COURT OF MAGISTRATES (GOZO)
AS A COURT OF CRIMINAL JUDICATURE

Magistrate Dr. Neville Camilleri B.A., M.A. (Fin. Serv.), LL.D.

The Police
(Inspector Frank Anthony Tabone)

vs.

OMISSIS

Number: 6/2012

Today the 15th. of November 2017

The Court,

Having seen the charges[1] brought against the accused **OMISSIS,**

charged with having on the night between the 14th. and 15th. October 2011, with several acts committed even if at different times, in Gozo constituted violations of the same provision of the law, and were committed in pursuance of the same design:

1. with the intent to harm the person of OMISSIS accused such person before a competent authority with an offence of which she knew that such person was innocent (Article 101(1) of Chapter 9);

[1] *A fol.* 61 *et seq.*

2. on the same date, time and circumstances fraudulently caused any fact or circumstance to exist, or to appear to exist, in order that such fact or circumstance may afterwards be proved in evidence against the person of OMISSIS, with the intent to procure such person to be unjustly charged with, or convicted of any offence (Article 110(1) of Chapter 9);

3. on the same date, time and circumstances gave to the Executive Police an information regarding an offence knowing that such offence has not been committed, or falsely devised the traces of an offence in such a manner that criminal proceedings may be instituted for the ascertainment of such offence to the detriment of OMISSIS (Article 110(2) of Chapter 9);

4. on the same date, time and circumstances with the purpose of destroying or damaging the reputation of the person of OMISSIS, offended such person by words, gestures, or by any writing or drawing, or in any other manner (Article 252(1)(2) of Chapter 9);

5. on the same date, time and circumstances insulted the person of OMISSIS (Article 339(1)(e) of Chapter 9);

6. on the same date, time and circumstances made improper use of an electronic communications network or apparatus (Article 49(c) of Chapter 399).

Having seen the documents exhibited and all the acts of the proceedings.

Having seen that the Attorney General gave his consent in terms of Section 370(4) of Chapter 9 of Laws of Malta for this case to be dealt with summarily (Doc. "B" – *a fol.* 10).

Having seen that the accused did not object for this case to be dealt with summarily (*a fol.* 11).

Having heard the evidence brought forward by the Prosecution and the injured party.

Having heard the testimony of the accused (*a fol.* 245 *et. seq.*).

Having seen the written Note of Submissions filed by the Prosecution on the 10th. of July 2017 (*a fol.* 293 *et seq.*).

Having seen the written Note of Submissions filed by the injured party on the 13th. of July 2017 (*a fol.* 301 *et seq.*).

Having seen the written reply of Submissions filed the defence on the 19th. of September 2017 (*a fol.* 317 *et seq.*).

Having heard, during the sitting of the 4th. of October 2017, final oral submissions on behalf of the injured party and the accused.

Having seen that this case was being heard together with cases bearing the names **The Police vs. OMISSIS** (Case Number OMISSIS) and **The Police vs. OMISSIS** (Case Number OMISSIS).

Having considered

That reference will be made to the most salient testimonies heard and documents exhibited during the proceedings.

That, during the sitting of the 22nd. of February 2012, **OMISSIS** (*a fol.* 12 *et seq.*) and said that on the 18th. of October 2011 he filed a complaint regarding the accused (his ex partner). He made reference to a judgment delivered by the Court of Appeal on the OMISSIS and states that this judgment specified that his child could sleep over at his place on the second Friday and last Friday of each month. He specified also that the 14th. of October 2011 happened to be the second Friday of the month and whilst the child was with him, around 7pm he received a phone call from the Rabat Police Station and was informed by the Police Sergeant that the accused was at the Police Station and that she was stating that he had breached the condition listed in the judgment delivered by the

Court of Appeal. He states that he received another phone call around 00.15am and was asked about his well-being and the well-being of the child, saying: *"u l-mistoqsija fin-nofs tal-lejl kienet, "inti kollox sew hemmhekk? It-tifel qieghed f'xi periklu? Inti qieghed tiehu hsiebu t-tifel?" Dak it-tip ta' mistoqsijiet. […] Qalli, "jiena qed incempel fuq is-sigurtà tieghek u tat-tifel". Qalli, "intix qed tiehu hsiebu sewwa""* (*fol.* 13). He got to know that the accused had mentioned that he suffered from a medical condition, and specifies that she mentioned blackouts, which blackouts were not mentioned in the previous phone call. He denies ever having any blackout and says that he even has a licence as a captain and has been been on boatrips to Greece and that the accused had even joined him on some boatrips specifying: *"jien mwegga' u din fil-konfront tieghi hi intenzjonata biex taghmilli hsara"* (*a fol.* 15), saying further: *"fuq il-malafama li ghamiltli din hi car li hi vvintatha. U jekk wiehed jara s-sekwenza tal-istatements kif saru u x'saru, hi haga vvintata. X'hin sar l-ewwel rapport lill-Pulizija bejn is-sitta u s-sebgha (6.00-7.00) ma ssemma' xejn blackouts"* (*a fol.* 15). He denies suffering from any condition and says that he takes no medication and never did. He exhibited a medical certificate dated 18th. of February 2012 marked as Doc. "OMISSIS 1" (*a fol.* 21), a decree dated OMISSIS marked as Doc. "OMISSIS 2" (*a fol.* 22 *et seq.*), a decree dated OMISSIS marked as Doc. "OMISSIS 3" (*a fol.* 24), and a declaration dated 15th. of October 2011 marked as Doc. "OMISSIS 4" (*a fol.* 25). He says that on Saturday morning he received another call from another Police Sergeant, saying: *"nircievi telefonata ohra addizzjonali mit-tielet surgent differenti jinsisti li dak il-hin stess nitla' l-Ghassa ghax hemm bzonn li naghti stqarrija biex it-Tnejn filghodu jittiehdu prodecuri kontra tieghi. Qalli, "hemm ordni. Fuq din ma nistghux ma naghmlux". […] Baqa' jinsisti; dan kien is-Surgent Portelli. Qalli hawn pressjoni kbira fuqhom, fuq is-surgenti, biex jittiehdu proceduri kontra tieghi immedjatament. Qalli li saru telefonati ghand l-Appogg, saru telefonati lill-headquarters tal-Pulizija Malta, dak li qalli. U kelli bilfors naghti stqarrija halli t-Tnejn filghodu mill-ewwel jittiehdu proceduri kontra tieghi"* (*a fol.* 17). He said that eventually PS Portelli and PS Attard went to his place and he typed the declaration Doc. "OMISSIS 4" (*a fol.* 25).

