



MALTA

COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE
MAGISTRATE DR.
CONSUELO-PILAR SCERRI HERRERA

Sitting of the 23 rd April, 2015

Number. 517/2013

The Police

(Inspector Luke Bonello)

vs

IBRAHIM ALI

(ID: 38905A)

The Court,

Having seen that the accused **IBRAHIM ALI** holder of identity card number 38905A was arraigned before her and having been accused:

With having in St. Julian's, between the 28th of April, 2013 and the 26th of May, 2013, committed several acts, even if at different times, which constitute violations of the same provision of the law, and were committed in pursuance of the same design, committed violent indecent assaults on the person of Svetlana Axiaq, aged 19 years.

The Court was humbly requested to order the necessary protection which is deemed fit in terms of Article 412 (C) of the Criminal Code during the course of this case and also in case the accused is found guilty.

In the eventuality that the Court finds the accused guilty, the Court is requested to provide for the security of Svetlana Axiaq and her family in terms of Article 383 et sequitur of the Criminal Code.

Having seen all the documents exhibited in the acts of these proceedings by the Prosecution in particular the conviction sheet of the accused at fol. 3, the Declaration – forfeiture of the right to legal counsel at fol. 4, the statement made by the accused at fol. 5 and 6, the PIRS II Report at fol. 7 et seq. and the consent by the Attorney General dated 28th May, 2013 at fol.12 for this case to be dealt with summarily.

On the 28th May 2013 the accused was asked if he had any objection to his case being dealt with summarily and he replied in the negative (fol. 16).

Svetlana Axiaq gave evidence on the 5th July, 2013 in the Maltese Language which evidence was translated into the English language by the Deputy Registrar Robert Bugeja wherein she explains that she was nineteen (19) years old and had started working at the La Vallette Resort after sitting for an interview. She started her employment on the 28th of April 2013 and her duties were those of a waitress. However she explained that at present she was no longer working there and had worked there for only three weeks. She recognised the accused as Ibrahim as the person who worked as a dishwasher with her. Being asked what was the relation between her and the accused she replied that she hardly ever spoke to him. She iterated that she used to work at Saint George's Park and sometimes at La Vallette. She explained that Ibrahim worked at St. George's Park. When she worked at St. George's Park she used to meet him and she explained that on one occasion when she was passing by with the trolley full of plates he touched her breast. However she exclaims that it wasn't the first time. He asked her, her name and she replied Svetlana. She stated that in fact that was all she told him on this first occasion and the week after she said that he grabbed her breast and that hurt her. She then explained that he had pinched her and she told her mother and her mother told her to tell this to her supervisor but she was afraid to do so. Then her mother phoned Joseph Madison the General Manager and she said that he told her that he asked the accused to apologise to her and that he should not do it again. The day after she remembered that she met up with Mr Madison and the accused and they discussed what had happened. She repeated that Mr Madison had asked the accused to

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apologise and the accused apologised and said it was meant to be a joke. She explained that the accused had admitted that he grabbed her breast but told her it was a joke. Then she told him he had hurt her and he said sorry and she left so that she could start the day's work.

She recalls that she then left the room and Ibrahim didn't talk to her again that day. She went back to work as normal. She had been working for three (3) weeks.

She then went on to explain what happened on the twenty sixth (26) of May, 2014 when she made the report to the Police. She explained that on that day Ibrahim told her that when she would take her break she should go and meet him however she was afraid of him and thus did not take any break. It seemed to her as if he intended to do something. She explained that this incident took place about two (2) weeks from the date that she has spoken with Madison. She also said that during these last two weeks the accused had spoken to her normally. However on this same day she explained that she was washing the plates in St George's Park and the accused came up to her and started touching her shirt, opening her shirt, she tried to push him away, and he told her, "*that's for me, I want, I want not for you*", he said, "*take off your clothes*". She was afraid and explained that she was alone. She explained that this happened in her break, however she remained washing the plates because she was afraid of him. He too should have been on break and in fact asked her to join him or should she take her break he asked her to join him though she was frightened of him and thus remained working.

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She explained that he went next to her as she was washing the plates and when he went near her, the zip of his trousers was open and his belt was undone and she was afraid, she started pushing him and he kept telling her, *"I want, I want, it's not for you, that's for me"*, he was referring to her breast, and then she says that she pushed him though she explains that she does not know how she managed to escape him and she went to look for Arthur the most senior person who was on duty.

