Court of Criminal Appeal

Hon. Madame Justice Dr. Edwina Grima LL.D.

Appeal No: 517 / 2017

The Police

Vs

Stranhinja Rajkovic

Today the, 29th November, 2018

The Court,

Having seen the charges brought against Stranhinja Rajkovic bearer of Maltese Identity Card no. 37549(A) accused before the Court of Magistrates (Malta) as a Court of Criminal Judicature accused of having:

> **On the 17th February, 2015, at around 8:05hrs in Sir Adrian Dingli, Sliema c/w Don Bosco Street, Sliema whilst driving vehicle no. IBP478 –**
>
> **1. Failed to slow down and, if necessary, stop when approaching a carriage way marked with parallel lines or studs across it's width or any other marking indicating a crossing for the use of pedestrians, in order to allow any pedestrians to use such crossing (MVR89 LS65.11);**
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> **2. Through imprudence, negligence and unskillfullness in his art or profession, and non observance of the motor vehicle regulations, caused involuntary injuries of grevious nature on the person of Maria Fortunata Arcidiacono as certified by Dr. Jonathan Joslin MD 1920 of MDH (Sec. 226 Chapter 9);**
>
> **3. And also driving said vehicle in a (a) dangerous, (b) negligent, (c) reckless, manner (Sec 15 (1)(a)(2) Chapter 65);**
>
> **Whereby the prosecution also requested that upon finding of guilt, the accused would be disqaulified from all his driving licences.**

Having seen the judgement of the Court of Magistrates (Malta) as a Court of Criminal Judicature proffered on the 23rd November, 2017 whereby the Court found accused guilty of the second charge brought against him and after having seen Section 226(a) of the Criminal Code, condemned the accused to a fine (multa) of eight hundred Euros (€800) whilst acquitting him of the first (1) and third (3) charge since these were not proven beyond a reasonable doubt.

Having seen the appeal application filed by appellant, Stranhija Rajkovic in the registry of this Court on the 5th December, 2017 whereby this Court was requested to vary the judgement in the names The Police vs Stranhija Rajkovic delivered by the Court of Magistrates (Malta) of the 5th December, 2017 by confirming the part wherein he was acquitted from the first (1) and the third (3) charges brought against him, whilst revoking and varying the said judgement wherein the same Court of Magistrates (Malta) found the appellant guilty of the second charge and acquitting the same from the second charge and its relative punishment for all effects and purposes at law.

Having seen the acts of the proceedings;

Having seen the updated conduct sheet of appellant, exhibited by the Prosecution as requested by this Court.

Having seen the grievances brought forward by appellant in his appeal application and which in brief are as follows:

> 1. The accused should have been acquitted of all charges brought against him since the place where the accident occurred was wrongly indicated in the charge sheet, wherein it results that the accident occurred at the intersection between Dingli Street and Don Bosco Street in Sliema when effectively it occurred further up in Dingli Street.
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> 2. Without perjudice to the above the First Court did not adequately and correctly assess the evidence found in the acts since there no evidence results of imprudence, negligence and unskillfulness or non observance of motor vehicle regulations on the part of appellant, which gave rise to the offence. The evidence actually indicated that it was the victim who walked out from behind a car which was coming from the opposite direction hence resulting in lack of forseeability on the part of accused in such circumstances.
>
> 3. Still without prejudice to the above submissions, the First Court was also incorrect in stating that the accused could have been more diligent considering the configuration of the road where the accident occurred which is straight and therefore offers a certain degree of visibility. This was actually denied by all the persons testifying including the witnesses brought forward by the Prosecution attesting to the low visibility present at the time of the incident. Compounded with this, the injured party was wearing a rain jacket and a hood, holding an umbrella and consequently was not keeping a proper lookout before crossing the road.

Considers,

Appellant finds objection, in the first grievance brought forward in his appeal application, to the decision of the First Court when rejecting his plea of nullity of the writ of summons, in that the place where the accident occurred is erroneously indicated as being Sir Adrian Dingli Street, Sliema corner with Don Bosco Street, since the spot where injured party was run over by the vehicle driven by

appellant is much further up the same road and not in the intersection indicated in the said charge sheet. Therefore appellant is of the opinion that he could never have been found guilty of causing the offence of an involuntary nature on the person of injured party in the place indicated in the charges brought against him and should have been acquitted solely on this ground.

