



MALTA

**COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE
MAGISTRATE DR.
MIRIAM HAYMAN**

Sitting of the 23rd October, 2014

Number. 676/2003

**The Police
Superintendent Michael Mallia**

Vs

**Aslan Yilmaz, Turkish national, son of Hamza and Pakiza
nee' Yetkin, born in Amsya on the 1st September, 1961,
residing inat Sweethaven, Flat 4, Triq i-Gibja, Swieqi,
holder of identity card number 13519A;**

The Court;

Having seen charges proffered against the above-mentioned
Aslan Yilmaz who was charge of having:

1. On the days before the 8th August, 2003 in Paceville, and other localities in Malta, with intent to make any gain whatsoever, gave aid, assisted, counselled or procured any other person to enter or to attempt or to leave or attempt to leave Malta, in contravention of the Laws thereof; or who, in Malta or outside Malta, conspired to that effect and this in violation of Article 337A of Chapter 9 of the Laws of Malta;
2. And also of having on the same days and circumstances, received a passport that was transferred to him by any other person and this in violation of Article 3(b) of Chapter 61 of the Laws of Malta.

Seen that in the examination of the accused, Yilmaz entered a non guilty plea.

Seen also that the Attorney General remitted the Articles at Law upon which the charges were based.

Seen that accused entered his consent in the regard of summary proceedings.

Articles remitted read:

Section 337A of Chapter 9 of the Laws of Malta and Article 3(b) of Chapter 61 of the Laws of Malta.

Heard all the evidence advanced and seen notes of submissions entered.

Thus **Superintendent Neville Xuereb** deposed that from his investigation it resulted that between Friday and Saturday of

the 8th and 9th of August, a van with a number of immigrants was found near Bahar ic-Caghak. Then the Ex Inspector David Saliba reported this to him. He recalled that amongst the immigrants a certain Tahir Acibalik had told him that his passport was being kept at the Top Kapi Restaurant in St Julian's. The Superintendent thus ordered PS 63 to obtain the same passport from this said restaurant. PC 63 Josef Farrugia it was a certain Yilmaz Maz who was keeping the said document.

He continued that this Tahir Acibalik had told him that he had also given this Yilmaz the amount of one thousand Euros (€1,000) so that he aids him to leave the Maltese Islands.

On his part **Inspector Jeffrey Cilia** said that in July 2003, an investigation was on the way because of a number of escapee immigrants from GHQ. Later on during the investigation a van was stopped at Bahar ic-Caghak, some of these resulted to be the immigrants who had actually escaped from GHQ. One of the immigrants, not an escapee, resulted to be a certain Tahir Acibalik and informed him that his passport was being retained by a certain Aslan Yilmaz. The passport was brought over from the Top Kapi Restaurant.

The Inspector continued that in his presence, this Tahir Acibalik stated that he had gone to the Top Kapi Restaurant, spoken to the accused regards clandestinely leaving the Island for Italy, and paid him the sum of one thousand Euros (€1,000) for this purpose. Tahir Acibalik was passed over to a certain Philip Azzopardi. Tahir Acibalik was shown a photo of the latter who was, according to the Police Inspector, also suspected of having aided the above-mentioned escapees. (photo folio 13)

Inspector Jeffrey Cilia also testified with regards to Philip Azzopardi's telephone numbers. He deposed that he had

obtained these numbers during the investigation with regards to the same Azzopardi who was obliged to hand over the information to the police when he released a statement. The numbers were 79294639 and 99452892.

He continued that since this Philip Azzopardi was also recognized by other immigrants, criminal proceedings were instituted against him.

Inspector Cilia deposed further that Tahir Acibalik had also told them during the investigation, that Philip Azzopardi had taken him to a hotel in Gozo for twelve (12) days, which hotel later resulted to be the Marsalforn Hotel. The accused later released a statement explaining the circumstances – Dok AY.