At this stage, the Prosecution exhibited four documents marked as Doc. "FT 1" to Doc. "FT 4" (*a fol.* 26 *et seq.*) OMISSIS says that Doc.

"FT 1" (*a fol.* 26) is his first complaint dated 18th. of October 2011, Doc. "FT 2" (*a fol.* 27) is an additional letter dated 1st. of December 2011, Doc. "FT 3" (*a fol.* 28 *et seq.*) is an additional letter dated 15th. of November 2011, and Doc. "FT 4" (*a fol.* 34 *et seq.*) is a statement released by himself to the Police. He specifies that the date 10th. of January 2007 *a fol.* 35 is not correct and that the correct date should be 8th. of January 2007. He once again denies having any condition or suffering from any blackouts. Asked if the accused has ever produced a document substantiating this, he replies: "*Assolutament le. U mhux hekk biss, fil-proceduri kollha tal-kustodja, dan qatt ma ssemma'. Hemm file fih pied (1') karti u dan qatt ma' ssemma'*" (*a fol.* 20).

During the sitting of the 6th. of June 2012, **OMISSIS** exhibited the following: (a) copy of documents contained in the Court of Appeal file regarding Application Number OMISSIS (including a decree given on the OMISSIS) marked as Doc. "OMISSIS 5" (*a fol.* 76 *et seq.*), a timeline of events marked as Doc. "OMISSIS 6" (*a fol.* 84 *et seq.*), charge-sheet marked as Doc. "OMISSIS 7" (*a fol.* 86) and another charge-sheet (including an affidavit) marked as Doc. "OMISSIS 8" (*a fol.* 87 *et seq.*). He says that in the latter two cases he was found not guilty.

During <u>cross-examination</u>, which was held during the sitting of the 6th. of July 2016 (*a fol.* 228 *et seq.*), he says that access to the child was regulated by means of a decree *pendente lite* given during the first Case OMISSIS. Subsequently, a judgement was given by the Court of Appeal in October 2011. He says: "*sa dik is-sentenza, l-overnight stays kienu fid-decizjoni tal-Ewwel Qorti, tal-Prim'Istanza, imma billi kien hemm l-appelli […] kienu ghadhom ma gewx in effett. Jigifieri, halli nirrispondik direttament, l-overnight stays iddahhlu mill-Qorti fl-elfejn u ghaxra (2010), minn ghalija f'Gunju kien, jew Mejju jew Gunju jigifieri fid-decizjoni tal-Ewwel Qorti, ta' Ghawdex […]. Imma billi kien ghad hemm appelli dwar l-access, sad-decizjoni tal-Qorti tal-Appell kien ghad m'hemmx overnight stays, ma kienx hemm provvediment ghal overnight stays*" (*a fol.* 229). When asked to confirm that the judgment of the Court of Appeal was not clear so much so that parties agreed for clarification, OMISSIS replies that this is not correct specifying that

the access for overnight stays was stipulated by the First Court in May or June of 2010 and that the decree regarding overnight stays was not changed by the judgement delivered by the Court of Appeal in October 2011. He makes reference to the decree delivered by the Court of Appeal on the OMISSIS (Doc. "OMISSIS 2" – *a fol.* 91 *et seq.* of Case No. OMISSIS). He states that for him the judgment delivered by the Court of Appeal was crystal clear and that he requested clarification because he kept the child for overnight stays and the accused reported this to the Police three times. He says that a meeting was held with the Judge and that the accused (or her lawyer) failed to appear. When asked if, following this meeting, there had been other problems regarding access to the child, he replies that the accused was causing problems because she was giving a different interpretation. He also says that the accused was also causing problems regarding months which had four/five Fridays. He says that the merit of the accused's report between the 14th. and the 15th. of October 2011 was the overnight stay. He says that it is not true what the accused said during her third phone call when she said that the injured party suffered from a medical condition (making reference to "blackouts") and that it is not true that his family suffers from this condition. He denies suffering from any condition or from blackouts. He says: ""*dak tweggaghni*"" (*a fol.* 234) and says: ""*Li ngurjani li kienet qed timplika li jien m'inhiex qed niehu hsiebu*"" (*a fol.* 234). He testifies: "*l-ingurja hi mhux biss ghalija direttament li jien insofri minn xi kondizzjoni, hija ghall-[…] familja*" (*a fol.* 234). He denies ever going to a person referred to as Profs. Mifsud, saying: "*int qed tghidlu professor, ma nafx, imma hu xi tip ta' tabib – lili qatt ma ezaminani, lili qatt ma kellimni*" (*a fol.* 235). He explains that during separate proceedings concerning the child, the accused had presented a certificate drawn up by a certain Mifsud and that it was the first that he (OMISSIS) had seen this certificate. He says that he never mentioned this Mifsud, adding that he had initiated proceedings in the Medical council since Mifsud made a statement in this certificate regarding his condition regarding blackouts when he had not examined him.

That, during the sitting of the 22nd. of February 2012, **PS 676 Edelon Spiteri** testified (*a fol.* 37 *et seq.*) that on the 15th. of October 2011 at

around ten past midnight (00.10am) he received a phone call at the Victoria Police Station where the accused reported that she was worried about the safety of her son and that she stated that she was aware that there was something wrong with the OMISSIS family and added that OMISSIS himself suffers from blackouts. He says that he phoned OMISSIS who informed him that his son was fine and was sleeping normally. He says that some days later, OMISSIS filed a complaint to initiate proceedings against the accused. He exhibited a copy of the report drawn up by him and other sergeants, which report was marked as Doc. "ES 1" (*a fol.* 39 *et seq.*). When he was asked what was this "*something wrong with the OMISSIS family*", he replied that he could not understand not even himself, saying also: "*She said something about they don't stay at each other's place and they don't sleep over; something like that she was referring but I didn't understand the point*" (*a fol.* 38). Asked who was the accused referring to when she said "OMISSIS family", he replies: "*close of kin, himself, his sister, mother*" (*a fol.* 38).