He was not there, she found the door to his office closed. Being asked if Arthur was Madison's senior she explained that she thinks so, though she was not sure. She explained that she went looking for him and could not find him anywhere however she came across Noel the head waiter at the bar, and she started to cry and he realised that she was shocked. She was crying and afraid and she told him that what had happened was the second time that he tried to touch her breasts, she told him that she needed to talk to him. He told her, *"tell me"*, and she told him, *"not here, this is not the place"*, she told him to go to the office. Ibrahim ran after her and did not let her speak and told him that he knew what she was going to tell him, *"it's about me"*, she states that the accused told Noel the words, *"because I want baby with her"*. She told him *"leave"* and she again told him *"go away, I want to talk to him alone"*. Noel told her that he was joking and she told him this was the second time that he tried to touch her. She told him these things are not jokes and then Ibrahim went and called another waitress and told her to calm down and that she's going to take these things seriously. When the accused saw her crying he called Tessie and in front of him she said that he was joking. Asked if Tessie knew what had happened she says that she did not know.

She explained that she does not do these type of things. She explained that she recollected that once she was going back home by bus and the accused went after her. On that day she says that she was duty from seven (7:00) till one (1:00) and then she started again at about two (2:00). Arthur asked her if she wanted to work in the evening. She told him, it was all right for her. She explained that whilst she was on the bus from Valletta to Qormi Ibrahim was on the same bus and he followed her. She then got down from the bus in Qormi, and saw him behind her. She insisted that from St. Julian's to Valletta he was not with her on the bus. She boarded the bus before him from Valletta and it was the first time that she saw him on the bus.

She continued explaining that she saw Ibrahim following her when she came down from the bus and he was saying "*I want to talk to you, I want you*". Then she phoned her mum and told her that there was a coloured man who ran after her. She did not mention the incident at work so as to not to worry her. Her mother told her to stay there and that she was coming to get her and she started going around so that he won't know where she lives. It was in the evening, at about ten (10:00) thus it was dark. Being asked if she knows whether Ibrahim is married, or whether he has a partner she explained that she knows nothing about him.

She explained that in May she had filed a report to the Police because she started getting phone calls. She said that on the 26th of May 2013 she started receiving phone calls, sometimes at one (1:00) in the morning but she did not know who was the person calling her because she switched off the mobile, though when she switch it on, she found a missed call. The

mobile would be switched off, so she could not know who was on the other end. Once her mother tried to phone back on these numbers and a coloured person talked, the voice was of a coloured person. She said that before she made the report no one ever phoned her on her mobile number and she explained that she never gave her number to the accused.

She was asked if from that day onwards any of the managers from the Hotel had contacted her to see how she was. She replied yes, the day after, Kenneth phoned her and asked her what had happened. She went to his office in Qormi and told him. He was not pleased that she made a report with the Police but her mother told him that he would have done the same if it was his daughter. She had no idea why Kenneth was not pleased that she made a report, though she thought that the reason could be because he feared that the Hotel would have a bad name. She does not know of any other person who was harassed by Ibrahim and she thinks that she was the only one. She explained that no one from the Hotel tried to calm the situation and she was still under shock because he kept saying take off your clothes.

Under cross examination she explained that he touched her breast on two (2) occasions though she only reported one incident, the second time when he touched her breast was on the twenty sixth (26) May 2013 when he made her a mark. She was asked where was the mark and she answered that he touched her and it hurt. She was asked if he had touched her back and she said no only her breast. The defence asked her whether it was true that when she explained what had happened to her friends they she said that she did not take it as a joke irrespective of how he joked with

them others though she did not believe that he did the same thing to the others. She insisted that what he did to her was not correct.

On the 5th July, 2013 **PS1187 Omar Zammit** gave evidence and stated that on the twenty sixth (26th) of May 2013, at about half past ten in the evening (10.30pm) he was informed by WPC 291 Amanda Azzopardi that a certain Svetlana Axiaq went to lodge a report with her parents to the Police Station in St. Julians. She informed him by telephone because he was investigating another case outside the Station and she reported to him that the complainant Svetlana had reported that she was violently assaulted by a certain Ibrahim Ali who worked with her, she explained to him that Svetlana had told her that the accused had touched her breast. He asked her what had happened exactly and Svetlana told WPC 291 at the same time that he was talking to her that it was not the first time that he did this to her and that on that day of the twenty sixth (26) May 2013 at about half past eight (8:30) he was working with her.