In cross examination the Inspector confirmed that accused in his statement had denied knowing a certain Philip Azzopardi. He also confirmed that none of the other illegal immigrants knew accused. He confirmed that no ID parades were conducted with the other illegal immigrants, and that they only mentioned Philip Azzopardi and had his mobile number on a piece of paper. He confirmed that only Tahir Acibalik mentioned the Top KapiRestaurant and accused.

The statement released in 2003 was so done after the accused was duly cautioned at Law. Accused answered freely, seems to have suffered no coercion or duress, such was not ever raised by Defence. Neither was there an attempt

The Court, in line with recent judgments on this issue, does not consider that accused was in a vulnerable position when he released the statement.

In it, it results he told the police that he had been in Malta for fifteen (15) years. He actually lived in Malta with a wife and

two children. He worked as a chef at the Top Kapi Restaurant. He held a working permit. He added that the Top Kapi Restaurant was owned by his brother.

He explained that Tahir Acibalik had gone to the restaurant and told him that he was staying at the Helena Hotel for a week and asked him to find him a cheaper hotel. He thus took him to the Tropicana Hotel for one day and later to stay in a flat where cooks and staff resided in St Julian's, for which Tahir Acibalik paid four Maltese Liri (Lm4.00) daily. He told the police that after four to five days, Tahir Acibalik told him he was going to Turkey and left the flat, however coming back during the night and stayed at the flat again. When he left the flat, the accused said that he never saw him again.

Asked how Tahir Acibalik's passport was at the Top Kapi Restaurant, he answered fifteen to twenty days after Tahir Acibalik left, a driver of a mini-bus went over to the restaurant and gave him an envelope inside which was Tahir Acibalik's passport, later he discovered.

He said he did not check what was inside the envelope and accepted it without asking any questions. He verified the contents an hour later. He confirmed the driver was Maltese and that he had never seen this man even after this occasion. He further stated he placed Tahir Acibalik's passport inside the restaurant's bar and did not file a report to the police about the accident.

Asked if he knew a person by the name of Philip, he replied he did not know any Philips, not even after seeing the photo itself.

PC 63 Joseph Farrugia stated that he was sent by Inspector Xuereb to recover a passport in the name of Tahir Acibalik

from the Top KapiKebab House. He asked in fact the accused for the said passport and same gave it to him from near the cash register. He further added he had asked for the passport by the name.

PC 165 Jason Gilson confirmed his signature on the above-mentioned statement, as also that Inspector Cilia had cautioned the accused.

Dr Joseph Borg, in name of Vodafone Malta Ltd, presented the incoming calls resulting from the cell phone number 99270750 between the 1st July, 2003 and 8th August, 2003 – this being accused cell phone number.

Dr Martin Bajada, on this part, exhibited his report of examination of contents retrieved from accused's mobile, Dok MB folio 158.

On her part, **Denise Formosa Gruppetta** in the name of Vodafone presented Dok DFG also in relation to the same phone number.

The main witness produced is **Tahir Acibalik** himself.

He explained that he was a technician and came to visit Malta on a holiday. He worked in Ankara manufacturing wheel chairs. He simply said he simply wanted to see Malta as a reason for his being here.

He insisted that a person approached him and said he will send him to Italy, that someone took them, to Gozo for twelve (12) days. He added that Aslan should be asked about this, pointing to the accused. He continued that Aslan took his passport, his money and together with the participation of a Maltese person, sent him for twelve (12) days in Gozo. He

insisted he paid Aslan one thousand Euros (€1,000) saying that “*even if I cut my head it is the truth.*” (folio 30).

He said that he met the accused at the Top Kapi Restaurant, saying also that through the Grape Vine he knew that Aslan sent a lot of people to Italy, that everybody knew this. He further added that the accused admitted with him such an involvement,

Explaining how this came about, he said that at the Top Kapi Restaurant the accused offered to send him to Italy. He explained that at that time he was staying at the Etna Hotel, but accused offered him to go stay at his house. He was taken to this house by Philip. He added and described Philip and the accused as shareholders, since they worked together, adding that the accused kept his passport and his money and introduced him to Philip.