From the acts of the case it results that the incident location as indicated on the charge sheet was taken from the Police report exhibited in the court records wherein this is indicated as "Dingli Street **almost corner with Don Bosco Street near zebra crossing**." This description of the location was repeated in the writ itself specifying that the accident occurred in "Sir Adrian Dingli, Sliema c/w Don Bosco Street."

As appellant rightly points out in his appeal application article 360(2) of the Criminal Code lays out the details which the summons should specify. The scope behind this section of the law is to provide all the necessary details to the accused persons sufficient to make him understand the nature of the charges brought against him so as to be in a position to adequately prepare his defence. However the summons, as it is rightly called, has only one function being to notify the person accused of the date, place and time when he should appear in court to answer to the charges brought against him as indicated in the said summons. The details mentioned in article 360(2) does not refer to *ad validatem* criteria, on pain of nullity, as long as the information provided, which is intended more as an *avviso a comparire,* are such that the person charged is aware and fully understands what he stands charged with apart from ensuring his identification. The information need not be specific either as long as a clear indication is given by the information therein provided for the abovementioned reason[1]. Hence the content of the writ of summons in this case, indicating the

[1] Il-Pulizija vs Raymond Cutajar - *L-artikolu 360(2) tal-Kap. 9 tal-Ligjiet ta' Malta li jipprovdi hekk: "Ic-citazzjoni ghandha ssemmi car il-persuna mharrka, u ghandu jkun fiha, fil-qosor, il-fatti ta' l-akkuza, bil-partikularitajiet ta' zmien u ta' lok li jkunu jinhtiegu jew li jkunu jistghu jinghataw."*

Issa l-gurisprudenza kostanti tal-Qrati taghna hi fis-sens li c-citazzjoni in kwistjoni mhix hlief avviz lill-imputat biex jidher quddiem il-Qorti. Fis-sentenza moghtija minn din il-Qorti (diversament presjeduta) fl-ismijiet Il-Pulizija v. Joseph Buttigieg fil-25 ta' Lulju 1994, intqal:

"L-insenjament tal-qrati taghna, kemm dawk superjuri kif ukoll inferjuri, hu tista' tghid univoku u gie kristallizzat fis-sentenza tal-Qorti Kriminali (li allura kienet tisma' appelli mill-qrati inferjuri) tas-6 ta' Dicembru, 1948 fl-ismijiet Il-Pulizija v. Arthur S. Mortimer A. & C.E. (Vol.XXXIII.iv.758) li dahlet ukoll fl-origini tas-subartikolu (2) tal-Artikolu 360, introdott fl-1911. Brevement, ic-citazzjoni ma hi xejn hlief avviz jew ordni sabiex il-gudikabbli jidher quddiem qorti inferjuri fil-hin u data li jigu indikati lilu, minflok ma jingieb quddiem dik il-qorti taht arrest (Art.360(1)). Din ic-citazzjoni ma hix il-bazi tal-akkuza, bhalma hu l-kaz tal-att ta' akkuza quddiem il-Qorti Kriminali. L-akkuza jew imputazzjoni tigi profferita fil-qorti inferjuri meta tinqara mill-prosekuzzjoni:

'La vera imputazione si deduce contro l'imputato dalla prosecuzione dinanzi alla Corte stessa. La lotta fra la prosecuzione e l'imputato non si impegna per mezzo della citazione, ma si impegna per mezzo della querela, della esposizione dei fatti che seguono innanzi alla Corte per parte dell'ufficiale prosecutore' (ara sentenza citata, pagna 761).

Dan ifisser li galadarba l-persuna mharrka effettivament tidher quddiem il-qorti, il-funzjoni principali tac-citazzjoni (ghax hemm funzjonijiet ohra, bhal, per ezempju, li l-imputat ikun jaf biex qed jigi akkuzat sabiex ikun jista' jiddefendi ruhhu sew, kif ukoll l-interruzzjoni tal-preskrizzjoni) tkun giet ezawrita (ara f'dan is-sens ukoll is-sentenza ta' din il-Qorti tad-19 ta' Gunju, 1989 fl-ismijiet I-Pulizija vs Noel Zarb Adami)."