He explained that WPC 291 told him that the accused works as a dishwasher there and he opened her blouse and then he touched her breast and he asked WPC 291 whether Svetlana had resisted such behaviour and she replied in the affirmative. He asked Amanda to see if Svetlana had any bruises but WPC 291 said that Svetlana had no such bruises. She also told them that Ibrahim was still working there so after he finished the job he was doing he was doing to La Vallette Resort together with PS 157 to ask for Ali but the Manager there told him that Ibrahim Ali had already left and that he was going to be working there the following morning on the twenty seventh (27th) May 2013 at eight o'clock (8:00).

On the following day the witness explains that the police went to arrest him to speak to him. He recognized Ibrahim in the Court Room and indicated the accused and said that he saw him at the Police Station on the following day.

He also confirmed that he did not see Svetlana on the day of the report but explained that Svetlana saw and spoke with WPC 291.

On the 5th July, 2013 **Arthur Agius** gave evidence and stated that at the moment he was employed with Vassallo Group. The company is called Cater Essence. It's a company that presently does catering for residential homes and catering for hotels. At the moment he was assigned duties at St. George Park Complex in St. Julians. He confirmed that the accused was already employed by the Hotel when he took over the new catering contract on the eighteenth (18th) of December, two thousand and twelve (2012). He was one of the first employees that was handed over from the previous contractor and he had been recommended to them by the previous contractor in the sense that he was an exemplary person. His position in the company at that time was that of a kitchen porter or as a kitchen steward. As far as he could remember Svetlana Axiaq was also employed by Cater Essence since March or April of the year 2013 as a waitress part time.

Asked by the prosecution if Svetlana had ever spoken to him about some incident while on the job, he replied in the negative and said that he was

never approached by Svetlana with regards to any incidents at work. He said the person directly in charge of the restaurant was the head waiter and that he is in charge of the evening shift. He explained that on the 26th May 2013 Mario Zammit was the head waiter.

He explains that he had been informed on the following morning about the incidents. He confirmed that on the following Monday there were some policemen at the door who wanted to speak to him about Mr Ali. He was not approached by Noel and insists that he was not aware at all about what had been reported.

The witness insisted that the accused was an exemplary person, he was a hard worker. He had been there for a while before, had experience at the place of work and they thought it would be an asset for them to have him on board because unlike them he knew where everything was. He stated that Ali is always punctual he appears to be very educated for what he knows and he never had any problems with him whatsoever. Asked whether there was any other employee who had complained about the accused with regards to any allegations of sexual assault apart from Svetlana he replied that he had no knowledge of any other person. Asked whether he confronted Ali with the report made by Svetlana he replied in the negative and explained no because nobody had told him about the allegations with regards to Svetlana. He however stated that he remembered that just after the police left the premises he received a phone call from Svetlana's mother explaining what happened the night before and that was all he could say. He however told her that they were

going to talk it over with their personnel manager Mr Kenneth Cutajar to see what the way forward was.

He said he then spoke with Kenneth Cutajar and the accused was dismissed from his duties and subsequently replaced.

On the 23rd October, 2013 **PC 897 David Gauci** and explained that on the twenty seventh (27) of May 2013, he was present whilst the accused released his statement. He recognised the accused and confirmed that he was given the caution by the Inspector. He also confirmed that the accused did not want the assistance of a lawyer during interrogation.

On the 21st April 2014 the Chief Justice assigned this case to this court as presided and this court immediately appointed the case for continuation. Such case was then assigned to this court permanently by a similar decree of the Chief Justice dated 5th November 2014.

On the 12th June, 2014 **WPC 291 Amanda Azzopardi** gave evidence and explained that on 26th of May, 2013 the complainant Svetlana Axiaq attended at St. Julian's Police Station together with her parents at about ten twenty (10:20) in the evening. She had alleged that a person known by the name of Ibrahim Ali had touched her private part. She also stated that Ibrahim Ali worked like her, washing plates in a Hotel known by name of La Vallette Resort, Dragonara Road, St.Julians.

