



QORTI TA' L-APPELL KRIMINALI

**ONOR. IMHALLEF
MICHAEL MALLIA**

Seduta tas-17 ta' Ottubru, 2013

Appell Kriminali Numru. 185/2012

Appeal Number: 185/2012

The Police

Vs

Ismail Abubaker Garba

Today, 17th October, 2013

The Court,

Having seen the charges brought against the appealed Ismail Abubaker Garba, holder of Immigration Identification Number 05LL 010 charged with having:

On the 24th March, 2006 at about 3.45pm at Ta' Kandja, assaulted or resisted by violence or active force, not amounting to public violence, PC 1478 Julian Grima a person lawfully charged with a public duty when in the

Kopja Informali ta' Sentenza

execution of the law or of a lawful order issued by a competent authority, where such assault or resistance was committed by three or more persons.

Furthermore with having on the same day, time and circumstances, caused injuries of slight nature to PC 1478 Julian Grima, a person lawfully charged with a public duty, while in the act of discharging his duty or because of his having discharged such duty, or with intent to intimidate or unduly influence him in the discharge of such duty as certified by Dr. Adrian Cassar Gheiti of St. Luke's Hospital.

Furthermore with having on the same day, time and circumstances, took an active part in an assembly of ten or more persons for the purpose of committing an offence, although the said assembly may not have been incited by any one in particular.

Having seen the judgment, meted out by the Court of Magistrates (Malta) as a Court of Criminal Judicature of the 22nd March, 2012, wherein the Court did not find the accused guilty and acquitted him of all charges.

Having seen the Attorney General's application presented in the Registry of this Court on the 12th April, 2012 whereby he requested this Court to revoke the appealed judgment whereby the accused was acquitted from all the charges proffered against him and subsequently proceeds to find the accused Ismail Abuabaker Garba guilty of all charges brought against him and consequently proceed to inflict a punishment against the same in accordance to law.

Having seen the acts of the proceedings.

Having seen the updated conduct sheet of the appealed, presented by the prosecution upon this Court's request.

Having seen the grounds of the Attorney General's appeal:-

That primarily the Court's basis for acquittal appears twofold and rests mainly with the fact that no proper identification method was adopted by the police when identifying the accused as the person responsible for the charges brought against him and the consistency of the evidence given by the appellee established by the timeline given to the Court by same which tallied with the date when the statement of the accused was released. This is rather ironic considering also that the Court opined *ex officio* that it will not be taking consideration of the content of the statement itself in the light of Constitutional cases in Malta dealing with the right of access to a lawyer before interrogations and the breach of the right to a fair trial on the basis of possibility of incrimination falling under Article 39 of the Constitution of Malta.

That the Court, whilst not doubting the veracity of the evidence given particularly by PC1478 and PC720 during which evidence the accused was identified in detail as the person who committed these offences, and which identification was in no way uncertain or based solely on probability, effectively chose to disregard what was said by both witnesses although such evidence was given in corroboration to one another. It appears that the reason for this lies in the fact that an Identification Parade as is understood by our Courts was not effectively carried out by the investigating officer. The Court opined that just because the victim in this case happened to be a police officer shouldn't make room for special procedures of identification.

That whilst the undersigned humbly submits that this comment is not a reflection of the truth in such instances, the applicant adds that in the circumstances of this case PC1478 confirmed the identity of the accused person and was certain of that identity at the time when he filed the report to the relevant authorities. His report indicated the person responsible for the rioting and the injuries he suffered. Hence this information and the manner in which it was given didn't require an identification parade since he reported the appealed as the person responsible without any doubt. The identification parade would have

been advisable and perhaps necessary if there was doubt or uncertainty or even the outright lack of knowledge about the identity of the person responsible, for instance when the person is not known or when the identification is based on recognition of the suspect on the basis of attire, appearance or other potentially vague circumstances or scenarios. Moreover the identity of the appellee was confirmed further by PC720 who testified that on the day following the riot and on his own accord, after having witnessed the incident which took place and where he actually gave assistance to PC1478 at the moment when he was attacked physically by the appellee, whereby he physically removed the appellee whilst he was biting PC1478, he identified the accused from a photo in the records at the detention centre which he had full access to in his position. He even added that he recalled clearly the appearance of the accused and indicated the expression on the face of the accused when he was biting down on PC1478 hence causing the injuries he suffered. He was also convinced that the appealed was very much involved in the riot although the latter claimed to have been nothing more than an onlooker. Moreover PC720 didn't inform the victim about the search he had carried out and in fact communicated the identity of the accused only once the victim informed him that he had recognised the appellee at which point PC720 confirmed that this was the same individual who he had seen himself and who he had identified from prison records as 05LL10 *qua* the appealed. On the basis of this information, the appellee was indicated as the person responsible to the authorities and hence action was taken against him after he was duly spoken to by the police Superintendent.