He also said that Philip took him to a hotel wherein he stayed for twelve (12) days, during which he was so scared that he was suicidal. This happened in Gozo.

Thus he explained that initially he stayed at the Etna Hotel, after that at the house and lastly twelve (12) days in Gozo. He added that once he left Etna Hotel, he went to Aslan and was taken to the house by Philip.

He also explained that the Top Kapi Restaurant belonged to accused’s brother. Thus at the house he was taken to, he resided therein with an employee of the said restaurant.

He confirmed the photo shown to him by the police – Dok D, as also the paper the police retrieved from his possession. He said that it was Aslan who actually wrote the numbers and letters.

Explaining about the hotel in Gozo, saying that they – inclusive other immigrants, were taken there at 11.30pm to the fourth floor where even the lights were switched off. At midnight they were taken downstairs and given food. Philip left them at the hotel wherein he was given room number eight (8), whilst the other Sudanese immigrants the number nine (9). He explained that they were locked inside the hotel, everywhere was closed. He was only allowed to go to the gents, adding that he could not take the situation anymore, so much so that he was suicidal. After these twelve (12) days, he was taken to Malta by boat, they then boarded a mini-bus and collected twelve (12) more persons. He said that Philip collected the money from the other immigrants but not from him, since he had already paid Aslan.

He further explained with regards to his stay in the hotel, that he had no clothes and could only leave to go to the gents in his underwear, explaining further that the hotel owner's daughter allowed no one to enter the hotel.

He further testified that it was the hotel owner who told them to get dressed because they were leaving the hotel at 8.00pm. The same owner led them to exit the hotel through the back door. He described that they were three (3) in the boat, besides himself - a lady and two males, and had to go to Malta to pick another eight (8) passengers.

He evidenced that Philip was in the front of the mini-bus. He insisted that he had paid his monies to Aslan, adding that he did not pay money to anybody else but to Aslan.

He said also that once in the van, he saw the police and added that the driver escaped.

Asked why he wanted to go to Italy, he replied he was tricked, now insisting he wanted to go back to Turkey to his country. Asked why he gave money to the accused, he answered that most probably, his senses were not there (folio 50).

He however insisted he paid up because he was tricked. However, he did admit that he knew that the one thousand Euros (€1,000) paid up were intended for Italy in an illegal manner.

Under cross-examination he answered that that the Helena Hotel was twelve Maltese Liri (Lm12.00) daily, he considered that as normal, adding that he had even booked in a more expensive hotel daily. He confirmed that he later found a cheaper hotel at seven Maltese Liri (Lm7.00) daily. He confirmed that it was Aslan who took him to the Tropicana and that once the hotel was full he left to live in a flat. He confirmed also that once in Gozo he never saw or could get in touch with Aslan, except for once when he begged the receptionist who got them food. He was allowed to do this contact and pleaded with Aslan that he was in a disastrous situation. He was told to go the the ferry and return to the hotel. Asked about the hotel tag he gave to the police, he answered that he took it since the cleaning girl forgot it. He indicated that hotel's owner name as Michael.

Asked about another telephone number in someone else's name, he said that he kept it for possible future necessities. With regards to Dok E, he confirmed that the top writings were done by Aslan, the rest by himself. He insisted the telephone number on Dok E was written by Aslan at the Top KapiRestaurant.

Asked why he opted to go to Italy once his eight-child family and wife were in Turkey and once he insisted he was happy, he answered that he was saddened by the decision he took, adding that wanting to go to Italy was a big mistake.

He reiterated that the agreement to go to Italy was entered into between Aslan and himself, but it was Philip who was going to take them, insisting he gave the money and passport to Yilmaz. He insisted that Mr Aslan had written on Dok E, this on the first or second day of their meeting. He confirmed however that Dok F was written by him.