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She explained that the complainant told her that whilst she was cleaning the plates the accused went towards her and started touching her. She ended up with her vest and pushed him away. She also stated that this was not the first time and in actual fact this was the second time. And when she asked her why she had not reported this incident in the first occasion she told her that she had spoken to her Manager and that he would look to the incident.

Asked by the Court if she had spoken to the accused Ibrahim Ali, she replied that PS157 had gone on site and did not find the person there.

The witness saw the report exhibited in these acts of the proceedings at fol. 7 and confirmed that this was the report which she had presented.

On the 12th June, 2014 **Noel Zammit** gave evidence and asked if he knew the accused present in Court he said yes, he knew him at work. He explained that he works at St. George's Hotel in Paceville and he knew the accused ever since he started working there.

Asked if he knew the complainant, he said yes he knew her since she had worked there too for about a week.

He remembers that in May, 2013 Svetlana Axiaq had spoken to him and said that the accused Ibrahim Ali was talking to her about sex and that at a moment in time he touched her shirt. He had just touched her shirt.

Asked by the Court if at any moment in time she told him that he removed her shirt, he said no, she never said that.

Asked by the Court whether she had told him that the accused had touched her private part, he said no, she never stated that. She said that the accused had touched her shirt. He then phoned up the HR Office and sent them an email to report this incident. Asked by the Court if he got any response to his email, he said no, they were going to look to the matter themselves. He could not remember to whom he had sent the email.

Asked if he had spoken to the accused about the incident, he said yes he did and confirmed that when he spoke to the accused about it, the accused told him that he had touched her shirt and that it was true that they were talking about sex.

The witness said that he works as a Supervisor. He said that Svetlana went to speak to him about half nine (9:30). Asked if he was alone, he said no there were a number of waiters. Svetlana had come to speak to him in the restaurant. At that time there were no people in the restaurant.

Asked if the complainant was at that time crying, he said that no she was not emotional or anything like that, she was normal. Once again he repeats the same thing and he said that Svetlana went to speak to him and told him that she wanted to speak to him and she alleged that Ibrahim had

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touched her shirt and that they were talking about sex. She was a bit excited but nothing special. She was still normal. In fact she told him that he had touched her the upper part of the shirt near her shoulders just beneath her shoulders. She never alleged that in actual fact he had touched her. As they were speaking Ibrahim passed by and he asked him why he had pulled her shirt and he said that he was joking. And he told him that it was not proper and that he shouldn't do these things.

Asked if he has a copy of the email he sent to the HR, he said that he does not have it, and that he would have to ask the HR to see if they have the copy. The person addressed was Kenneth and he repeated the same words which he said here in Court. Naturally, he could not take the responsibility of such a report so he passed it on. He did not have a copy of the reply to the email. The witness confirmed that the accused was no longer working with them.

On the 29th July, 2014 **Noel Zammit** gave evidence and exhibited two (2) emails which were marked as document X and Y. These were the same emails he spoke of in his previous testimony given on the twelfth (12th) of June 2014. He confirmed that he reported this complaint to his superior Kenneth Cutajar on the twenty seventh (27th) May, 2013 at eleven fifty pm (11:50pm). He also confirms that before sending this email to Kenneth he had spoken to Kenneth on the telephone. He confirms that after this report was presented the accused was removed from the roster with immediate effect.

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Asked if with regards to this report he sent the accused and the complainant to speak to Kenneth he said no he did not. As far as he knew Kenneth took the decision to remove the accused from the roster on the basis of the report. He confirmed that his job was that of a supervisor of the restaurant. He did not witness any of the events reported in the sense of physical contact. This happened on Sunday evening and he immediately informed his superiors by phone.

