient was admitted to ENT to fix his fractures. The teeth were wired up to stabilise and aid the healing. He also had a number of follow ups at the dental department. He claims that the patient has a disability though not a paralysis. He said there is a 2% disability. His report is marked as dok DM⁷ and he confirms its contents. On the 23rd September 2021 he recognised the *parte civile* as the patient he examined.

Dr Tim Vella Briffa gave evidence on the 23rd September 2023 confirmed that he is a dentist and remembers seeing Mario Spiteri after having been involved in an alleged brawl. He confirms that Mr Spiteri had a fractured jaw. He says that the patient was in significant pain for quite some time and was also subjected to surgery. He also lost a tooth and had direct trauma to the face. He concluded that the surrounding injuries to the jaw to the underlying nerves and underlying teeth could take months to fully recover.

Dr Carina Debattista gave evidence on the 1st November 2021 and stated that she was the doctor working at the department of Emergency in Mater Dei on the 3rd December 2020. She confirms that she had issued a medical certificate in the name of Mario Spiteri as he was suffering from a fracture in the mandible jaw. The injuries that she saw were compatible with a blow to the face.

⁷ Fol. 57

Dr Alex Azzopardi gave evidence on the 1st November 2021 and stated that he is a consultant in oral surgery. He confirms that Mari Spiteri ended up at the Dental Department Casualty section. He was seen by one of his junior doctors Dr Tim Vella Briffa who confirmed that the patient had a fractured mandible. He presented a copy of a report that was drawn up by his junior doctor Mr Vella Briffa and this was marked as dok AA.

PC 1486 Gordon Portelli gave evidence on the 1st November 2021 and confirms the PIRS report exhibited in the acts of these proceedings from page 4 to 7 and confirms its contents.

The accused **Rowe Shana Kayde** gave evidence voluntarily on the 19th July 2022 who stated that he has been living in Malta for thirteen years. He is an Engineer, married with two children and works and as from the following Monday he was going to be working as the customer liaison engineer for Smartlings Airlines. During the time of the incident, he worked as a training executive with Medavia Aviation.

With regards to the incident in question he says that he needed to get petrol, so he stopped at the station by the airport. When he pulled down at the petrol station there were two vehicles in front of his car. So, he waited for a second but none moved so he slightly tapped the horn because the back of his car was still slightly onto the street. Another couple of seconds passed and the vehicle that was furthest in front of him drove off then the car that was in front of him moved onto the petrol station. There were two booths at that petrol station. The car in front of him moved on onto the first stop and did not move and he remained outside of the gas pumps. So again, he gently tapped his horn to make the other driver aware of the other pump in front of him so that he could then proceed to the second one.

At that time there was another car coming behind him so he would not move straight away. So he waited for the person behind to clear and then out his car in reverse and he went round to the other pump that was further away. He then switched off the engine and was looking down to the centre of the car to the console

to get his wallet to pay for the petrol. While he was looking for his wallet, he heard a very loud like frightening thump as if someone had slapped the glass of his window of the car in a very aggressive fashion. He knew it was not the petrol attendant because he had been to that station before, and they never did that to him and thus he was shocked. He turned around and saw this gentleman standing there whom he now knows is Mr Spiteri. He opened his door and came out of the car and asked him 'what is your problem' 'why are you slapping my window like this?'. Instantly his threats began 'you are my fucking problem' 'why are you fucking blowing your horn at me for?' 'You want me to punch you in your fuckin face?'. He was taken completely off guard and he was shocked. He told him that he did not really want any of this, so he went back to his car. He grabbed his things but wanted Mr Spiteri to leave. He stood there for a couple of other seconds yelling at him through the window of his car though it was still up. He then walked off to go back to his car, so he waited for him to pass his car and he was going almost close to his car.

He was waiting hoping not to get involved in any altercation. He knew he was frantic and very aggressive. He just wanted to get his petrol and be on the road again. He got out of the car to walk to the booth to pay for the petrol When he was coming out of the car Mr Spiteri saw him getting out of the car and went charging back over to where he was. Again, he told him 'What is your problem?' and Mr Spiteri replied, 'you are my fucking problem, I am not scared of you'. The witness told him 'What do you have to be scared off'. He replied, 'I am not scared of you because you are black' He was baffled and shocked and asked him what that had got to do with the incident. He told him 'you guys think you are so special which your black lives matter'.