U bhalma qalet din il-Qorti (diversament presjeduta) fissentenza moghtija fl-4 ta' Novembru 1994 fil-kawza fl-ismijiet Il-Pulizija v. Emanuel Buttigieg: "Id-dettalji msemmijin dwar il-fatti ghandhom jigu ndikati fiha mhux ghall-fini tal-validita` taghha, jew tal-proceduri, kompriza s-sentenza, li jsegwuha, izda ghall-fini ta' pratticita` u ta' evitar ta' telf ta' zmien, u cioe` biex l-imputat x'hin jidher quddiem il-Qorti jkun jaf fuqhiex ikun gie mharrek, u hekk dakinhar stess li jidher ikun preparat biex jiddefendi ruhu ghall-imputazzjoni dedotta.....Dan kollu premess ifisser li c-citazzjoni li jkun fiha l-ordni lill-imputat biex jidher quddiem il-Qorti talMagistrati qatt ma tista' tkun nulla, kemm jekk tkun tikkontjeni kif ukoll jekk ma tikkontjenix dettalji korretti jew skorretti tal-fatti. F'ebda kaz dik ic-citazzjoni ma ggib in-nullita' tal-proceduri sussegwenti, kompriza s-sentenza."

place of the accident as being Sir Adrian Dingli Street in Sliema (although qualifying it as being somewhere in the intersection with Dun Bosco Street) indicates to the person accused the date, time and place where the incident occurred such as to make it sufficiently clear to appellant, being the accused person, as to which incident the charges are referring. The situation would have been somewhat different had a different street name been indicated thus creating confusion as to which incident the summons is referring to.

Once the accused appeared in Court assisted by his lawyer and the Prosecution upon oath confirmed the details of the charges, then it is upon that evidence that the Court has to rely in making its assessment of all the evidence brought before it. In this case it does not result from the acts that there was an error in this sense committed on the part of the Prosecution since the place in which the accident occurred clearly results as being Sir Adrian Dingli Street, in Sliema. Consequently the first grievance is being rejected.

Considers,

That with reference to the second and third grievance these will be dealt with by the Court simultaneously in that they both refer to the interpretation which the First Court made of the evidence presented before it.

Now it has been firmly established in local and foreign jurisprudence that both in cases of appeals from judgements of the Magistrates' Courts as well as from judgements of the Criminal Court, with or without a jury, the Court of Criminal Appeal will most reluctantly disturb the evaluation of the evidence made by the Court of first instance, if it concludes that that Court has reached a reasonable judgement which is also legally well-founded. In other words this Court does not replace the discretion exercised by the Court of first instance in the evaluation of the evidence, but makes a thorough examination of the evidence to determine whether the Court of first instance was reasonable in reaching its conclusions. However, if this Court concludes that the Court of first instance could not have reached the conclusion it reached on the basis of the evidence produced before it and this both factually as well as legally, then that would be a valid – if not indeed a cogent reason – for this Court to disturb the discretion and conclusions of the Court of First Instance (confer: "inter alia" judgements of the Court of Criminal Appeal in the cases :"Ir-Republika ta' Malta vs. George Azzopardi" [14.2.1989]; "Il-Pulizija vs. Carmel sive Chalmer Pace" [31.5.1991]; "Il-Pulizija vs. Anthony Zammit" [31.5.1991] and others.)

In a judgement delivered by the Court of Criminal Appeal : "Ir-Republika ta' Malta vs. Ivan Gatt", decided on the lst. December, 1994, it was held that the exercise to be carried out by this Court in cases where the appeal is based on the evaluation of the evidence, is to examine the evidence, to see, even if there are contradictory versions – as in most cases there would be – whether any one of

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Is-subartikolu (2) ta' l-artikolu 360 tal-Kodici Kriminali jirrikjedi biss li c-citazzjoni jkun fiha l-fatti ta' l-akkuza. Fis-sentenza taghha fl-ismijiet Il-Pulizija v. Philip Schembri moghtija fit-18 ta' Novembru 1994 minn din il-Qorti (diversament presjeduta), gie spjegat: "Dawn il-fatti, naturalment, iridu juru b'mod car ir-reat li tieghu l-persuna tkun qed tigi imputata, minghajr il-htiega ta' tigbid ta' kliem jew immaginazzjoni, jigifieri b'mod li l-imputat ikun jaf ta' liema reat jew reati qed jigi akkuzat u ghal liema reat jew reati jrid iwiegeb." – Deċiża mill-Qorti tal-Appell Kriminali Inferjuri ippreseduta mill-imħallef David Scicluna nhar il-24 ta' Marzu 2010.