During cross-examination, which was held during the sitting of the 3rd. of February 2015 (*a fol.* 210 *et seq.*), PS 676 Spiteri says that the accused appeared worried about her son. Asked if the tone of the accused's voice was a panicked one, he says that he cannot recall well the exact tone of her voice.

During re-examination (*a fol.* 211), he says that the accused wanted the Police to go to the injured party's place and check personally on her son. He says that after contacting OMISSIS, he called back the accused and informed her that the child was fine and that from their side they could do nothing more.
That, during the sitting of the 22nd. of February 2012, **PS 1233 John Attard** also testified (*a fol.* 42 *et seq.*) saying that on the 14th. of October 2011 at about 6.45pm, the accused called at the Victoria Police Station and reported that her ex-partner did not hand over their son at 6pm as per judgment of the Court of Appeal. He says that the accused insisted with the Police that they go to OMISSIS's place and bring over her son. He says that he phoned OMISSIS on the phone who quoted some sections from the judgment and insisted that he was right. He says that the next day he, together

with PS 1407, called at OMISSIS's residence and OMISSIS prepared a statement in writing. He confirms his signature on this statement (Doc. "OMISSIS 4" – *a fol.* 25). He testifies that a few days later, on the 21st. of October, OMISSIS called at the Victoria Police Station and exhibited document marked as Doc. "JA 1" (*a fol.* 46). He also confirms what was written by him in the police report marked as Doc. "ES 1" (*a fol.* 39 *et seq.*).

He says that the accused had called personally at the Police Station and some time later her lawyer OMISSIS also called at the station, saying that he was waving his hands and said: *""just go and bring her son back!""* (*a fol.* 44). He says that the accused had told him that she called the 179 Helpline and was informed that the Police were meant to go and bring her son over. He says that the accused insisted that she was right about the judgment. He also says that around 9pm someone called from the Police General Headquarters and told them to go to the residence of OMISSIS to check if the son was well kept at OMISSIS and says that he told them that he knows that OMISSIS has a good character and does not have to go and check.

That, during the sitting of the 22nd. of February 2012, **PS 1407 Frank Portelli** testified (*a fol.* 47 *et seq.*) that on the 14th. of October 2011, the accused called at the Victoria Police Station and reported that her ex-partner OMISSIS did not hand over their son at 6pm. He says that the accused showed them a judgment delivered by the Court of Appeal in October 2011 and that the accused stated that since court proceedings had started, her son was three weeks old and never slept at his father's place. He says that the accused requesed them to go and bring her son from her ex-partner's house and she was informed that they can only lodge a report and charge OMISSIS in Court. He says that OMISSIS insisted that he was right, saying also that on the 15th. of October 2011, he, together with PS 1233, called at the residence of OMISSIS and he gave them a written statement, copy of which is marked as Doc. "OMISSIS 4" (*a fol.* 25). He says that on the 21st. of October 2011, OMISSIS called at the Victoria Police Station and said that on the 17th. of October 2011 he filed an application for clarification regarding sleepovers and on the

18th. of October 2011 the Court of Appeal decreed that sleepovers had not been changed. He confirms the updates drawn up by him on Doc. "ES 1" (*a fol.* 39 *et seq.*).

He says that the accused went in person at the Victoria Police Station and that later on her lawyer OMISSIS went as well. He says that the lawyer told them they were meant to go and bring over the accused's son. He also says that the accused said the same thing, adding that she had called Helpline 179.

That, during the sitting of the 16th. of May 2012, **Dr. Joseph Vella (**representative of the Gozo General Hospital) testified (*a fol.* 54) that according to their records there is no file with the name of OMISSIS (holder of Identity Card Number OMISSIS).

That, during the sitting of the 16th. of May 2012, **Dr. John Xuereb Dingli** also testified (*a fol.* 55 *et seq.*) regarding Doc. "OMISSIS 1" (*a fol.* 21). Whilst confirming the contents of this document, he says that OMISSIS had asked him to state whether he was ill from any condition or not. He testifies: *"I had already filled in a certificate showing same most of the things contained in two thousand and eight (2008)"* (*a fol.* 55). He says that he has known OMISSIS since 2001 and that before he had been taking care of his parents, adding that apart from being a patient of his, he is also his friend. He says that over eleven years, he went with OMISSIS for three times for three hours on his boat saying that OMISSIS was able to manoeuvre the boat on his own which is at least 40'.

During <u>cross-examination</u>, which was held during the sitting of the 3rd. of February 2015 (*a fol.* 213 *et seq.*), when he was asked if OMISSIS suffers from blackouts, he replied in the negative. He also says: *"Never. I mean considering what he does it would be, he goes sailing single-handed; he can't possibly suffer from blackouts"* (*a fol.* 213). He also says: *"And he would have told me about them because that is very dangerous to have if you are on your own on a boat"* (*a fol.* 213). Asked how regularly does OMISSIS visit him, he replies: *"Fairly regular. Because last years he has, the frequency has got come less. Because I have been finding him healthy all the time and I don't push to*

him to do more than two yearly visits. So basically it's, so it's been at least I think approximately two years that I've seen him" (*a fol.* 214). He says that OMISSIS is totally healthy and says that these visits were on a check-up basis and not on an illness basis.