At that stage he said that he did not want to be near the *parte civile* as he had already hit his car, threatened him, and now was making reference to the colour of his skin. He then proceeded to the booth to pay and knew there were witnesses over there who could see what was happening and should anything happen there were cameras which would back up the whole incident.

He did not want to return to the car and be a sitting duck as he had already hit his car. There was a pillar right by the booth and he stayed there next to it. Mr Spiteri was going to and from to his car whilst insulting him. He then told him 'Say *what you want but do not put your hands on me do not touch me.*' He then approached him again and he told him again 'I am not afraid of your racist remarks but do not touch me'. At this point Mr Spiteri took his hand and shoved him in the shoulder left side. The situation was escalating to a physical assault and thus he thought it was to his best interest to protect himself. So, he defended himself and he hit Mr Spiteri two or three times. Mr Spiteri then jabbed him on his shoulder and told him 'What *are you going to do now?*' whilst shouting at him. He then hit him by pushing over his left hand and then struck him with the right hand again. He says he may have hit him a third time. Mr Spiteri fell to the ground, and he stood like in a defensive posture with his hands. His hands were clenched, and he was protecting his face and chin.

At that time the petrol attendant went out and went between them to separate them. The attendant asked them to stop He took him away and walked him back to his car. Mr Spiteri got up and kept going to and from to his car with his mobile in his hand. He does not know if he took a photo or a video, but he can confirm that he was still very aggressive. The lady then told him that she had called the police and so he waited there for them to turn up to make his report. He felt very intimidated as Mr Spiteri kept going to and from to his car. The police did turn up and he gave his version of events. He then went to make another report at the police station of MIA. He confirms that he did not know Mr Spiteri before this incident and had not spoken to him again. He said that he acted instantaneously. The incident was escalating. He did not know what the next move was going to be. He was taking his risk to protect his own safety.

He does confirm that h may have hit Mr Spiteri three times and that Mr Spiteri fell to the ground and he immediately stopped and put himself in a defensive position. The court also read the statement given by the accused to the police during the investigation which statement is found at fol. 8 of the proceedings.

The court examined the PIRS report confirmed by PC 1486 Gordon Portelli. It resulted that on the day in question prior to the incident Mr Spiteri was driving a SsangYong whereas the accused was driving a Nissan. In the report PC Portelli claims that Rowe told him that he was waiting for his turn to get into the police station near MIA when the car that was before him stopped at the first fuel pump which was closest to him. He hooted his horn so that the car moves to the next pump so that he too may get served from the same pump the other driver had stopped at. He then decided to pass by the other car and move towards the pump that was free. At that time the *parte civile* then punched the window of his car and the accused came out of the car / The accused proceeded to pay at the booth. The man then went back to him and told him that he was going to beat him up and that is when he felt threatened. He explained to him that Mr Portelli told him derogatory remarks and even told him racist marks. Mr Spiteri then poked him on his shoulder and at that very moment he defended himself as he felt threatened and punched him two or three times in the face.

Mr Spiteri too spoke with the police officer and said that as he was entering in the petrol station the car in front of him reversed and he stopped behind it waiting for it to drive off. He says that behind him was a car whose driver kept hooting the horn continuously. He then parked to the closest pump and the driver of the car that was behind him drove off to the fuel pump that was further ahead. He then explained to him that he got down from his car and proceeded to the other car that had driven in front of him to explain to him why he was stationary. He thus touched the window of the driver lightly. He says that the driver started shouting 'do not touch my car' He then went back to his car to get his card to pay for the fuel. He said that the driver called him 'fucker'. At this moment the driver told him the word black, and he got annoyed that the racial comments were being uttered by the accused. At that point he confirms that he touched the accused on his shoulder with one finger and at that same time the accused punched him, and he fell to the ground⁸

⁸ Fol. 7 of the acts of the proceedings.

