



**COURT OF MAGISTRATES (MALTA)  
AS A COURT OF CRIMINAL JUDICATURE**

**MAGISTRATE DR.  
EDWINA GRIMA**

Sitting of the 30<sup>th</sup> October, 2013

Number. 1239/2012

**The Police  
(Inspector Trevor Micallef)**

**Vs**

**Craig Anthony Brotherston son of George and  
Georgina nee' Grososky, date of birth 29<sup>th</sup> April 1981  
in England, res. Caper House, 158, Sliema Road,  
Kappara, San Gwann and holder of British passport  
no. 704794168**

The Court,

Having seen the charges brought against the accused Craig Anthony Brotherston wherein he was charged with having in these islands on the 20<sup>th</sup> October 2012 at about four in the morning (04:00a.m.) wilfully committed any spoil, damage or injury to or upon movable or immovable property 'barrier' which is situated at Aragon House, Dragonara Road, St. Julians which damage exceeds the

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amount of Euro 1164.69 (Lm500) to the detriment of Matthew Zammit, Luke Zammit and/or other persons and/or other entities.

Having seen the documents exhibited;

Having heard the evidence;

Having seen the consent of the Attorney General of the 26<sup>th</sup> November 2013 for the case to be tried summarily by this Court;

Having heard submissions by the parties;

Considers,

Following a police report filed on the 20<sup>th</sup> October 2012 by a certain Matthew Zammit, being injured party in this case, the police started investigating an allegation of wilful damage allegedly caused by accused on a car park barrier at Aragon House, Dragonara Road, St.Julians. It was reported that an argument had broken out between two car park attendants being a certain David Xuereb and Andres Koztistika and a foreigner regarding the payment of a parking ticket. From what was reported by injured party, it was alleged that this foreigner had refused to pay the parking ticket accusing the attendants that this was hefty for the amount of hours he had used the car park. It was alleged that this man then got into his car and drove off, crashing into the barrier thus causing considerable damage to the same. The vehicle used by the foreigner was an Opel Astra bearing registration number CQZ 019. From investigations carried out by the police it resulted that this vehicle was rented out to two persons being the accused Craig Anthony Brotherston and a certain Amy Collier. The police, consequently proceeded to question accused and it seems that at no point in time was Amy Collier called in for questioning. Accused was spoken to by PS1030 Clint Theuma. It transpires from the acts that no caution was given to accused prior to questioning by this police sergeant. This is being pointed out since this police sergeant states that when accused was spoken to

by him, he admitted to causing the damage to the car park barrier. When asked by the Court if he had cautioned accused, he replies;

**“No, we don’t caution people, just tell them about the report. Its normal police procedure, you send for him and then the inspector takes the statement<sup>1</sup>.”**

This clearly is a violation of accused’s fundamental human right to silence. Since police investigations were being carried out in order to establish whether *prima facie* a crime had been committed by accused, it was his right to be duly cautioned and warned of the legal consequences of a confession made by him. This clearly was not done and consequently were the Court to take such declarations into consideration, this would be tantamount to a violation of accused’s human rights as safeguarded by our Constitution and by the European Convention on Human Rights and Liberties.

It transpires from the testimony of this police sergeant that no investigations were carried out on site and the vehicle involved in this incident was never examined by the police as to whether it had sustained any damages when it allegedly crashed into this barrier. It is obvious that once this sergeant had obtained a “confession” from accused, he deemed it fit to conclude all investigations, thus leaving important evidence to the case unrecorded. From the police report found in the acts, it results that PS1030 warned accused that

proceedings would be taken just the same against him in court even if he paid the damages, and this only after he had obtained this confession.

The Prosecution also produces as witnesses injured parties, Matthew Zammit Testaferrata and Luke Testaferrata. These two witnesses however clearly state that they were not present for this incident. Matthew Zammit exhibits a CCTV footage and fifteen stills depicting this incident. This footage was not seized by the

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<sup>1</sup> Vide testimony at folio 33 of the court records.

police from the premises where the incident occurred but was exhibited by injured party as already stated who also downloaded the stills from the said footage.

Car park attendents David Xuereb and Andres Korzistka, being the only eye witnesses to the incident are never called to testify by the Prosecution.

The accused, five days after the incident, and after having consulted with a lawyer of his choice, releases his written statement after having been duly cautioned by the Police wherein he chooses not to reply to any questions put forward to him by the Investigating Officer.<sup>2</sup> In such circumstances the rules of inference will come into effect as laid out in section 355AU of the Criminal Code which states:

***(1) Where in any proceedings against a person for an offence, evidence is given that the accused –***

***(a) at any time before he was charged with the offence, on being questioned by the police trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or***

***(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subarticle (2) shall apply if it is shown that the accused had received legal advice before being questioned, charged or informed as aforesaid.***

***(2) Where this subarticle applies –***

***(a) a Court of Magistrates as court of criminal inquiry in making a decision under article 401(2);***

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<sup>2</sup> Vide accused's statement exhibited a folio.8 of the court records.