That, during the sitting of the 16th. of May 2012, Prosecuting Officer **Inspector Frank Anthony Tabone** also testified (*a fol.* 64 *et seq.*) regarding what he had been informed on the 14th. of October 2011 by PS 1407 and PS 1233 as to what the accused had reported. He also testifies about what the accused had reported later with PS 676 Edelon Spiteri. He says that on the 18th. of October 2011, OMISSIS reported at the Victoria Police Station and filed a complaint to initiate criminal proceedings against the accused in view of her reports. He says that on the 23rd. of December 2011, the accused was spoken to by himelf and that she released statement exhibited and marked as Doc. "FT 5" (*a fol.* 68 *et seq.*). He says that in her statement, the accused insisted that OMISSIS suffers from blackouts.

During cross-examination, which was held during the sitting of the 21st. of October 2014 (*a fol.* 203 *et seq.*), he says that OMISSIS had told them that the accused had lodged a false report in relation to the alleged blackouts he suffered. He says that they proceeded against the accused since she alleged that the injured party suffered from blackouts and because she lodged a false report that the injured party was not taking care of his son. He says: "*She told me there were issues on the decree and were not clear enough*" (*a fol.* 206). The accused always told him that she was doing what her lawyer OMISSIS told her to do.

That, during the sitting of the 16th. of May 2012, **WPC 58 Lorita Buhagiar** also testified (*a fol.* 70 *et seq.*) saying that she was present when the accused released the statement marked as Doc. "FT 5" (*a fol.* 68 *et seq.*). Asked if at some point the accused expressed concerns about her understanding of what was happening or what was written in the statement, she replies in the negative. She confirms that the accused was given all the time to read the

statement, that she had consulted with her lawyer before and there were no concerns, *"as far as I know"* (*a fol.* 70).

That, during the sitting of the 30th. of October 2012, **Dr. Joseph Grech** on behalf of Vodafone plc testified (*a fol.* 95 *et seq.*) as regards to the calls made on the 14th. of October 2011 from mobile number registered in the name of the accused. He exhibited a document regarding these calls which document is marked as Doc. "JG 1" (*a fol.* 97). Asked about the 15th. of October 2011, he replies: *"And the fifteenth (15th) but there weren't any calls. We have only found those with regards with fourteenth (14th) of October"* (*a fol.* 96).

That, during the sitting of the 30th. of October 2012, **Emanuel Cini** on behalf of GO Plc testified (*a fol.* 98 *et seq.*) that they have got no mobile services in the name of the accused or on her identity card number. He exhibited a document marked as Doc. "EC 1" (*a fol.* 100) containing a breakdown of calls from fixed line OMISSIS from 6pm of the 14th. of October 2011 until 11.00am of the 15th. of October 2011. He states that fixed line number OMISSIS is registered in the name of OMISSIS, of OMISSIS and exhibited a document marked as Doc. "EC 2" (*a fol.* 101).

During the sitting of the 5th. of March 2013, the Prosecution exhibited: (a) a true copy of Application Number OMISSIS in the names **OMISSIS vs. OMISSIS** marked as Doc. "JA 2" (*a fol.* 104 *et seq.*) and (b) a true copy of Application Number OMISSIS in the names **OMISSIS vs. OMISSIS** marked as Doc. "JA 3" (*a fol.* 128 *et seq.*).

That, during the sitting of the 5th. of March 2013, **OMISSIS** testified (*a fol.* 182 *et seq.*) saying that the accused is her daughter. She says that telephone number OMISSIS is the number found in the property where she lives, saying that she lived in OMISSIS. She confirms that the accused lives with her. She does not recall if the accused made use of the mentioned telephone number on the night of the 14th. of October 2011 but says that the accused uses the phone whenever she wishes. She recalls that the accused had phoned the

Police when, according to her, OMISSIS had not followed the Court judgment but does not remember the date.

That, during the sitting of the 9th. of November 2016, the accused **OMISSIS** testified (*a fol.* 245 *et seq.*) saying that she had a relationship with the injured party, that on the OMISSIS they had a child together and that three weeks after the injured party kicked her out of the house. Asked whether the relationship with the injured party was good or bad, she replies that at the time it was not good. Asked what happened after the birth of the child, she replies: *"He changed the locks, kept hold of my baby, and wouldn't let me get back in"* (*a fol.* 246). She says that the injured party got hold of the baby when she was breast-feeding him and that he kept saying that he was going to give him formula. She says that she tried to calm the injured party to see if he would let her back in and says that she walked away so that may be he would calm down and that nobody could calm him down. She says that she went to her lawyer OMISSIS who told her that she needed to make a police report in order to get the Courts to return her baby. She says that she filed the police report and she took actions to take the baby back. Asked if she remembers lodging something in Court, replies: *"No. I don't remember but I've filed lots of papers, lots and lots and lots. I mean, I have boxes and folders and files of papers. I don't know which paper you are referring to"* (*a fol.* 248). She says that after OMISSIS, she went to OMISSIS, to OMISSIS, to OMISSIS and to OMISSIS. Asked about the judgment delivered by the Court of Appeal and as regards overnight stays, she testifies as follows: *"Well that basically as I was, it was explained to me that the overnight stays were to take place during the scholastic year. And then there were papers that, I remember OMISSIS saying that about an injunction, about the overnight stays on a Friday. Because I think the other party filed some papers or something. Look, there was a bit of confusion about what was going on. As I understood it, the overnight stays were not allowed. That was what was explained to me. So that is why OMISSIS filed the papers on the injunction. And then I remember there was a document and Dr. OMISSIS asked me where did this document come from and I didn't know and I thought, and then he just threw his hands up in the air and said I can't work under this kind of pressure, and I thought it was because there was something dodgy. You know, I couldn't understand why I was told*

no he is not go to overnight and then the next minute because papers were filed in Malta he was then allowed after a judgment. I couldn't understand. I thought a judgment was a judgment and that was it. You know, you couldn't change it. So that is why" (*a fol.* 251).