these versions could be freely and objectively believed without going against the principle that any doubt should always go in the accused 's favour and, if said version could have been believed and was evidently believed by the jury, the duty of this court is to respect that discretion and that evaluation of the evidence even if in the evaluation conducted by this Court, for argument's sake, this Court comes to a conclusion different from the one reached by the jury. Such discretion will therefore not be disturbed and replaced by its own unless it is evident that the jurors have made a manifestly wrong evaluation of the evidence and consequently that they could not have reasonably and legally have reached that conclusion[2].

Considers:

That the second charge against the appellant for which he was found guilty refers to the breach of article 226 of the Criminal Code which reads as follows:

> **Whosoever, through imprudence, carelessness, unskilfulness in his area or profession, or non-observance of regulations, causes grevious bodily harm, he shall on conviction be liable to imprisonment for a term not exceeding one year or to a fine (multa) not exceeding four thousand and six hundred and fifty-eight Euro and seventy-five cents if the harm caused produces the effects of article 218 of the Criminal code.[3]**

Hence it is clear from the wording indicated that the offence must be a result of imprudence, carelessness, professional unskilfulness **or** non observance of regulations, being therefore involuntary in nature but constituting *culpa* which is punishable under our law although not to the extent of *dolus*. Moreover, the provision in the law also indicates that there is no need to prove all the criteria mentioned, in that one is sufficient for guilt to result. In other words the prosecution does not need to prove that appellant was careless and imprudent and unskillful and in breach of regulations, in that any one of such circumstances would suffice to satisfy the required elements of this offence.

Now according to appellant there was absolutely no evidence of the presence of any of these criteria including the non-observance of motor vehicle regulations and insists that the evidence indicates that it was the victim herself who walked out from behind a car which was heading in the opposite direction as a result of which he was in no position to see or even foresee the presence of the victim prior to impact. In fact appellant claims that he never saw the victim until he actually hit her. Moreover appellant suggests that the victim was wearing attire which impaired a clear visibility of her surroundings and also had an umbrella which indicates that she proceeded to cross the road without checking to see if there were any oncoming vehicles. Moreover appellant claims that the First Court relied heavily on the evidence tendered by witness Carla Melita Chetcuti Bonavita whose evidence however was not reliable. Consequently, he does not agree with the conclusion reached by the First Court that he should have been more diligent especially owing to the fact that he had a high visibility of the road in question, and this despite the fact that all witnesses, including prosecution witnesses confirmed that it was raining heavily that morning, thus indicating that the visibilty of the accused could have been impaired owing to no fault of his own.

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[2] Ir-Repubblika ta' Malta vs. Mustafa Ali Larbed" decided on the 5th July, 2002

[3] The provision in the Criminal Code has to be read in conjunction with Article 225. Moreover the punishment meted out in this judgement refers to that indicated under paragraph (a) of Article 226 which the facts of this case refer to, owing to the permanent effects of the injuries sustained by the alleged victim.

Considers:

That primarily, with reference to the last part of the grievances put forward by appellant (regarding the extent of visibility of appellant), and after examining the acts of the case and the judgement of the First Court, it cannot but concur with the reasoning put forward in the appellate judgement that Sir Adrian Dingli Street in Sliema is a long, wide, straight road thus offering a long distance visibilty to the driver driving up this road. Although it is true that the day of the accident was a rainy day, which weather conditions could have impaired appellant's vision, however this imposes a greater degree of diligence on any driver, which degree of diligence was completely absent in this case. From the acts it clearly results that appellant was not driving at a moderate speed as confirmed by the eye witness Chetcuti Bonavita. Not only but as the First Court rightly points out the layout of the road which, as said is a long, straight road has a number of side roads all along which abut the main road. Not only but appellate judgement refers, in its considerations, to the heavy rain thus placing a higher degree of prudence and diligence on appellant's shoulders.