The Court examined the CCTV footage too which footage was exhibited by the witness Elaine Pizzuto and this played an important part. In the video which relates to the incident that happened on the 3rd August 2020, next to the Pump number 2 the accused can be seen walking towards a fuel pump possibly chatting with someone. A few minutes later he can be seen standing next to a white vehicle and at 9.32 the police arrive at the scene. In the video taken by pump number 3 Spiteri is seen standing by the car of the accused arguing with him. At that time the *parte civile* was holding his mobile up indicating that he was possibly taking a photo or a video of what was happening in the surrounding. The accused too holds his mobile phone next to his ear whilst Spiteri is making use of his mobile phone. The accused is spoken to by the police. In the CCTV film taken by pump number 6 the court saw the car Korando pulling into the petrol station. Behind this car was a Nissan Qashqai. The Nissan stops behind the Nissan as the Korando enters the petrol station. The Nissan then reverses and drives through the middle of the petrol station. Here Spiteri is seen walking in and out of the footage and soon after a police officer is seen talking to him. The court saw in the CCTV of pump number 7 the Korando park near the fuel pump. The Nissan drives through the middle of the station between the white car and the Korando on the right. Most important the court notes that Spiteri gets out of his car and can be seen rushing forward in the direction taken by the Nissan Qashqai. He can also be seen walking back towards his car and when he turns back, he can be seen arguing with someone. Then it is evident that the *parte civile* was arguing with the accused. At this moment Spiteri holds back to his car, opens the door of the car, gets something out of his car and turns round his vehicle. A few seconds later Spiteri goes back and opens his car from the driver's side and is seen once again arguing and gesticulating with his hands. The accused is seen walking to the attendant looking at Spiteri.

At 9.33 Spiteri walks to the fuel attendant's booth and can be still seen arguing and gesticulating. He even looks back at the accused. At 9.23.67 Spiteri can be seen lifting his hand in the direction of the defendant. At that moment the accused

punches Spiteri four times and Spiteri falls to the ground. The defendant takes the defensive position. Spiteri then gets up and walks to his car and then back towards the accused possibly with a mobile in his hands. He then walks back to his car and returns walking towards the accused. After going back to his car Spiteri again for this time walks in the direction of the defendant. The fuel attendant is also seen trying to restrain Spiteri.

Considers further,

The court is only faced with two conflicting witnesses as direct evidence, the version of events given by the *parte civile* Mr Spiteri and that given by the accused. However, it also has circumstantial corroboratory evidence by the CCTV recordings.

As held by our courts in the case **Pulizija vs. Joseph Thorn**⁹:-

“... mhux kull konflitt fil-provi ghandu awtomatikament iwassal ghall-liberazzjoni tal-persuna akkuzata. Imma l-Qorti f’kaz ta’ konflitt ta’ provi, trid tevalwa il-provi skond il-kriterji annuncjati fl-Artikolu 637 tal-Kap. 9 u tasal ghal konkluzzjoni dwar lil min trid temmen u f’hiex trid temmen jew ma temminx” (vide also Ir-Repubblika ta’ Malta vs. Dennis Pandolfino,¹⁰ Il-Pulizija vs. Patrick Mangion et¹¹, Il-Pulizija vs. Michele sive Michael Fenech¹², Il-Pulizija vs. Mohammed Mansur Ali¹³, Il-Pulizija vs. Mario Pace¹⁴ u Il-Pulizija vs. Hubert Gatt¹⁵.)

The Court notes that in the case **Il-Pulizija vs. John Pace**¹⁶ it was held that: -

⁹ Decided by the Criminal Court of Appeal on the 9th July 2003

¹⁰ Decided by the Criminal Court of Appeal on the 19th October 2006.

¹¹ Decided by the Criminal Court of Appeal on the 17th September 2012.

¹² Decided by the Criminal Court of Appeal on the 17th September 2012.