During cross-examination (*a fol.* 251 *et seq.*), to the question: *"After the judgment which you interpreted that the overnight stays were of a certain manner that you just described, was there any instance that you reported something to the Police about the overnight stays?"* (*a fol.* 252), replies: *"I can't remember, sorry"* (*a fol.* 252). She confirms that there was an instance when she reported to the Police regarding the safety of the child and says that at one point she was worried. She says: *"I was worried because he [the injured party] suffered from blackouts"* (*a fol.* 252). She says that she remembers calling late in the evening. She says that the Police did nothing and asked what she did tell them, she says: *"I can't remember"* (*a fol.* 254). She says: *"I was worried because of the behaviour of OMISSIS at the time"* (*a fol.* 254). Asked what did she tell the Police, says: *"I'm trying to remember"* (*a fol.* 254). She says: *"I was worried because there were times when he would come to my place, like, there were times when his erratic behaviour, like, things he was doing. He would bang his own head on the brick wall, stuff like that"* (*a fol.* 254). Asked if she did tell the Police that the child was in danger, she replies: *"I can't remember"* (*a fol.* 255) and then: *"I can't remember my exact word from like – "* (*a fol.* 255). Asked again whether she told the Police that their child was in danger, she replies: *"I can't remember for sure"* (*a fol.* 255). She says that she was concerned for the well-being of the child. She confirms that she followed her first call, by other calls. Asked whether she remembers what she told the Police in the subsequent calls, she replies in the negative and says that she remembers being on the phone with the support line *Appogg*. Confronted by the lawyer of the injured party that she is not saying the truth and that she is under oath and that she has to say the truth, she says: *"I am always telling the truth"* (*a fol.* 256). She is not sure whether she followed up the calls by actually going to the Police. Asked again if she actually went to the Police Station, she says: *"Probably"* (*a fol.* 257). She was once again told by the lawyer that she was not saying the truth and she replied that she was saying the truth and she is the most

truthful person. Then she says: *"Because I've tried to move on with my life and to forget"* (*a fol.* 258). She says that before she had her son, she never made police reports. Asked if it is correct to say that she went to the Police accompanied by her lawyer, she replies: *"Quite possibly"* (*a fol.* 258). She says: *"I have trained my brain to forget"* (*a fol.* 258). Asked again whether on the night between the 14th. and the 15th. of October 2011 she went to the Police Station accompanied by her lawyer to make a report regarding the well-being of her child, she replies: *"I can't swear, I can't swear"* (*a fol.* 259). She says: *"From what I saw I had every reason to make a report"* (*a fol.* 259). Asked whether she was present when the Police gave evidence regarding what she is being asked, she replies: *"I don't know, I guess, I don't know"* (*a fol.* 260). Asked how does she know that the injured party suffered from blackouts, she replies by saying that she saw him when they were on the boat sailing together and when she was asked a context of time, she replies: "*You are asking me to remember something which I am trying to forget. When we were together – "* (*a fol.* 261). Asked about when she met the injured party, she replies by saying that she cannot remember. Asked if she remembers that she met OMISSIS around the year 2004, she replies: *"Right now, no. I can't remember"* (*a fol.* 261). Asked after how many months or years did she start realsing that the injured party suffered from blackouts, replies: *"I can only guess"* (*a fol.* 262) and then says: *"I don't know. I don't want to say the wrong thing. I don't know"* (*a fol.* 262). She testifies: *"What I can remember is that he had like we were on the boat and when we were living together and I asked him about it, you know, I said what happened? Why? And he said he didn't know"* (*a fol.* 262). Asked by the Court how many times did OMISSIS suffer from blackouts in her presence, she replies: *"That I can remember two"* (*a fol.* 262) and says that they happened within the same year. Asked what does she mean by blackout, she replies that the injured party had dropped to the floor and asked if he had drunk, she replies in the negative. Asked if he was taking pills or drugs, she replies: *"Not that I know of, no"* (*a fol.* 263). She says that at the time they were on good terms. She says that, after falling flat on the floor, the injured party did not go to a doctor and she did not even suggest. Asked why, she replies: *"Because I didn't feel that it was my place to tell him what to do"* (*a fol.* 264). She says that even though the injured

party was her partner, *"It's not my place to tell him to go to a doctor. It's his decision. He is a grown man"* (*a fol.* 264). She says that she was surprised and shocked about this incident and says that it was not at the beginning of their relationship. Asked when was the second time that the blackout happened, she replies that this happened in the bathroom in OMISSIS when she found him on the floor by the toilet. She says that he was not hurt and was not bruised and there was no blood. She says that he did not drink and to her knowledge, the injured party was not taking drugs or pills. Asked whether this time she suggested that he should go to a doctor or may be take some medication, she replies in the negative and says that the injured party kind of brushed it off. She says that this happened before their child was born. She confirms that she was contesting access to the child saying that all she wanted was for her son to go back when he was a baby and that she went to Court to ask for her baby back. She says that all she wanted was some time alone to breast-feed and bond with the baby but was not allowed. She confirms that litigation proceedings were about access and says that she did not want to deny access of the child to the injured party.

She confirms that her first job in Malta was in Ponsonby Street, Gzira. She does not remember when. Asked how long had she been in Malta before she found her first job, she replies: *"I can't remember"* (*a fol.* 270). She confirms that she followed a course when she came to Malta. Asked to confirm whether she already had a residence of Malta ID Card in 2002, she replies: *"I had an ID Card, I can't remember the dates but yes I did have an ID Card"* (*a fol.* 270). Asked to confirm whether all this happened before she met the injured party, she replies: *"Probably"* (*a fol.* 271). She says that after her child was born, it is not correct to say that at no stage she was denied access to the child. She says that she was denied access to the child in the beginning and specifies that this happened for around a week. She says: *"it was a massive trauma, you know, like having a baby taken away"* (*a fol.* 271). She says that at the time the child was about three weeks old and says that she did not have access because the injured party would not let her back to her son. Asked to confirm whether she was still breast-feeding the child during this one week, she replies in the affirmative. Asked how

was she breast-feeding the child if she did not have access, she replies: "*He wasn't, there were, you know* – " (*a fol.* 272). Asked if she did it remotely, replies: "*Yes, I did have a pump*" (*a fol.* 272).