The Court finally considers that the lack of diligence is even more emphasised when appellant ran over the victim whilst the same was trying to cross the road on a pedestrian crossing. When approaching a pedestrian crossing it is the duty of every driver to slow down and examine both sides of the road to ensure that no pedestrian is trying to cross. Therefore, if as appellant alleges, victim emerged into the middle of the road after a vehicle had passed by on the opposite carriageway such as to present an obstacle to appellant's view of the other side of the pedestrian crossing, and an obstacle also to the pedestrian as to oncoming traffic on the opposite side of the road, this necessitated the exercise of great prudence and diligence, imposing an obligation on appellant to slow down even more.

In the case **Police vs Manuel Spiteri** the presiding Court opined that:

> ***'Sewwieq li jibda joqrob strixxi pedonali (specjalment dawk uzati hafna) ghandu mhux biss jirrallenta izda ghandu wkoll izomm "a proper lookout" biex jara jekk hemmx xi nies fuq il-bankini fil-gnub li qed jindikaw li ser jaqsmu jew li diga bdew jaqsmu, u dan sabiex huwa jkun pront jieqaf ma' l-istrixxi minghajr b'ebda mod ma jinvadihom.[4]'***

Moreover in the case **Mary Zarb et vs Mauro Overend**[5] the Court, although in its civil jurisdiction, delved into the responsibilities of drivers and pedestrians when collisions occur and the care which either one has to take in order to prevent an accident. The Court opined that one cannot presume that the car driver is fully responsible whilst exonerating entirely the pedestrian. However, neither must it be understood that the pedestrian should be considered an intruder when crossing the road. Both parties have to adopt the required standard of care also taking into account any unfavourable road or weather conditions with regards to drivers and the manner in which, and the place from where, the road is being traversed by the pedestrian.

> ***"Fi kwestjoni ta' investiment ta' pedestrian, bhal ma huwa dan il-kaz il-Qorti ma tista' titlaq minn ebda presunzjoni ta' htija tas-sewwieq jew li l-pedestrian ghandu dejjem ragun. B'danakollu hu veru illi, fejn m'hemmx regolat b'xi mod partikolari l-passagg tal-***

[4] Decided by the Inferior Court of Criminal Appeal presided over by Mr. Justice Vincent Degaetano on the 6.1.2003 (Ref. 137/2002/0).

[5] Decided by the First Hall Civil Court presided over by Mr. Justice Philip Sciberras on the 27th June 2003 (Ref. 260/1994/1).

pedestrians, pedestrian li juza t-triq karrozzabbli anqas ghandu jitqies xi intruz; u filwaqt illi l-pedestrian ghandu certament juza l-kura mehtiega biex ma johloqx ghall-utenti ohra tat-triq sitwazzjonijiet ta' perikolu jew emergenza, minn naha l-ohra d-drivers ta' karozzi, li huma magna ta' potenza li joqtlu jew ikorru, ghandhom l-obbligu gravi li jiehdu kura li jsuqu b'mod illi ma jkunx ta' perikolu jew dannu ghall-pedestrians li ghandhom ukoll id-dritt li juzaw it-toroq;

Meta fis-socjeta` taghna nies fit-triqat ma jistghux jimxu aktar anke f'dawk il-partijiet ta' l-istess triqat fejn ghandhom jistennew biss traffiku minn naha u mhux ukoll mill-ohra, allura nkunu abbandunajna kull rispett ghas-sahha u l-inkolumita` tal-persuna biex jiddomina nkontrastat it-trasport mekkanizzat, l-istat taghna jkun hafna aghar milli qatt kien;

Hu obbligu li kull driver jirregola s-sewqan skond il-kondizzjonijiet u c-cirkostanzi, bhal ma huwa l-hin ta' bil-lejl, il-vizwali ostakolata bid-dlam u bix-xita, l-piz tal-vejikolu, l-istat ta' l-art, u rapporti ohra kontingenti; u hu anke dmir ta' driver li jzomm dik li komunement tissejjah 'a reasonable careful look-out' liema dmir igib mieghu li d-driver jara dak li jkun ragjonevolemnt vizibbli. Li jfisser li jinkombi b'dover fuq kull sewwieq li juza attenzjoni partikulari kif jikkonduci s-sewqan tieghu u jirregola l-velocita` ghax b'hekk jilqa' ghall-imprevvist u jevita li jsib ruhu konfrontat b'mod improvviz minn ostakoli.