On the 29th July, 2014 **Kenneth Cutajar** gave evidence and explained that he is employed as an HR Manager for CaterersEssence, it is a catering company and they run various kitchens in a number of offices. Amongst a number of them was St. Georges Pub where the alleged incident took place. He remembered that Noel Zammit had given him a phone call reporting that one of their employees, Svetlana, had been harassed. He also remembered that Noel Zammit had mentioned Ali who was employed as a steward with the company. Noel had reported to him that the accused had cornered her and had touched her breast. He remembered that he had spoken to Noel and asked him if Ali was still on the premises and he had confirmed that he had left. He asked him to meet him up the following morning and also asked him to forward a written report. He immediately contacted Svetlana too whom he also met the following morning and she described the ordeal that she had gone through. He also called Ali however he did not reply to his calls. Then he took a decision that Ali should not report to work any longer. A couple of days later Ali reported to his office, he met up with Ali and explained to him the situation. He had also told him that he was contacted by the Police and as things were he wasn't allowed to carry on with his employment. A few hours later he called him and told him that his employment with the

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company had been terminated. He is recognising Mr. Ali as the accused present in Court.

Asked whether he had taken any action upon the report which was made to him he replied in the affirmative. He immediately asked to speak to Ibrahim Ali, however he was informed that at that moment in time Ali was no longer on the premises. He tried to contact Ali however with no success. Asked if he had any other reports of this nature he said yes he had however the accused was not involved. He had no harassment reports with regards to the accused however he was aware of the fact that the accused spoke to women on the premises.

He was not aware of any other incident which possibly could have taken place between the accused and the complainant. The accused was still on probation when he terminated his employment. He did not feel that such a report should reflect well on their employees. When he spoke to the complainant he knew that she was not feeling well, she was out of sorts and did not want to return back to work. He also remembers that the complainant had come to speak to him with her mother and he had ascertained to them that Ali will no longer return to work.

On being shown two (2) documents X and Y which are two (2) relevant emails he confirmed that one of these emails was written by himself whilst the other was written by Noel Zammit. He terminated the contract with the accused because he felt it was not the way that the company should proceed with its employees.

He also spoke to two (2) other employees who had witnessed what had happened in particular. They had confirmed to him the report of Svetlana, they witnessed the incident in question. These employees are female. Svetlana left her employment on her own free will, she resigned. They had no problems with Svetlana who happened to be an exemplary employee.

On the 6th October, 2014 **Inspector Luke Bonello** gave evidence and stated that on the twenty sixth (26th) of May, 2013 at about twenty past ten (22:20) in the evening a certain Svetlana Axiaq reported at the St Julian's Police Station that she was sexually assaulted or molested by a colleague of her namely Ibrahim Ali. Miss Axiaq described what Mr Ali had done and subsequently on the following day he spoke with Svetlana and she recounted what had happened in the presence of her mother.

Mr Ibrahim Ali was subsequently arrested upon his orders and on the twenty seventh (27th) of May which was the following day at about half past four (16:30) in the afternoon Mr Ibrahim Ali released a written and signed statement in the presence of PC 897 David Gauci. In which statement he said that whatever he had done to Miss Svetlana was only as a joke and he had no intention to molest her sexually in any way and what he had done to her he usually does with the other female colleagues.

Before releasing his statement Ibrahim Ali was given the usual warning and the right to remain silent and he was also informed with his right to seek legal advice which right he opted to forfeit.

Asked by the court with particular reference to the statement released by the accused if in actual fact the accused had said that what he had done was a joke he said that when he confronted the accused with the allegation made by Svetlana regarding him touching her breast and trying to remove her shirt he replied that he did not do so but subsequently in another question when he was asked about his sexual advances with regards to Svetlana he said that when they are at work he jokes with the other girls that they are his wife and he stated that Svetlana had asked him how many women did he want to marry. He further explained that the accused said that he had told Svetlana that the black girl is his future wife but all the other girls were also his wives as he was joking. If he was not mistaken he believed that the accused had said in his statement that he had touched her shoulders something like that, but he never admitted to having touched her breast and private parts.

On the 10th November, 2014 **Rebecca Falzon** gave evidence and said that she used to work with the La Vallette Resort on April, May, two thousand and thirteen (2013) as a waitress. Asked if she was working on the twenty sixth (26th) May, two thousand thirteen (2013) and the days preceding such date she said yes she was working. She remembered that on the day in question the dishwashers were not working so they needed two (2) dishwashers to wash the plates by hand and naturally subsequently they also needed two polishers so that they could dry the plates in time for them to go outside. She remembered that Svetlana and herself together were polishing the plates and from about six thirty (6:30) in the evening till the evening. Asked if the accused was present with them, she said yes he was washing the plates.