¹³ Decided by the Criminal Court of Appeal on the 24th January 2013

¹⁴ Decided by the Criminal Court of Appeal on the 6th February 2003

¹⁵ Decided by the Criminal Court of Appeal on the 31st October 2013

¹⁶ Decided by the Criminal Court of Appeal on the 31st October 2013

“Ma hemm xejn hazin illi l-Qorti tistrieħ fuq xhud wieħed biss kif del resto hija ntitolata li tagħmel permezz tal-Artikolu 638(2) tal-Kapitolu 9. Dan l-Artikolu jgħid illi xhud wieħed jekk emmnut minn min għandu jiggudika fuq il-fatt hija bizzejjed biex tagħmel prova shiha u kompluta minn kollox, daqs kemm kieku l-fatt gie ippruvat minn zewg xhieda jew aktar. Naturalment din ix-xhud tkun trid tigi evalwata fil-kuntest tal-linji gwida mogħtija mill-Artikolu 637 tal-Kapitolu 9”

Apart from the fact that no one saw the incident take place this case is based on circumstantial evidence. The court makes reference to the case: **Il-Pulizija vs. Abdellah Berrad et** wherein it was held that:

“Huwa minnu wkoll kif rapportat aktar ‘l fuq li fl-Artikolu 638(2) tal-Kapitolu 9 ix-xieħda ta’ xhud wieħed biss, jekk emmnut minn min għandu jiggudika fuq il-fatt hija bizzejjed biex tagħmel prova shiha u kompluta minn kollox, daqs kemm kieku l-fatt gie ippruvat minn zewg xhieda jew aktar. Għalhekk jispetta lill-Qorti tara liema hija l-aktar xhieda kredibbli u vero simili fic-cirkostanzi u dan a bazi tal-possibilita’.Huwa veru wkoll li l-Qorti għandha tqis provi cirkostanzjali jew indizzjarji sabiex tara jekk hemmx irbit bejn l-imputat u l-allegat reat. Dan qed jingħad għaliex għalkemm huwa veru li fil-kamp penali l-provi indizzjarji hafna drabi huma aktar importanti mill-provi diretti, pero’ hu veru wkoll li provi indizzjarji jridu jigu ezaminati b’aktar attenzjoni sabiex il-Gudikant jaccerta ruħu li huma univoci.”

At this juncture the court makes reference to the case in the name: **Il-Pulizija vs. Joseph Lee Borg**¹⁷, whereby it was stated that circumstantial evidence has to be

¹⁷ Decided by the Criminal Court of Appeal on the 15th June 1998

univocal and thus not ambiguous. They must be intended to tie the accused to the offence to the exclusion of all other. They must be directed to prove that it is only the accused who could be found guilty and that all evidence that is brought forward must be compatible with his innocence. As held in: **Il-Pulizija vs Carmelo Busuttil**¹⁸:

“Il-prova ndizzjarja ta’ spiss hija l-ahjar prova tal-volta hija tali li tipprova fatt bi precizjoni matematika”.

It is true that in criminal proceedings circumstantial evidence at times is more important than direct evidence. However, it is also true that circumstantial evidence has to be examined in closer proximity to ensure that they are univocal.

Archbold in his book **Criminal Practice** ¹⁹17 with reference to what Lord Normand said in the case **Teper vs. R** ²⁰18 :-

“Circumstantial evidence is receivable in Criminal as well as in Civil cases; and indeed, the necessity of admitting such evidence is more obvious in the former than in the latter; for in criminal cases, the possibility of proving the matter charged by the direct and positive testimony of eyewitnesses or by conclusive documents much more than in civil cases; and where such testimony is not available. The Jury is permitted to infer the facts proved other facts necessary to complete the elements of guilt or establish innocence. It must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another [...]. It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there is no other co-existing circumstance which would weaken or destroy the inference”

¹⁸ Decided by the Criminal Court of Appeal on the 6th May 1961

¹⁹ 1997 Edition Para 10-3

²⁰ 1952.