Ma jistax jinghad illi hawn si tratta ta' ezercizzju ta' xi privilegg tal-pedestrian jew li tezisti xi forma ta' presunzjoni ta' dritt favur tieghu meta dan ikun involut f'incident ma' vettura. Ghall-kuntrarju l-kejl li bih jehtieg li tigi meqjusa l-materja ta' responsabilita` jibqa' dak klassiku tad-determinazzjoni ta' x'kienet il-kawza prossima u immedjata ta' l-incident u x'kien il-fatt determinanti li pprovokah. Hu car li kemm il-pedestrian kif ukoll id-driver, ghandhom dmirijiet u responsabilitajiet bhala utenti tat-triq u kull wiehed minnhom kien bil-ligi obbligat li josserva r-regolamenti li jinkombu fuqhom biex jigi assigurat illi fl-ezercizzju tad-dritt taghhom li juzaw it-triq ma jaghmlu xejn biex ifixklu lil haddiehor fl-uzu legittimu ta' l-istess triq. Hu meta jsir abbuz mid-dritt ta' dan l-uzu billi ma jigux osservati r-regolamenti li l-ligi timponi li jinholqu cirkostanzi li jipprovokaw is-sinistru. Minn dan in-nuqqas, sew jekk tal-pedestrian, sew jekk tas-sewwieq, temani r-responsabilita` ghall-akkadut.

***Il-pedestrian ghandu certament drittijiet fic-cirkolazzjoni tat-traffiku, imma ghandu wkoll l-obbligi. Jekk il-pedestrian ikun qieghed ruhu f'post fejn mhux suppost ikun u d-driver, li jkun qed isuq karozza b'mod regolari, isib ruhu f'posizzjoni ta' emergenza subitanea minhabba fih, dak id-driver m'ghandux jigi ritenut hati ta' sewqan perikoluz u tal-konsegwenzi li jista' jsofri dak il-pedestrian f'dik il-kontingenza*.**

Therefore although the degree of proof in the criminal field is greater than in cases brought before the Court in its civil jurisdiction, however the principles outlined above provide a clear understanding as to the degree of diligence and the meaning of the term ‘keeping a proper lookout’, which constitutes the duty of every driver to see that which is reasonably visible or in plain view.

Considers,

It is uncontested that the merits of this case refer to a traffic accident wherein a pedestrian was run over whilst attempting to cross a main road on a pedestrian crossing. No degree of recklessness can therefore be placed on the victim who insists that she had crossed the road in a diligent manner such that she waited for a car to pass by which did not stop for her although she was waiting on the

pedestrian crossing to cross the road. *Ex admissis* appellant had stated to the police *a tempo vergine* that he was wiping his windscreen from the inside and did not even see the victim before impact. This was denied by him in his testimony before the Court stating that he was referring to his wipers clearing his windscreen from rainwater, since it was raining heavily. Whichever version is to be believed it is obvious that appellant did not have a clear view of the road. This did not deter him from driving up Dingli Street at an elevated speed so much so that Chetcuti Bonavita who was emerging from a side road had to stop suddenly due to appellant's oncoming vehicle.

In fact the evidence found in the acts of the proceedings indicates that Mrs. Arcidiacono crossed from the pedestrian crossing as she did daily, and before doing so checked whether an oncoming vehicle was going to allow her to proceed, so much so that she mentions the fact that a vehicle, which she describes as a sports car, had ignored that she was standing at a pedestrian crossing at had proceeded to drive on normally. Her version remained unchanged and there is absolutely no other evidence which puts into question or doubt this version of events. It is uncontested that appellant was approaching a pedestrian crossing, which fact he was perfectly aware of and which circumstance was also confirmed by Mrs. Chetcuti Bonavita who was exiting Don Bosco Street at the time when she saw appellant's vehicle drive towards the pedestrian crossing allegedly at considerable speed. Moreover Mrs. Arcidiacono was wearing a rain jacket and hat and not an umbrella as the defence mentioned in his appeal application as well as during his submissions before the First Court. This claim was denied by Mrs. Arcidiacono who confirmed that she had a rain hat on but no umbrella so neither can it be argued that an umbrella was blocking her view of the road.