Asked by the Court if they were talking at all, she said yes they were talking casually all three (3) of them between them. Asked by the Court if at any time that evening Svetlana appeared to be apprehensive or told me anything negative in regards to the accused, she said no she did not. She was polishing the plates which the accused was washing on that evening, whereas Svetlana was polishing the plates that somebody else was washing. Asked if at any moment in time she heard Svetlana scream or oppose to any actions, she said no.

She explained that the accused used to joke all the time and they were all friends. He never touched her or any other girls as far as she knows. She used to work at the La Vallette Lounge from two thousand eleven (2011) to two thousand and fourteen (2014). In fact when she started her employment the accused was already there working, however he left before she left. When she said that the accused used to joke she means that he used to joke with everybody casually not just with the girls. However it is not true that the accused used to joke in a sexual manner or double sensed. Asked if at any moment in time she left the room where they were, she answered that possibly she could have left to smoke a cigarette. However when she left the room there were other people in the same room being waiters and the other dishwasher, besides the accused and Svetlana.

Asked if there were any other employees who had a different coloured skin, she said yes there was another female. Asked if she knew about the relationship she had with the accused she said no, she did not know.

However the accused did joke and refer to every woman as his wife. For them it was a usual joke, it was an inside joke as they were working together for a long time. Asked if he was the only male working with them he said no he wasn't and the jokes which he used to share he used to share them to everybody between them. Asked if she remembers how Svetlana's behaviour used to be when Ali used to joke, she answered that she does not recollect. She never noticed anything abnormal with regards to Svetlana.

Asked if she is still friends with the accused, she answered more or less. They rarely contact each other. Asked if she knows anything about the personal life of the accused, she said no she does not know. She does not know if he is still in contact with the lady who has coloured skin too. If she's not mistaken her name was Rita and she is foreign as far as she knows. She stated that he does not meet Rita at all. She hasn't seen her for over a year and she does not meet with Ali either. Her contact is via Facebook or mobile and it is for no particular reason just friendship.

On the 12th February, 2015 **WPC 291 Amanda Azzopardi** gave evidence and stated that she remembers that the complainant had alleged that the accused had touched her breast. She did not see any signs of bruises because the complainant was wearing clothes however she brought no thorn clothes and made no reference to any injuries she sustained. However the complainant was emotional.

On the 12th February, 2015 **Noel Zammit** gave evidence and said that he works as a supervisor in St. George Hotel and this by supervising the

goings on the restaurant. He confirmed that way back in May two thousand and fourteen (2014) Svetlana had spoken to him about certain acts of the accused. He remembers that he was in the restaurant and Svetlana Axiaq approached him and told him that she needed to speak to him in the office. He subsequently went into the office to see what had happened. She told him that the accused had spoken to her about sex and had actually touched her shirt. He did not see anything in particular. Asked by the defence which part of the shirt he touched he indicated near the shoulder blades. Asked if there were other employees at work on the day in question he said that he did not remember however he imagined that there were other people in the restaurant. I remember that in fact Svetlana Axiaq on that day was a bit exited.

In re-examination he was asked when she came to speak Svetlana Axiaq was alone or in the company of third parties he remembers that she was alone and then he approached the accused about what was alleged in his regards and he told the witness that he was joking. When Svetlana spoke to him in the restaurant Ali was not around. However when she spoke to him in the office Ali was passing by, he called him and he said that he was joking with her and he said that he was joking in the presence of Svetlana.

The accused chose not to give evidence as was his right to do but the court noted that he had released a statement voluntarily on the 27th May 2013 and consequently regard must be had to such a statement exhibited in these proceedings at fol 5.

The accused said that he had been living in these islands for eight years and that he was planning to get married to his girlfriend who works with him. He confirmed that he had a son living in Italy. He confirmed that he worked as a supervisor of the dishwashers of St Georges Park Hotel in St Julians and had been working in that post for four months. Asked if he knew Svetlana Axiaq he said he did. Asked if it was true that on the eve he had removed the shirt of Svetlana and touched her breast he categorically denied such an allegation. Asked if it was true that he had asked Svetlana to have sexual intercourse he again says that is was not true. He says that on that evening his girl friend was at the same place of work and that there were many other waitresses and that their boss was coming and going. Asked if it is true that he had on another occasion asked her to sleep with him he replied that at work he is always joking in fact he said that the black women was his wife and the other women were also his wives. He said that Svetlana herself had asked him to joke with her and that they used to all pat each other on the back and that she had done the same to him three days prior. He explains that three days prior the waiter had told him that Svetlana had said that he had touched her and he could not understand why she said that when she herself had patted him on his back. He explained that the waiter told him to be careful of Svetlana and the day before she wanted to speak to him and he told her to move away since he did not want problems and he pushed her slowly and she started to cry and left. He said that he was not alone when this happened even his boss Arthur was present. He denied ever having touched her breast.