Once all evidence of the Prosecution was presented and its case closed, accused voluntarily took the stand.

He testified in his Defence saying that he only got to know Tahir Acibalik when the latter entered the shop asking for a cheap hotel. He took Tahir Acibalik to the Tropicana for one night, adding he spoke to the receptionist on behalf of Tahir Acibalik who spoke no English at all.

Asked why Tahir Acibalik's passport was at the Top Kapi Restaurant, he answered that between eight and nine o'clock in the evening he was smoking outside with the waitress and a red van approached and a man the driver there from approached him and gave him an envelope. It was a normal minibus. He described the man as a normal Maltese talking person, and the envelope as a normal brown sized one. He explained that he took the envelope but had no chance to verify its contents because of customers.

He said that though later he questioned why Aslan sent him his passport, he kept it for twenty (20) days, till Mr Xuereb (the Inspector) asked for it. He thought that Aslan might fear to losing it.

He explained that the text messages extracted from his mobile were from his son – a certain brother-in-law, he also identified two messages from Tahir Acibalik.

He denied ever taking money from Tahir Acibalik.

He explained he was in Malta for fifteen (15) – sixteen (16) years. Asked if he invested any shares or was a shareholder, he answered in the negative.

In cross examination he recognized his statement, confirming his signatures thereon. He was reminded that in his statement he had said that after four (4) to five (5) days, Tahir Acibalik left that flat intending to leave for Turkey, therefore it was suggested to him that he had remained in contact with Tahir Acibalik for the mentioned period of time. He answered that he knew Tahir Acibalik, stayed in contact with him for these number of days and no more. He said also that he gave his number to Tahir Acibalik on the latter's request, just in case he got lost. He added that he offered Tahir Acibalik to reside with his cooks because he was crying that he had no money.

With regards to holding his passport, he reiterated he did this thinking that Tahir Acibalik might lose it. He confirmed that the police called for the passport a few days later after Tahir Acibalik left. He also said that he knew Tahir Acibalik's name from the passport. He confirmed he had not reported the passport to the police, insisting that he thought that Tahir Acibalik left the passport with him, fearing he might lose it.

Considers:

As justly pointed out by Defence Counsel, the case here rests on Tahir Acibalik's testimony, very much in direct contrast to that upheld by the accused – a denial.

The Court as an adjudicator has the advantage of having seen the main witness testify, the difficulties of the gentleman due to his difficulty in expressing himself.

The facts as presented by the Prosecution are simply that Tahir Acibalik sought the accused's assistance to leave Malta and enter Italy clandestinely, paying accused one thousand Euros (€1,000) for the operation. He was first accommodated at accused's assistance in a hotel, then in a flat wherein Top Kapiemployee's resided, later taken to a Gozitan hotel and locked there for twelve (12) days. It was a Philip Azzopardi who was to transfer the foreigners to Italy.

It also resulted that Tahir Acibalik's passport was as Tahir Acibalik himself deposed held at the Top KapiRestaurant from whence the police recovered it.

Considers:

That the main Section of Law under which Aslan Yilmaz is charged is Article 337A and reads in its Sub Sections as follows:

“Any person who with the intent to make any gain whatsoever aids, assists, counsels or procures any other person to enter or to attempt to enter or to leave or attempt to leave or to transit across or to attempt to transit across, Malta in contravention of the laws thereof or who, in Malta or outside Malta, conspires to that effect with any other person shall, without prejudice to any other punishment under this Code or under any other law, be liable to the punishment.....”

The crime is that of human smuggling or one commonly known as migrant smuggling. It is in its detail distinct from that of human trafficking because it has at its core the agreement between the smuggler and the smuggled person, an agreement, contracted to an extent, at least between the parties, that should terminate upon arrival at a destination usually pre-agreed. On the other hand, in human trafficking, people are usually bought and sold like chattel for reasons of forced labour, sexual exploitation, domestic servitude, and other uncountable heinous crimes even shockingly enough, the sale of human organs. Both are of an abhorrent character!