That moreover the law doesn't oblige the execution of identification parades although these may be advisable in the event of sufficient doubt and in the interest of justice in certain instances. This in no way however diminishes the credibility of eye-witness recounts provided that their identification was adequate and sufficient for all intents and purposes as evidence. The case the Republic of Malta vs Ali Ben Mohammed Hechmi Bettaieb decided by the Court of Criminal Appeal in its Superior Jurisdiction on

the 2nd June 2005¹ delved deeply into the notion of identification whilst making reference to the position taken in various other cases both local and foreign on the same issue. The most important point raised was that the law in no way obliges or imposes the requirement of an identification parade and no specific procedure of identification as carried out by the police effectively exists in the law. Therefore in the light of this, the position taken by the Court in the case at issue went counter to the principle pronounced in the above referred judgement, in that the Magistrate opined that the police failed to apply the correct identification procedure. Effectively however no such specific procedure is mandatory or specifically laid down in the law.

Also with reference to this case and as was expressed by Chief Justice Miles in the *Supreme Court of the Australian Capital Territory* in the case **Sharrett vs Gill** (1993) 65 A Crim R.44:

'... I am unaware of any authority in this country or elsewhere ... that lays down a general principle that all eye-witness testimony is subject to weaknesses and dangers. It would be surprising if there were such a principle. Of course, everybody knows that everybody else has human failings with regard to such matters as observation, interpretation, recollection and articulateness and such failings are assumed to be taken into account in most cases by the tribunal of fact unless there is some particular need for the fact-finder to refer to or to be referred to some aspect of the case where such failings are relevant. The highest judicial authorities emphasise that, in jury trials, cases of disputed identification require express and precise reference to these human failings ...and this principle has been extended to trials without a jury. However, it is hard to imagine life where people are not able to act safely and sensibly upon their observations of what they see and hear, and even upon their identification of fellow human beings by such

¹ Court of Criminal Appeal, Mr. Justice Joseph Filletti, Mr. Justice David Scicluna and Mr. Justice Gino Camilleri, 1/1998.

observations. The ability to distinguish one human being from another and to recognise a person as one previously encountered are surely basic skills indispensable to social existence, and skills well acquired at an early age. What the lawyers call identification is essentially no different from what is generally known as recognition';

Therefore the above further strengthens the argument that the evidence which was tendered by PC1478 and PC720, as eye-witnesses of the events is definitely evidence which the court could have relied on for the sake of identification of the accused. It appears also that both these witnesses gave information which tallied to each other and reconfirmed the identification of the accused during the proceedings in spite of the passage of time between the moments of the aggression, when the statement was taken and the action instituted. It is important to recall that the victim of this case was in hospital for some time so it was not possible for PC1478 to report him immediately to the relevant authorities. Moreover the evidence tendered by PC720 also resembled the description of the injuries suffered by the victim PC1478 and with the medical records explaining the nature of his injuries in the acts of the proceedings². This further confirms the veracity of the evidence tendered by this eye-witness.

That without prejudice to the above when the appealed testified he stated that another illegal immigrant had carried out these offences and he claimed to have indicated the person concerned to Superintendent Zarb at the time when he was interrogated. It is true that no identification parade was carried out to clarify this point. However the person indicated by the appellee was summoned to the office of Superintendent Zarb together with PC1478 and PC720 who in spite of this new information adamantly insisted that the accused was the person responsible in spite of the fact that since the incident took place he had changed his hair style on a number of occasions, a fact which even PC720 as well as

² Folio 37 of the Court proceedings.

Superintendent Martin Bayliss (another witness for the prosecution) expressed in Court. It transpires also that Superintendent Bayliss who was also present during the riot identified the accused in Court as the person who had bitten PC1478 although his hairstyle changed since the riot³. Therefore the identification of the accused remained consistent and valid and didn't weaken in any way apart from the fact that as is stipulated above there was no obligation on the part of the police to carry out the said identification parade. Moreover, it is also interesting to note that the hairstyle of the person identified by the accused as the person responsible happened to be the same as that which the appealed Garba had at the time when he was spoken to by the police and which hairstyle was different at the time of the riot.⁴

That with regards to the consistency of the evidence of the appellee, the Court appears to have based this argument on the fact that the appealed Garba gave the correct time-line to the Court when giving evidence and recounted what he had said to the police when he gave his statement. Ironically however the court appears to be confirming this time-line with the date indicated in the statement which the Court decided to ignore in content owing to the right of access to a lawyer which was allegedly breached. Whilst pointing out that none of the information whatsoever in the statement could in any way have incriminated the appellee and whilst with all due respect to Court authority neither one of the parties at any point of the proceedings raised the issue of such breach, the Court couldn't *ex officio* raise the matter itself since the person suffering such a breach or his representative has to feel aggrieved in such a manner in the first place. In spite of all of this however, since the Court chose to ignore the content of the statement it appears that the Court in a contradictory fashion, decided to base the credibility of the evidence of the appealed on the time-line which he gave and which corroborated that in the statement, the content of which the Court chose *di sua*

³ Folio 84

⁴ Evidence of Superintendent Zarb at folio 11.

sponte to ignore. It is even more fundamental to note that the prosecution never failed to disclose the same time-line to the Court and just as the appealed stuck to his version, so did the witnesses for the prosecution. However in the light of what the first Court declared concerning the identification procedure allegedly wrongly applied the Court chose to decide in favour of the appellee although at no point stating that the evidence brought by the prosecution failed to constitute proof beyond a reasonable doubt or to be incredible in any way. The Court decided to give the accused version the benefit of doubt in the light of the fact that from the moment of the incident to when he was actually spoken to approximately one month had passed. With all due respect to the Court findings this in no way constitutes sufficient ground for acquittal especially in the light of the prosecution evidence tendered.