It clearly results even from the CCTV recording that it was the *parte civile* who decided to initiate the confrontation with the accused for no apparent reason and this when he decided to '*tektek fuq it-tieqa*'. It is also evident that the first physical contact was made by the *parte civile* when he nudged the accused on his shoulder. Spiteri in fact explains the reaction of the accused when this took place and says that '*Do not touch my car; Do not touch my car.*' At no point does the *parte civile* state that the accused was aggressive when the *parte civile* acted the way he did. Infact, he says that the accused was calm not aggressive. On the other hand, it results that the *parte civile* was aggressive, he intimidated the accused, The *parte civile* was definitely very angry and tense and kept going to and from to the car where the accused was as evidently shown in the CCTV footage. The accused remained calm even after punching Spiteri as he waited for the police.

The accused brought up the defence of legitimate self-defence and that what he did was done to defend himself so much so that even when he gave his statement, he describes himself after punching the accused that he put himself in defence position because he was afraid of Spiteri who was very aggressive for no apparent reason. Surely the fact that the accused pressed the horn was not enough reason for him to descend from his car and go and seek an explanation for his behaviour.

The Court examined closely the elements which are necessary to have a successful defence of legitimate self-defence. The principle of self defence was explained at length in the case **Il-Pulizija vs Tony Curmi**²¹ wherein the court held that; -

“Illi kif inhuwa ben saput, il-gustifikazzjoni għal-legittima difesa tirrizulta meta persuna til a' b'forza l-vjolenza jew aggressivita' ta' persuna oħra diretta lejha jew lejn terzi, kontra liema persuna hekk aggredata l-aġir tad-difensur imputat huwa dirett. Fil-legittima difesa trid tkun inħol ot sitwazzjoni ta' perikolu, dannu, theddida u/jew minaccja tal-istess, bl-aġir tal-aggressur u mhux da parti tad-difensur,

²¹ Decided by the Courts of Magistrates as a Court of Crminal Judication on the 27th June 2017

sitwazzjoni kkreati unikament mhux minn min jadotta dik it-tip ta' difiża, iżda minn min qed juri jew jimmanifestaw dak il-perikolu jew theddid jew dannu attwali kif jispjega Antolisei -

“occorre in fine che l'aggressione abbia creato per il diritto presso di mira un pericolo attuale.”

Fil-Manuale di Diritto Penale Generale pg 261, insibu li “pericolo attuale e' il pericolo presente.”

[...]

Jiġi rilevat li d-dritt għal-leġittima difesa jitwield u huwa konsegwenza naturali mid-dritt fundamentali ta' kull bniedem li jipproteġi lilu nnifsu minn xi aggressjoni jew dannu anke bl-użu tal-forza. Iżda l-liġi timponi ċerti kondizzjonijiet biex din l-eċċezzjoni tiġi mil għuha. Cioe t-theddid ta' xi aggressjoni jew dannu jew perikolu jrid ikun ingust, gravi u inevitabbli. Id-difiża trid tkun saret biex jiġu evitati konsegwenzi li jekk jeffettwaw ruħhom jikkaġunaw ħsara rreparabbli lid-difensur, jiġifieri ħsara jew offiża lil-ħajja, ġisem u/jew partijiet tal-ġisem tad-difensur. L-imputat difensur irid jipprova li dak li hu għamel, għamlu, stante li fl-istat psikoloġiku li kien jinsab fih f'dak il-mument, biex jevita xi perikoli li ma setgħux jiġu evitati b'mod ieħor. Jiġifieri l-perikolu għandu jkun attwali, istantaneu u assolut u ma jridx ikun xi perikolu anticipat. Il-perikolu għandu jkun attwali, ta' dak il-ħin, u mhux xi theddida ta' perikolu li tkun saret ħinijiet qabel għax dan jista' jagħti lok għal provokazzjoni u mhux difesa leġittima. Il-perikolu jrid ikun assolut, cioe li f'dak il-mument li kien ed iseħħ ma setax jiġi evitat b'xi mod ieħor. Iżda hawnhekk għandu jiġi applikat it-test oġġettiv kif diversi awturi u sentenzi tal-Qorti dejjem speċifikaw, u mhux biżżejjed li wieħed jgħid x'seta' għamel jew x'messu għamel jew x'messu għamel id-difensur (imputat) abel ma ha l-azzjoni in difesa bl-użu tal-forza.