The Court heard the prosecution, lawyer of the *parte civile* and the defence lawyer make their oral submissions on the sitting of the 12th March 2015.

Considerations.

The Court feels that before entering into the merits of the case in question, it should first of all discuss and consider in particular the burden and degree of proof that has to be placed before an accused can be found guilty.

The general rule with regard to the burden of proof is that he who asserts a fact must prove it.

In the words of **Manzini**:

"Il cosi della onere della prova, cioe il carico di fornirla spetta a chi accusa."

The result is that in criminal proceedings, the general burden of proof will rest upon the prosecution throughout the proceedings, although the burden of proving particular facts in issue may well lie on the defense from time to time, such as when the defense must prove and establish the defense of insanity.

It is a fundamental principle of criminal procedure that a person accused of any crime is innocent until proved guilty as is enshrined in section 40(5) of the Constitution of Malta. This was stated in the case **Police vs Michele**

Borg, decided by the Appeal Courts on the 13th May, 1936, whereby it was held that:

"Illi skond il-principju u s-sistema tal-ligi u procedura penali taghna imfasslin fuq dawk ta' l-Ingilterra u li huma strettament d'ordine pubblico,"
the accused is presumed innocent until proved guilty.

What does the presumption of innocence really mean? It means that the accused does not have to prove his innocence; the prosecution must prove his guilt.

Since it is the prosecution which makes the allegation of guilty, the general onus of proof, that is establishing the guilt of the accused, rests on the prosecution, who must therefore prove every constituent of the particular offence. The burden of proving the guilt of the accused must be absolute, beyond reasonable doubt, and if there remains some reasonable doubt, the prosecution has not discharged its burden and the jury must acquit.

Speaking of the degree of cogency which the evidence must reach in a criminal case before the accused can be convicted, **Lord Denning** said:

"That degree is well settled It must carry a high degree of probability.... If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence

'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice".

This is so because every precaution must be taken against the risk of convicting an innocent man.

The prosecution and *parte civile in* their submissions stated that circumstantial evidence proved that it was the accused who committed the crimes under examination because the evidence of the complainant was corroborated by circumstantial evidence.

With reference to this point in issue, reference should be made to what was said in the judgment delivered by the Court of Appeal on the 9th June 1978 in the names **Police v Dawood Sayed Dawood Abd el Kaader** where the renowned judge made reference to what was said by Lord Normand in the case in the names **Teper v The Queen** [1952] AC 480, 489.

As was held in the case decided by the Court of Appeal on the 17th June 1998 in the names **Police v David Gatt**:

"Provi cirkostanzjali huma bhal katina li tintrabat minn tarf ghal tarf b'sensiela ta' ghoqiedi li jorbtu ma' xulxin u li flimkien iwasslu fl-istess direzzjoni."

It is imperative that when a case depends solely on circumstantial evidence, that such circumstantial evidence has to be univocal not equivocal or ambiguous. It has to be evidential evidence which links the accused and nobody else but him, that he was the guilty person and that all the evidence that was brought forward against him is incompatible with his principles of innocence.

This Court had the opportunity to make an appreciation of most of the witnesses that gave evidence in this case and this in terms of **Section 657 of the Criminal Code**, and thus it lived through the collection of evidence brought forward by the prosecution, unlike other courts where the evidence is gathered before an inferior court. The Court took note of the conduct of the witnesses, the way they gave evidence, the interest they had in what they said and if what they said, reflected the truth and in particular if there were any inconsistencies.