That finally and in view of all of the above the appellant humbly submits that the Court's findings and the acquittal of the accused were in no way justified in that the evidence brought by the prosecution was legally valid and sufficient enough for all intents and purposes of the law for there to be a finding of guilt on all the charges proffered against the appealed Garba.

Considers.

That on the 24th March, 2006 a riot broke out at Ta' Kandja Detention Centre involving a number of illegal immigrants who were detained there. A number of Police Officers including PC 1478 Julian Grima were involved in assisting the containment of these illegal immigrants with the purpose of apprehending them and returning them to their respective quarters. In the course thereof, a scuffle ensued between the officers and one of the illegal immigrants involved in the riot whereby the illegal immigrant bit PC 1478 Julian Grima on the second finger of his right hand and on his right leg. During this aggression PC 1478 suffered a head injury resulting in his loss of consciousness and a need to escort him to hospital for treatment. Subsequent to his recovery, PC

1478 recognised and identified the appealed Garba as the person who had caused him such injuries, moreover PC 720 Paul Bonnici who was also present during the riot and who witnessed the scuffle which took place also confirmed that the appealed Garba was in fact the person who had caused the injuries on the person of PC 1478 and who was actively involved in the riot. Ismail Abubaker Garba was therefore charged in Court and answered to the charges listed out at the beginning of this judgement. The Court of Magistrates decided this case on the 22nd of March, 2012 (fol 97) where it did not find Ismail Abubaker Garba guilty of the charges brought against him and ordered his immediate discharge. The Attorney General felt aggrieved by this judgement and filed this appeal claiming that there was enough evidence before the first Court to convict the accused and that the identification procedure need not necessarily be a formal one but subject to the normal rules of evidence including but not exclusively the ID Parade.

Considers.

The first Court did not give much weight to the identification made by PC 720 and stated, *“But with due regard, when the police are victims of crime, the procedure for identifying the suspect must be the same as that adoptive for victims that are not in the Police Force. The Court does not feel that the method adopted by PC 720 is one that can lead to a safe judgement if the accused were to be found guilty.”* This Court agrees with the reasoning that the procedure for identification must be the same for everyone whether the victim is a lay person or a policeman which means that the normal rules of evidence apply. In this case the prosecution produced two persons that were eye witnesses to this incident, the first was the victim himself PC 1478 and the other PC 720 Paul Bonnici who both confirmed that it was the accused that inflicted the injuries on PC 1478 Julian Grima. Now whether this identification happened on the day of the incident, later at Police Headquarters when PC 1478 saw pictures of the accused or later still during Court proceedings the fact remains that both PC 1478 and PC

720 recognised the accused as taking part in the scuffle and actually inflicting injuries on PC 1478. The fact that accused denied his participation in this incident brings the matter to the forefront of credibility which has to be assessed by the First Court, in this case deciding in favour of the accused without in anyway blighting the evidence tendered by PC 1478 and PC 720. The First Court however remarked that the fact that PC 720 stated that on the day after of the incident he went to have a look at 5 photos and recognised the accused, is not the proper procedure for identifying a suspect. This Court however does not agree with this conclusion, there are various ways where a person may be called to identify another person, either by looking at the person concerned through an ID Parade, looking at photos or else identifying accused during Court proceedings. This does not mean that the only sure method is the Identification Parade but the other methods are also accepted means of evidence which the Court normally accepts under the circumstances that they were given. The Identification Parade is not exclusionary but is just one of the methods normally adopted by the police; other methods can also be adopted and have been accepted by the Court. In this case we have the categorical evidence of PC 1478 and PC 720 who both recognised the accused as taking part in this incident and inflicting injuries, this recognition happened very soon after the incident and later in a Court of Law. This Court therefore feels that it should give weight to the identification of these two Police Officers as against the mere denial of the accused. This Court was in a position of examining the evidence tendered before the first Court and does not agree with the interpretation given by the first Court and neither by its conclusions which therefore merits a review and a revision of the judgement and Sentence concerned and therefore feels that the appeal of the Attorney General deserves to be upheld.

For these reasons the Court upholds the appeal, revokes the judgement of the first Courts and after having seen Articles 96 (b), 95 (1) and 68 of the Criminal Code

Kopja Informali ta' Sentenza

condemns accused to a term of imprisonment of 8 months.

< Sentenza Finali >

-----TMIEM-----