That the evidence tendered indicates that the incident occurred when Mrs. Arcidiacono was already half way across the road. Appellant on the other hand claims that there was a van coming his opposite direction heading towards Tower Road whilst he was heading upwards and as soon as he passed the van, he ran over Mrs Arcidiacono who he did not see any time prior. He claims that it was raining very heavily on the day which hence would have made it difficult for him to see Mrs. Arcidiacono or to take any evasive action to prevent impact, apart from the fact that he mentions that she showed up unexepectedly since she walked out from behind another vehicle.

However the fact remains that appellant was aware that he was approaching a pedestrian crossing which he was familiar with. Despite the fact that it was raining heavily, he was driving at approximately 8 o' clock in the morning where the visibility of the road and the signage of the pedestrian crossing would have been clear so he was perfectly aware that he was approaching the crossing at issue, even more so with a view to his familiarity and frequent use of that same road. Appellant also claims that he was not driving fast but that he retained a normal speed and exercised more caution than is usually expected owing to the heavy rain, and if this were the case then he was most certainly aware that he was approaching the pedestrian crossing which was used by the victim.

Now in this respect the Court has to also make reference to the evidence of Carla Melita Chetcuti Bonavita who claimed that as she was exiting Don Bosco Street to turn up towards Dingli Street in the same direction as that of the appellant, the appellant's vehicle drove past her with speed so much so that she claimed that he could have impacted with her vehicle too if she had not been more careful herself. There is no other evidence other than that of this witness indicating the speed at which the appellant was driving, since the police sketch in the acts of the case was done by one of

the police officers on the scene and makes no indication of any brake or skid marks. Hence the Court cannot conclude in a definitive manner that the appellant was speeding beyond the required speed limit although local jurisprudence has repeatedly pointed out that excess speed is not necessarily measured on whether one actually exceeds the speed limit or otherwise but one has to factor in the road conditions and configuration to establish whether the driver should have been more cautious, hence necessitating that speed is reduced even further, even if speed limit is not actually exceeded in the first place[6]. Therefore although as has been stated there is no evidence that appellant was exceeding the speed limit in his driving, however it clearly results that he was not driving cautiously and keeping a proper lookout.

Finally on this point as was stated in the case in the names **The Police vs Joseph Grech**[7], '*Biex nuqqas ta' "proper lookout" iwassal ghal responsabbilta` penali il-Qorti trid tkun sodisfatta illi kieku ma kienx ghal dak in-nuqqas ta' "proper lookout" dik il-hsara x'aktarx kienet tigi evitata jew x'aktarx li ma kienitx issehh f'dak il-grad li effettivament sehhet. Jekk dik il-hsara fi kwalunkwe kaz ma setghetx tigi evitata, allura jigi nieqes in-ness ta' kawza u effett bejn in-nuqqas ta' "proper lookout" (l-ghemil negligenti) u l-hsara kagunata (l-effett dannuz); ma jkunx jista' jinghad li n-nuqqas ta' "proper lookout" kien kawza efficjenti, ghall-anqas in parti, tal-hsara kagunata'*.

Therefore in conclusion, it is the opinion of this Court that responsibility on the basis of lack of sufficient proper lookout on the part of the appellant ensues and this was ultimately the cause of the incident which took place as described and consequently of the injuries suffered by the victim.

Considers further:

That without prejudice to the acquittal by First Court of the third charge proffered against appellant, the lack of proper lookout, sufficient or otherwise which in the First Court's opinion as well as this Court's was lacking, is actually tantamount to negligence. In fact according to the case **The Police vs Alfonso Abela**[8] the Court stated the following:

> **Nuqqas ta' 'proper lookout' u cioe' nuqqas ta' prudenza ordinarja li wiehed ghandu jadopera biex jevita s-sinistri stradali jammonta ghal sewqan traskurat.**
>
> **kif gie ritenut fi "NEWHAUS N.D. vs. Bastion Insurance Co. Ltd" (1968) :-**
>
> **"Keeping a proper lookout means more than looking straight ahead – it includes awareness of what is happening in one's immediate vicinity. A motorist shall have a view of the whole road, from side to side, and in the case of a road passing through a built-up area, of the pavements on the side of the road as well."[9]**

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[6] See cases Pulizija vs Zarb Adami et (7.2.03), Pulizija vs James Abela (11.7.02), Pulizija vs Kenneth Borg (18.4.02) and Pulizija vs Stephen Zammit (0.7.02) all decided by the Inferior Court of Criminal Appeal presided over by Mr. Justice Joseph Galea Debono. See also Pulizija vs Robert Pace decided by the Inferior Court of Criminal Appeal and presided over by Mr. Justice Vincent Degaetano (8.06.01).