The complainant first made her report to WPC 291 and this on the 26th May 2013 at about 10.20 p.m. as can be evidenced from the PIRS report exhibited in these proceedings at fol. 7. Herein she reported that a colleague of her at work who does the same job as hers and has a dark colour skin attempted to use force against her by touching her private parts (*"hebb ghaluha billi mess il-partijiet privati taghha"*). She explained that whilst she was drying some plates and Ali was washing others he moved next to her and then tried to persuade her to have sex with him. She said that at that moment in time he tried to remove her shirt, and she ended up with her under vest and he started to touch her breasts. She added that she pushed him and told him that she was not interested and

subsequently left from work. (*"Svetlana qalet li wara dan l-accident hija telqet minnufih mix-xoghol"*).

She also reported that this was the second time he has asked her to have sex with him and when she was asked why she did not report the other case she said that she had spoken to Noel the head waiter who in turn told her that he would speak to him.

In court on the 5th July 2013 Svetlana Axiaq testifies and says that the accused had already touched her breasts and hurt her and pinched her and she had told her mother who told her to speak with Joseph Madison the General Manager and she said she did and Mr Madison met them both together and the accused had apologised for this incident. It must be pointed out however that Mr Madison did not testify to corroborate this evidence and the accused made no mention to it. She said that the accused had admitted he had touched her breasts and was sorry and thus apologised. However she went back to work. She then explained the report in question and said that the accused approached her opened her shirt touched her breasts and said with reference to her breasts 'I want that for me'. He told her to take off her clothes though she was frightened. She said that he had his zip down and that his belt was unfastened. She started pushing him away and he repeated the words again with reference to her breasts *"I want it not for you that's for me"*. She started to push him away and does not know how she managed to escape and went to look for Arthur. She said she did not find him but found Noel the bar man. She said she was crying and in shock. She said that he noticed she was frightened

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and she told him that it was the second time that he approached her and touched her.

It does transpire from the above that she was not consistent in her evidence. She reported to the police that she ended up in her under vest because the accused removed her shirt, then in court she says that he tried to remove her shirt. She says in her report to the police that she left work straight after the incident but in court she says that she went to look for Arthur and found Noel.

If we were to analyse what Noel says he said that it is true that the complainant spoke to him though he says that she reported he was talking to her about sex and that he touched her shirt. Asked if she told him that the accused had touched her private parts he answers in the negative and insists that she told him only that the accused touched her shirt. Asked if he spoke to the accused about this he said he did and that the accused admitted he had touched her shirt and that they were speaking about sex. He also says that he was not alone as there were other employees at work. He confirms that Svetlana was not crying and was not emotional. She was normal. In fact he says that she told him that the accused had touched her upper part of the shirt just beneath her shoulders. He says that the complainant did not allege that the accused had touched her. In fact he says that she explained that he touched her near her shoulder blades (fol. 91).

Also the complainant reported to the police that the accused had hurt her and pinched her and that she was bruised though WPC 291 says she saw

no bruises and furthermore no medical certificates were exhibited in these proceedings. In fact WPC 291 says that the complainant made no reference to any injuries that she might have sustained. However in her testimony in court Svetlana says that the accused hurt her and gave her a bruise "*Heqq weggghani u telaghtli tbengila*".

Arthur Agius denies that Svetlana ever spoke to him about the accused even though the complainant says that she had spoken to an Arthur. The prosecution brought forward no other Arthur to testify so this could be indicative that it wanted to corroborate her evidence which did not happen.

Kenneth Cutajar gave evidence and said that Noel Zammit had reported to him that Svetlana had reported to him that the accused had touched her breasts (even though in court Noel Zammit denies that Svetlana ever reported this to him). He says that he had spoken to her witnesses who allegedly had witnessed this incident though the prosecution failed to bring forward these two witnesses who in fact were not even indicated by name. These two witnesses could have thrown better light on what had actually happened on the day in question if anything at all had happened.

In the light of all these contradictions the court does not feel it is in a position to confirm the report made by the complainant and consequently in the light of all these contradictions the court feels that the prosecution failed to prove its case to the degree required by law.

The Court saw all the relevant sections at law in particular Section 209 of Chapter 9 of the laws of Malta and finds the accused IBRAHIM ALI not guilty of such a charge and acquits him accordingly.

Due to the fact that the Court found the accused not guilty of the charge brought forward against the accused it does not uphold the request of the prosecution to issue a protection order in favour of the complainant.

< Final Judgement >

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