“While there are significant differences between Trafficking in Persons (TIP) and human smuggling, the underlying issues that give rise to these illegal activities are often similarly. Generally, extreme poverty, lack of economic opportunities, civil unrest, and political uncertainty, are factors that all contribute to an environment that encourages human smuggling and trafficking in persons.”

(US. Department of State: Fact Sheet: Distinction Between Human Smuggling and Human Trafficking 2006)

The United Nations Convention against Transnational Organised Crimes defines migrant smuggling as “....*the procurement in order to obtain, directly or indirectly, a financial or material benefit, of the illegal entry of a person into a state party of which the person is not a national.*” (United Nations Office on Drugs and Crime).

The elements that constitute the crime as defined in Maltese Law (as reflected in the Convention above-cited) are briefly:

The intention of any again;

The procurement, providing, facilitating (any acts falling in this definition) as also the agreement to provide, any means for the entry/exist from or into a country, any person – obviously in an illegal manner, furtively, not in uniformity with the required Laws, otherwise travel agents will be penalised!

Without any doubt, the alleged crime under this review is that of migrant/people or human smuggling. The facts show that allegedly an agreement was entered into between the accused and Tahir Acibalik so that accused would facilitate the transfer, through third parties, one of whom was Philip Azzopardi, against payment, of Tahir Acibalik to Italy - a transfer by sea. Accused received a payment for the arranged transfer.

The facts show that the accused held in his possession Tahir Acibalik's passport, claiming that he received it in a brown envelope, delivered to him by a driver of a minibus, this after having helped Tahir Acibalik find less expensive accommodation. His excuse, because it really is none other than that, was that he thought that Tahir Acibalik had sent him this document for fear of losing it. This albeit claiming he hardly had any other contact with Tahir Acibalik.

In the Court's opinion, the facts presented by accused are weak and feeble, and totally improbable, especially the

explanation presented to justify his possession of Tahir Acibalik's passport.

As Defence stated, here the Court has to evaluate one version that clearly contradicts another. A look at the call profiles presented by Dr Joseph Borg for Vodafone Malta Ltd, contradicts accused's claim that he did not know Philip Azzopardi, because certainly this list shows otherwise.

Furthermore, the Court had a good chance of assessing Tahir Acibalik's demeanour – yes he showed unease and difficulty to express himself. That by no means, translates that he was narrating an untruth. He gave evidence at length and was in the salient necessary facts very constant – he paid the accused one thousand Euros (€1,000) to be clandestinely transferred to Italy, was housed in hotels very furtively, kept locked and literally hidden from any scrutiny, then transferred to Malta and packed in a minivan with other immigrants (some escapees) to be frisked to other coasts. A clean description of a typical human smuggling operation that leaves no room for any other interpretation. He clearly and repeatedly pointed to the accused leaving the Court with no doubt about the latter's deep involvement!

The Court therefore finds Aslan Yilmaz guilty as charged after having seen Articles 337A of Chapter 9 of the laws of Malta, and Article 3(b) of Chapter 61 of the Laws of Malta.

With regards to punishment, considers the gravity of this crime and the effects it leaves on the entire Nation, plagued with the influx of illegal immigrants, and the effects left on those displaced people constrained to adapt, if ever, to other cultures and countries, with all the difficulties these poor people are put through - this for the avarice of others.

The Law, taking into account the seriousness of these crimes, in fact prohibits the judge/magistrate to impose a non-custodial punishment – a clear message with regards to the nature of this case.

Therefore the Court, having also seen Articles 17 and 31 of Chapter 9 of the Laws of Malta, condemns Aslan Yilmaz to a year and a half effective imprisonment and a fine of five thousand Euros (€5,000).

Magistrate Dr Miriam Hayman LL.D

< Final Judgement >

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