Having considered

That in the statement (Doc. "FT 5" – *a fol.* 68 *et seq.*) released by the accused on the 23rd. of December 2011, which statement was released after the accused consulted with her lawyer (*a fol.* 68), when she was asked with reference to her report made on the 14th. of October 2011 and was asked why she requested the Police to bring over her son from her ex-partner OMISSIS, she replies: "*I was informed by my lawyer OMISSIS that on page 36 sec. 76 of the Judgment made by the Court of Appeal on the OMISSIS, which judgment states quote: "The Court is therefore of the view that the visiting times fixed by the Court of First Instance are to be confirmed except that, in the interest of the child, during the scholastic year, the father collects the child on Tuesdays and Fridays after school and return him to plaintiff at 6pm. Access during the weekend is to be enjoyed by the father on alternate days, in the sense that one week the father will have the child on Saturday and the following on Sunday and this from 10am to 6pm. Access to the child during the holidays and on special days as decided by the First Court will stand". In view of this section I phoned my lawyer and informed him that OMISSIS did not return our son and also told him that I was worried. My lawyer told me that all I could do is to make a report and basically that's what happened. What I like to add is that my son was never prepared to go over and sleep at my ex-partner residence. That night I also phoned OMISSIS, he didn't answer the phone and I made the report with the police*" (*a fol.* 69). When asked why did she tell the Police that she was worried about the safety of their son, she replies: "*Because as I have already told you, it was the first time our son slept there and I was worried in case OMISSIS blacked out*" (*a fol.* 69). When she was told that OMISSIS stated he never suffered from any blackouts and that she had lodged a false report, she replied: "*He is lying all you have to do is look at the judgment. About the blackouts when I used to live with him and can confirm that he used to drop on the floor and when I used to ask him what happened he always told me that he didn't know what happened to him*" (*a fol.* 69). Asked if she had anything in writing to prove that OMISSIS suffers or used to suffer from

blackouts, she replies in the negative. She says: *"What I like to add it that I phoned at the Victoria Police Station for the second time because the persons from Appogg told me to keep insisting and to phone the police again, since I was worried about my son"* (*a fol.* 69).

Having considered
Legal Considerations Regarding the Level of Proof Required

That the Prosecution is bound to bring forward evidence so that the Court can find the accused guilty as charged. **Manzini**[2] notes the following:

> *"Il così detto onero della prova, cioé il carico di fornire, spetta a chi accusa – onus probandi incumbit qui osservit".*

In the Criminal field the burden of the Prosecution is to prove the charges beyond reasonable doubt. With regards to the defence, enhanced by the presumption of innocence, the defence can base or prove its case even on a balance of probabilities meaning that one has to take into consideration the probability of that version accounted by the accused as corroborated by any circumstances. This means that the Prosecution has the duty to prove the tort attributable to the accused beyond every reasonable doubt and in the case that the Prosecution being considered as not proving the element of tort the Court has a duty to acquit the accused.

That the following principles, as clearly outlined by the Constitutional Court in its judgment of the 1st. of April 2005 in the case **The Republic of Malta vs. Gregory Robert Eyre et**, must be applied:

> "(i) it is for the Prosecution to prove the guilt of the accused beyond reasonable doubt; (ii) if the accused is called upon, either by law or by the need to rebut the evidence adduced against him by the Prosecution, to prove or disprove certain facts, he need only prove or disprove that fact or those facts on a balance of probabilities; (iii) if

[2] **Diritto Penale** (Vol. III, Chapter IV, page 234, Edition 1890).

> the accused proves on a balance of probabilities a fact that he has been called upon to prove, and if that fact is decisive as to the question of guilt, then he is entitled to be acquitted; (iv) to determine whether the Prosecution has proved a fact beyond reasonable doubt or whether the accused has proved a fact on a balance of probabilities, account must be taken of all the evidence and of all the circumstances of the case; (v) before the accused can be found guilty, whoever has to judge must be satisfied beyond reasonable doubt, after weighing all the evidence, of the existence of both the material and the formal element of the offence."

That **Lord Denning** in the case **Miller vs. Minister of Pension**[3] explained what constitutes "proof beyond a reasonable doubt". He stated:

> "Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. 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 shall of that will suffice".

Having considered

That according to the Prosecution and the injured party, the accused breached the following sections of the law:

- Section 101 of Chapter 9 of the Laws of Malta (calumnious accusation);
- Section 110(1) of Chapter 9 of the Laws of Malta (fabrication of false evidence);

[3] 1974 - 2 ALL ER 372.

- Section 110(2) of Chapter 9 of the Laws of Malta (simulation of offence);
- Section 252(1)(2) of Chapter 9 of the Laws of Malta (defamation);
- Section 339(1)(e) of Chapter 9 of the Laws of Malta (insults);
- Section 49(c) of Chapter 399 of the Laws of Malta (improper use of mobile).

In the judgment in the names **Il-Pulizija vs. David Mizzi**[4] decided on the 16th. of February 1998, the Court of Criminal Appeal outlined the distinction between Articles 101 and 110(1) of Chapter 9 of the Laws of Malta by stating the following:

> "*Ir-reat ikkontemplat fl-Artikolu 110(1) tal-Kodici Kriminali hu dak tal-kalunja reali jew indiretta, u jiddistingwi ruhu mil-kalunja verbali jew diretta kontemplata fl-Atikolu 101 billi jirrikjedi li l-agent b'qerq, materjalment holoq jew materjalment gieghel li jidher li hemm fatt jew cirkostanza bl-iskop li dan il-fatt jew cirkostanza tkun tista' tingieb bhala prova kontra persuna ohra. Kemm fil-kalunja diretta kif ukoll f'dik indiretta, l-element formali tar-reat jikkonsisti f'illi wiehed ikollu l-hsieb li jaghmel hsara lil persuna ohra billi jaghmel mill-gustizzja strument ta' ingustizzja kontra dik il-persuna l-ohra. Fi kliem iehor, ghar-reat ikkontemplat fl-Artikolu 101(1), mhux bizzejjed is-semplici kliem migjuba fil-fomm jew bil-miktub, li permezz taghha wiehed dolozament jakkuza persuna quddiem awtorita kompetenti b'fatti ammontanti ghal reat meta jkun jaf li dik il-persuna hi innocenti, izda hu mehtieg li jinholqu tracci jew indizzji materjali bil-hsieb li dawn ikunu jistghu jintuzaw kontra dik il-persuna.*" (emphasis added).