[7] Decided by the Inferior Court of Criminal Appeal, presided over by Mr. Justice Vincent De Gaetano (6.6.2003).

[8] Decided by the Inferior Court of Criminal Appeal, presided over by Mr. Justice Joseph Galea Debono (10.3.2005).

[9] See also the Inferior Criminal Court of Appeal judgement in the names Police vs No. 22889451 Gunner Brian Wilson, presided over by Mr. Justice William Harding with regards to the test which should be used used to establish whether driving should be considered dangerous or reckless (7.5.1955) - *It is not easy to formulate, in words the difference between dangerous driving and negligent driving. There are cases which are, on the face of them, glowing instances of dangerous driving; other cases are absolutely cases of negligence. It is the border-line cases that require consideration in the light of*

Hence it is the opinion of this Court that the criteria of negligence purported in article 226 of the Criminal Code and for which the appellant has been found guilty is in fact satisfied by the lack of sufficient proper lookout of the appellant when he failed to confirm that no pedestrians where crossing the road from the pedestrian crossing which he was approaching. Moreover, the fact alone that the appellant didn't slow down sufficiently or stop altogether at the pedestrian crossing would also be in breach of Motor Vehicle Regulation 89 which hence results in a breach of regulations which is another one of the criteria postulated in the same Article 226 of Chapter 9. Therefore this Court is also satisfied that there is sufficient evidence to the required degree confirming negligence or lack of observance of regulations on the part of the appellant which behaviour was tantamount to this unfortunate incident, in spite of the fact that appellant was acquitted of the third charge, being the offence envisaged under article 15 of Chapter 65 of the Laws of Malta . However, since the prosecution has not filed an appeal with regard to the acquittal by the First Court of third charge brought against appellant, this Court is precluded from varying the conclusions reached in the appellate judgement although as pointed out negligence in appellant's driving results as having contributed to this traffic accident. As the eminent Professor Sir Anthony Mamo states:

> **"…. the essence of negligence is made to consist in the "possibility of foreseeing" the event which has not been foreseen. The agent who caused the event complained of, did not intend or desire it, but could have foreseen it as a consequence of his act if he only had minded: so his negligence lies in his failure to foresee that which is foreseeable".**

Can appellant declare that he can be exempt from criminal responsibility, therefore, by stating that he could not have forseen that a pedestrian could be attempting to cross the road on a pedestrian crossing? This alone is sufficient for this Court to throw out all his arguments intended to shift the blame on the victim who was crossing the road by using a pedestrian crossing in a diligent manner, and on his excuse that due to the heavy rain and an oncoming vehicle the visibility was poor and was presenting an obstacle to his view of the road. These grounds are not sufficient at law to exempt him from responsibility, as pointed out.

Finally, the nature of the injuries suffered by the victim have been confirmed by the medical witnesses in this case and owing also to the extent thereof neither is there any doubt that the said injuries resulted during the incident at issue are grevious in nature with permanent effects.

Consequently, for the above-mentioned reasons the Court rejects all the grievances put forward by the accused in his appeal application, and confirms the judgement of the First Court.

True copy

Joyce Agius

Deputy Registrar

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the difference between negligent or careless driving on the one hand and dangerous driving on the other, and where the difficulty arises. It is safe to say that the difficulty is a question of degree, which is in the sense that dangerous driving implies something more serious than mere careless driving. Otherwise, every case of careless driving would be a case of dangerous driving; because, in a way, every act of negligence in driving, every infringement of the rules of safety laid down in the highway Code, gies rise to a potential danger. The solution of the difficulty lies in the appraisal of the circumstances of the case by the Court; after which appraisal the Court will rule out, or otherwise, a charge of dangerous driving as distinct from careless or negligent driving.