***(b) the court or jury, in determining whether the person charged or accused is guilty of the offence charged, may draw such inferences from the failure as appear proper, which inferences may not by themselves be considered as evidence of guilt but may be considered as amounting to corroboration of any evidence of guilt of the person charged or accused.***

Consequently the only evidence found in the court records relating to the incident is the CCTV footage together with the stills and the corroborative evidence as may be inferred from the accused's silence when interrogated by the Prosecuting officer after having been duly cautioned and after having consulted his lawyer. The Court therefore has to establish *a priori* whether the evidence found in the footage is safe and satisfactory to determine whether the charge brought against the accused is legally founded.

Considers,

The rules laid down in R vs Turnbull, although not laying down specific rules under Maltese legislation, however have served as a guidelines in Maltese jurisprudence in cases involving the identification of the person of the accused. This was emphasized in the case The Police vs Stephen Zammit (Court of Criminal Appeal judgment delivered on the 16<sup>th</sup> July 1998) wherein The Court gave a detailed exposition of the Turnbull rules:

***“First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses***

***can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.***

***Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.***

***Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.***

***All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger.***

As already pointed out earlier on the only evidence the Prosecution has brought forward regarding the identification of the accused as the person involved in the damage to the parking barrier is a CCTV footage of the parking area depicting the incident from beginning to end. The two persons who were involved in the argument with accused regarding the payment of the parking ticket, were unfortunately never produced as witnesses in this case.

In his book, *On Evidence* (6<sup>th</sup> edition) Cross gives a definition of what constitutes so-called **real evidence**, in criminal proceedings:

***‘Things are an independent species of evidence as their production calls upon the court to reach conclusions on the basis of its own perception and not on that of witnesses directly or indirectly reported to it ...***

***Although it was devised by Bentham and adopted by Best, ‘Real evidence’ is not a term which had received the blessing of common judicial usage. There is general agreement that it covers the production of material objects for inspection by the judge or jury in court, but it is debatable how much further the term should be extended’.***

Cross passes on to give various examples of what is “real evidence” and amongst these examples includes *automatic recordings* wherein he states:

***‘Most discussion has hitherto centred on the admissibility of tape-recordings, but this has now been supplemented by a thin trickle of authority on the admissibility of other media such as film, video-tape and computer output. In all of these cases the evidence is real evidence when it is tendered to show what it was that was recorded’.***

Murphy, then in his book ‘A Practical Approach to Evidence’ (3rd Ed) gives this definition of ‘Real evidence’ (fol. 7):

***'A term employed to denote any material from which the court may draw conclusions or inferences by using its own senses. The genus includes material objects produced to the court for its inspection, the presentation of the physical characteristics of any person or animal, the demeanour of witnesses (which may or may not be offered or presented to the court by design), views of the locus in quo or of any object incapable of being brought to court without undue difficulty and such items as tapes, films and photographs, the physical appearance of which may be significant over and above the sum total of their contents as such ... What is of importance in each case is the visual, aural or other sensory impression which the evidence, by its own characteristics produces on the court, and on which the court may act to find the truth or probability of any fact which seems to follow from it'. ...***

***'The court may look at and draw any proper conclusions from its visual observation of any relevant material object produced before it ... The tribunal of fact is entitled to act on the results of its own perception, even where it conflicts with other evidence given about the object ...'.***

However he continues:

***'The court must, before admitting recordings as evidence be satisfied that the evidence which may be yielded is relevant and that the recording produced is authentic and original ... The above principles apply to the use of film produced by hidden, automatic security cameras installed in banks and elsewhere for the purpose of recording robberies and other incidents. The jury are entitled to consider the film as identification evidence of the persons recorded on it, subject to the foundational requirements stated above" see eg 'R v Dodson; R v Williams [1984] Crim LR 489; see "Taylor v Chief Constable of Cheshire [1986] 1 WLR 1979'.***



In the case Taylor vs Chief Constable of Cheshire (1986), Ralph Gibson LJ states:

***‘Where there is a recording, a witness has the opportunity to study again and again what may be a fleeting glimpse of a short incident, and the study may affect greatly both his ability to describe what he saw and his confidence in an identification. When the film or recording is shown to the court, his evidence and the validity of his increased confidence, if he has any, can be assessed in the light of what the court itself can see’***”

Considers,

The Court has examined in detail the *footage* of the CCTV recording exhibited by injured party. There is no doubt that the person appearing in the said footage and involved in the incident with the parking attendants is the person of the accused. The image portrayed in this footage is identical to the physical appearance of accused. Also it is clear from the footage that accused was accompanied by a person of the female sex who was seated in the passenger’s seat whilst he was the person driving the car. All this coupled with the fact that accused had in the presence of injured party Matthew Zammit accepted to make good any damages sustained, and also by application of the rules of inference to the statement of accused, leaves this Court with a moral certainty that accused is guilty of the charge brought against him. This in spite of the fact that investigations by the police were not fully carried out and two main witnesses were never brought to testify by the Prosecution.

Consequently the Court after having seen Sections 325(1)(a) of the Laws of Malta, finds the accused guilty as charged, condemns him to a period of thirteen months imprisonment, which term of imprisonment after having seen Section 28A of the Laws of Malta is being suspended for a period of one year from today.

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The Court warns accused with consequences according to law if he were to commit another crime within the operative period of this judgment.

After having seen Section 28H of Chapter 9 of the Laws of Malta condemns accused to pay Matthew Zammit Testaferrata and Luke Zammit the sum of €1442 within six months from today.

**< Final Judgement >**

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