That the crime created by Section 110(1) of Chapter 9 of the Laws of Malta (i.e. fabrication of false evidence) is in some continental codes and text books dealt with as a form of calumnious accusation. Whereas the false accusation as outlined in Section 101 of the Criminal Code dealing with any information, report or complaint whether filed verbally or in writing constitutes the calumnious

[4] Per Prim. Imhallef Vincent DeGaetano decided on the 16th. of February 1998.

accusation which is defined as being verbal and direct, this form constitutes the calumnious accusation known as real or indirect. As Professor Mamo states in his Notes on Criminal Law:

> "The constituent elements of this crime emerge clear from its definition. The material element consists in fabricating that is, as the law says, falsely causing any fact to exist or appear to exist which may be used as evidence of a criminal offence against an innocent person. The intentional element consists in the intent on the part of the agent to procure that the person be unjustly convicted of or charged with the offence."

On the other hand, the crime under Section 101 of calumnious accusation known as verbal or direct:

> "such crime is completed by the mere presentation of the information, report or complaint to the competent authority, in the case of this indirect form of calumnious accusation the crime cannot be said to be completed until the fact or circumstance of fact falsely caused to exist or to appear to exist as aforesaid, becomes known to the competent authority."

Finally it is clear from the wording of the law that this type of calumnious accusation must be such as to lead to the conviction of the person being unjustly charged or to the person being unjustly charged of a crime due to the fabrication of this false evidence.

As regards the simulation of offence (Section 110(2) of Chapter 9 of the Laws of Malta), this provision was added to our Code by Ordinance IX of 1911 and was modeled in its substantive part on Section 211 of the Italian Code of 1889. Professor Mamo in his Notes on Criminal Law states:

> "The simulation of an offence is considered as a crime for the injury which it does to the administration of justice by misleading it; for the alarm which the news of an offence

causes in the public; for the inconvenience and expense to which the officers of justice may be put; for the danger of suspicions and molestations to which law-abiding citizens may be exposed in the attempt to ascertain an imaginary fact.… This crime differs from that of calumnious accusation in as much as in the simulation of offence there is no specific accusation against any determinate person and there is not, therefore, the intent to cause an innocent person to be unjustly convicted or charged … The simulation may be either verbal or direct or real or indirect. The former must consist in a denunciation, that is in an information or report or complaint to the Executive Police: and the crime is completed by the presentation of such information report or complaint, so that the subsequent confession of the untruth would not avail to exclude it. … Finally the denunciation must be made without specifying the supposed offender; otherwise this crime degenerates into that of calumnious accusation."

A real or indirect simulation would be had in the case of a person who, in order to make believe that he is a victim of a crime, creates traces of the offence in order to give an appearance of reality to the simulated crime, in such a manner as to cause the Police to proceed to further investigations and the enquiry of the *in genere* leading to the discovery of the author of the supposed crime.

In the judgment **Il-Pulizija vs. David Mizzi** referred to above, the Court of Criminal Appeal held:

"Kwantu ghar-reat ikkontemplat fl-Artikolu 110(2) – is-simulazzjoni ta' reat – dan, bhal tal-kalunja, jinqasam f'simulazzjoni reali jew indiretta u f'simulazzjoni verbali u diretta. Is-simulazzjoni reali jew indirecta tavvera ruhha meta wiehed bil-qerq johloq tracci ta'reat b'mod li jistghu jinbdew proceduri kirminali sabiex jizguraw li dak ir-reat kien sar. Is-simulazzjoni verbali jew diretta tirrikjedi semplicement li l-agent jiddenunzja lill-Pulizija Ezekuttiva reat li hu jkun jaf li ma sarx. Ghalhekk element kostituttiv ta' dan ir-reat hu l-konsapevolezza ta' l-agent li r-reat li hu qed jiddenunzja fil-fatt ma sehhx."

According to Profs. Mamo:

> "The specific malice of this crime consists in the intent to deceive or mislead justice by denouncing or making appear an offence which is known not to have been committed and not in the intent to harm, directly by the simulation, any other person."

Having considered

It is crystal clear that judicial proceedings between the injured party and the accused regarding their child had been of a very litigious nature and that each one of them resorted to various legal actions and that various acts had been filed in these proceedings. In its judgment, the Court of Appeal notes the following: "*The evidence produced in this case show that both parties have presented an interminable number of applications/police reports which basically show that the parties cannot agree on anything, not even on minor matters. In fact even where there were no real problems, issues were inflated making it more difficult for the Court to decide the case of the basis of the original demands made in the sworn application*" (*a fol.* 152). In a footnote of the mentioned judgment, the Court of Appeal notes that: "*They disagreed on where and how to give birth to the child, his vaccination, access, feeding, medical problems, doctor's choice, christening, child's name and surname, breastfeeding, MMR inoculation, his clothing, visitation rights, attendance to kindergarten. In fact the child, for some time, ended up in two different kindergartens*" (*a fol.* 152). As an aside, the Court notes that communication between the injured party and the accused practically consisted of agreeing not to agree on anything. This Court hopes that along the passage of time they learnt to communicate better and this for the well-being of their child!

There is no doubt that both parties consulted their respective lawyers. It also results that even though the Court of Appeal delivered its judgment on the OMISSIS (*a fol.* 133 *et seq.*), and even though the mentioned Court of Appeal delivered a decree dated OMISSIS, the accused resorted to other judicial action. The Court is

satisfied that the accused resorted to such latter action only because, according to her or according to the advise she had been given, the judgment was not clear where it concerned the sleepovers of the child. The injured party contends that the accused accused him of placing his son in an unsafe/dangerous situation, or harmed him or neglected him (Doc. "FT 1" – *a fol.* 26).