Fil-fatt kif jgħid il-Professor Mamo fin-noti tiegħu:

“the danger against which the accused reacts should be viewed not necessarily as it was in truth and in fact, but rather as the accused saw it at the time.”

Wieħed għalhekk irid ipoġġi lilu nnifsu fiċ-ċirkostanzi kif ħassu dak il-ħin u mument cioè imbezża' u l-ħsieb tiegħu li ser jiġi aggredit;

{...}

[...][F]id-difesa legittima, huwa m'għandux jadotta metodi li huma in eċċess jew minaccja ta' perikolu. Izda anke hawn

[...] għandu wkoll jiġi kkunsidrat sew l-istat mentali tal-vittma tal-aggressjoni jew minaccja ta' perikolu, cioè l-imputat. Rinfaccjat b'perikolu serju u imminenti kif haseb hu f'dak il-mument, wieħed ma jistax jippretendi li kellu jzomm il-kalma u fil-fatt il-liġi stess f'ċirkostanzi bħal dawn taċċetta miskalkolazzjonijiet u errors of judgement.

In the case, *Ir-Repubblika ta' Malta vs Martina Galea*,²² the court held that: -

“... huwa appena necessarju jinghad li rekwizit indispensabli għad-diriment tal-legittima difiza hija l-inevitabilita', meta l-akkuzat “cannot escape though he would” bil-korollarju li ma nistghux nitkellmu dwar legittima difiza jekk l-akkuzat “would not escape though he could.”

This court has had ample occasions to discuss this defence In fact in the judgement in the names **Il-Pulizija vs Salvu Psaila**,²³ held that:-

²² Decided by the Criminal Court of Appeal on the 14 th January 1986

²³ Decided by the Criminal Court of Appeal on the 9th November 1963

(a) *“Il-gustifikazzjoni tal-legittima difiza timplika li:*

(b) Id-deni li jigi repellit mill-agenti jkun ingust fil-kawza tieghu u l-attakk ta’ l-assalitur ikun ingust u illegittimu u ghalkemm dan irid jigi rigwardat fis-sens intrinsiku u mill-impressjoni soggettiva li jircievi l-ojolentat eppure min b’l-imgieba u kontenju tieghu, ikun kawza mmedjata qabel ma jinstab fil-perikolu ma jikkompetilux li jkollu l-impunita pjena jew shiha;

(c) Id-deni jrid ikun attwali u prezenti filwaqt tar-reazzjoni; u fl-ahhar nett li;

(d) Id-deni jkun inevitabbili l-ghaliex bla ma jkun hemm in-necessita` tad-difiza r-reazzjoni ta’ min igib ‘il uddiem il-“feci sed jure feci” ma jistax jghid li jkun ipprova l-legittimita` ta’ l-att ‘per se’ antiguridiku tieghu. Jinghad imbaghad li huwa accertat fid-Dottrina li d-deni minaccjat u l-perikolu sovrastanti jridu jkun ta’ gravita u bejniethom (deni minn banda u perikolu minn naha l-ohra) ... irid ikun hemm proporzjonalita...”

Therefore, as rightly decided by the first court once the accused acted in his own defence, he can never behold guilty of what he did. There is no doubt that the behaviour of Spiteri was unjust when one considers how he behaved simply on account of the beeping of a horn. Also, this couple up with his physical act namely when he knocked on the window abusively and when he pocked the accused on his shoulder unnecessarily was evidence of the unjust behaviour of Spiteri. There is no doubt too that the accused was afraid of Spiteri’s aggressive behaviour and his physical threats and intimidation and thus he was justified in thinking that there was danger. The accused considered the behaviour of Spiteri as being sudden, actual, and absolute. The accused still defended himself once Spiteri was on the floor and this indicates how afraid of Spiteri he was. It is enough to mention the fact that Spiteri was going to and from to his car and back to the accused and this strengthen the feeling of the accused that he was in a dangerous situation.

Thus, it results that the appreciation of facts carried out by the first court was safe and satisfactory and thus this court is rejecting the appeal of the Attorney General and confirms the judgement of the first court in toto.

Consuelo Scerri Herrera

Judge

Adrian Micallef

Deputy Registrar