After considering all that has been brought forward in these proceedings, the Court notes that no shred of proof exists that the injured party or any member of his family suffered from blackouts. Despite this and considering that the judgment by the Court of Appeal had just been delivered, and considering that the accused was concerned about the well-being of her child, and that she was basing her report on her own perception (or her lawyer's!) of how the judgment delivered by the Court of Appeal had to be interpreted, it cannot be concluded that she had fabricated evidence or simulated an offence. There is no proof that she had accused the injured party with an offence of which she knew he was innocent of. The elements required to find guilt under the first (1st.), the second (2nd.) and the third (3rd.) charges brought against the accused have not been sufficiently proven.
As regards the fourth (4th.) charge brought against the accused, the Court notes that in the previous paragraph it has been noted that no shred of proof exists that the injured party or any member of his family suffered from blackouts. In the judgment delivered on the 26th. of April 2011 in the names **Il-Pulizija vs. Sergio Zampa et**, the Court of Magistrates (Malta) as a Court of Criminal Judicature noted the following:

> *"Fis-sentenza moghtija mill-Qorti ta' l-Appell nhar it-30 ta' April 2011 mill-Qorti ta' l-Appelli Kriminali fl-ismijiet* ***Il-Pulizija vs. Joseph Vella****, biex ikun hemm ir-reat ta' ngurja skond l-Artikolu 252, il-kliem (jew gesti, kitba, ecc., skond il-kaz) ingurjuzi jridu jkunu gew komunikati, direttament jew indirettament, lil terza persuna – mqar terza persuna wahda – ghax b'hekk biss jista' jitwettaq il-hsieb li jkollu l-agent li jtellef jew inaqqas il-gieh tal-persuna ngurjata ("with the object of destroying or damaging the reputation of any person", fit-test*

Ingliz). Huwa necessarju li l-persuna li tigi ngurjata tigi identifikata.

Jinghad bla dubju ta' xejn li sabiex jissussisti dan ir-reat kif imfisser fis-sentenza moghtija mill-Qorti ta' l-Appell nhar it-3 ta' Settembru 2001 fl-ismijiet ***Il-Pulizija vs. Joseph Gauci*** *li: "Ma hemmx dubbju li l-ingurja kontemplata fl-Artikolu 252(1) tal-Kap. 9 trid tkun maghmula bil-hsieb specifiku li dak li jkun inaqqas jew itellef il-gieh ta' haddiehor. Hi dottrina pacifika li meta l-kliem ikunu manifestament ingurjuzi, tali intenzjoni specifika hi prezunta u jkun jinkombi fuq l-imputat jew akkuzat li jipprova (imqarr fuq bazi ta' probabilita') li dawk il-kliem ma qalhomx bil-hsieb li joltragga izda b'xi skop iehor rikonoxxut mil-ligi li jinnewtralizza l-animus ingurjandi" (Vide* ***Francesco Cascun vs. Re Sac Charles Vella*** *deciz mill-Qorti ta' l-Appelli Kriminali nhar it-13 ta' Mejju 1961).*

Issa jif jghid ***Gateley****, "Words which impute to the plaintiff the commission of a crime for which he can be made to suffer…by way of punishment are actionable.* ***Antolisei*** *jghid "Per la consumazione del reato di defamazione é necessario che l'espressione offensive pervenga a conoscenza di un altra persona e sia da altri percepita. La perfezione del reato si verifica allorché i fatti che li concretano vengono a conoscenza di altre persone".*

The Court makes reference to a judgment delivered by the Court of Criminal Appeal in the names **The Police vs. OMISSIS** decided on the OMISSIS where the Court of Criminal Appeal confirmed a judgment delivered on the OMISSIS by the Court as currently presided in which judgment the accused was found guilty under Article 252(1) of Chapter 9 of the Laws of Malta for having said that the injured party was "sick".

Considering what has been noted above, particularly that no evidence whatsoever exists that the injured party suffered from blackouts, the Court does not doubt that when the accused spoke to the Police between the 14th. and the 15th. of October 2011 she said that the injured party suffered from blackouts. The Court notes

further that when the accused told the Police that the injured party suffered from blackouts this is tantamount to the crime envisaged in Article 252(1) of Chapter 9 of the Laws of Malta. It results that the accused offended the injured party by telling the Police that he suffered from blackouts. It results that the accused said this voluntarily with the intent to damage the reputation of the injured party. Hence the accused will be found guilty of the fourth (4th.) charge brought against her. In the circumstances in question, considering all the circumstances in their proper perspective, by saying that a person suffers from blackouts can by no means be considered as giving vent to a vague expression or an indeterminate reproach falling within the terms of subarticle (2) of Article 252 of the Criminal Code.

As far as the fifth (5th.) charge brought against the accused is concerned, it does not result that what the accused said is tantamount to an insult and hence the accused will not be found guilty of the mentioned charge.

As regards the sixth (6th.) charge brought against the accused, the Court notes that the improper use mentioned in this charge does not result and hence the accused will be acquitted from the mentioned charge.

Having considered

That it results that only the fourth (4th.) charge brought against the accused has been sufficiently proven.

With regards to the punishment to be inflicted, the Court will be taking into consideration various factors, including the nature of the fourth (4th.) charge brought against the accused and the clean conviction sheet of the accused (Doc. "A" – *a fol.* 9).

Consequently, the Court, for the above-mentioned reasons,

- due to lack of sufficient evidence at law, does not find the accused guilty of the first (1st.), second (2nd.), third (3rd.), fifth

(5th.) and sixth (6th.) charges brought against her and hence acquits her from the said charges

and

- after having seen Article 252(1) of Chapter 9 of the Laws of Malta finds the accused OMISSIS guilty of the fourth (4th.) charge brought against her and condemns her to a fine (*multa*) of two hundred Euros (€200.00).

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Dr. Neville Camilleri
Magistrate

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Ms. Mary Jane Attard
Deputy Registrar