Tools for contesting witness evidence

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Introduction

During the *iter* of criminal proceedings, magistrates reign supreme in the application of the rules stipulated in the Code of Criminal Procedure in so far as no interlocutory appeal lies against any application of the rules of procedure. This situation increases the burden on judges and magistrates to apply the rules of procedure correctly for the simple reason that a mistake in their application could lead to a serious flaw in the outcome of the proceedings.

The legislator devised several ways in which witness evidence can be controlled and contested. In the first place, there is the overarching power of the judge or magistrate to control, and, in extreme cases, to sanction the conduct of the witness, in particular the behaviour of recalcitrant witnesses:

> *587. The witness shall answer any question which the court may allow to be put to him; and the court can compel him to do so by committing him to detention until he shall have sworn and answered.*

The law gives the power to the court to segregate witnesses in order to prevent contamination /of the evidence:

> *605. It shall be lawful for the court, either of its own motion or upon the demand of the parties, to prevent any witness who has been examined from holding any communication whatever with any other witness who is about to be examined.*

This provision allows the court to protect any witness who is about to be examined in a court case at any future date from being approached by giving a specific order preventing any of the parties from approaching him or her, and this in addition to other provisions prohibiting any person from intimidating or bribing any witness who is about to be examined or who has been examined.

In addition to the judicial control of the witness, the legislator also laid down provisions providing tools at the disposal of the parties' lawyers, including

prosecutors. Briefly, the tools provided are: (a) examination in chief, (b) cross examination, (c) confrontation of witnesses, (d) reference to previous inconsistent statements. The last item (d) appearing in this list will be dealt with under (a) and (b) as it is common to both the examination in chief and the cross examination of witnesses. These rules are applicable to civil proceedings as well as to criminal proceedings as a result of the fact that certain provisions in the Code of Organization and Civil Procedure are rendered applicable to criminal matters by virtue of two specific provisions contained in the Criminal Code.

(a) Examination in chief – Questioning your own witnesses

Examination in chief, that is, the questioning of a witness by the party producing him or her, is subject to strict rules imposing the prohibition of leading or suggestive questions, except with the court's special permission:

> *578. Leading or suggestive questions may not, without special permission of the court, be put in an examination in chief.*

A person producing a witness is not allowed to attack the credibility of his or her own witness by evidence of bad character:

> *584. A party producing a witness shall not be allowed to impeach the credit of the witness by evidence of bad character ....*

However, exceptionally, the law allows a person producing a witness to control his or her testimony in two ways only, namely, (i) rebuttal through the production of other evidence; (ii) proving the existence of previous inconsistent statements:

> *584. .... but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony.*

Therefore, proving the existence of previous inconsistent statements is allowed during questioning of one's own witnesses.

(b) Cross examination – Questioning your adversary's witnesses

The law allows the parties' lawyers and prosecutors very wide latitude in cross examining the adversary's witnesses.

Section 579 (1) provides:

> *579. The opposite party has the right to cross examine a witness; in such cross examination leading or suggestive questions are allowed.*

Section 580 gives a clear indication of what is allowed in cross examination:

> *580. (1) In cross-examination, a witness may only be questioned on the facts deposed in his examination, or on matters calculated to impeach his credit.*

The law allows a lawyer to attack the credibility of his or her adversary's witnesses in different ways but chiefly in two ways, namely (i) rebuttal throught the production of other evidence; (ii) proving that "his general reputation for truth" is bad:

> *585. A witness may be impeached by the party against whom he is called by contradictory evidence, or by evidence that his general reputation for truth is bad.*

This provision provides wide powers of interrogation and rebuttal. In the case **Group 4 Securitas (Malta) Limited et vs. Michael Angelo Pace et** (12 January 2012, Case 58/1999) the Civil Court held that section 585 of Chapter 12 provides a strong weapon that is able to destroy or weaken the version given by a witness:

> "Il-liġi [art. 585] tagħti lill-imħarrkin, f'każ bħal dan, arma li twaqqa' jew iddgħajjef tassew il-verżjoni ta' l-imħarrek Pace."

The law imposes very narrow restrictions regarding what may not be asked in cross examination, e.g. degrading questions (section 590) and incriminating

questions, that is, questions that exposed the witness to a criminal prosecution (section 589):

> *590. (1) It shall be in the discretion of the court to determine in each particular case, when a witness is not bound to answer a particular question on the ground that the answer to such question might tend to expose his own degradation, or when a witness will not be compelled to give evidence as to facts the disclosure of which will be prejudicial to the public interest.*
>
> *589. A witness cannot be compelled to answer any question the answer to which may subject him to a criminal prosecution.*

The above two prohibitions relative to degrading questions and incriminating questions apply both to examination in chief and to cross examination. It is to be noted, however, that the court is vested with the discretion to allow questions that could be deemed to be humiliating for the witness by tending to expose his own degradation. In a case involving a road traffic accident or a commercial transaction, such questions would never be considered admissible. However, in a separation case or an action for annulment of marriage questions that might tend to expose the degradation of the witness taking the witness stand could still be allowed provided that they are relevant to the matter in issue.

Naturally, once the law allows the party producing a witness to prove the existence of previous inconsistent statements, the law, which imposes less restrictions in cross examination, allows proof of previous inconsistent statements with regard to witnesses of the opposite party.

Section 586 provides the mechanism which applies to proving the existence of previous inconsistent statements:

> *586. (1) Before impeaching the credit of a witness by evidence that he has made at other times statements inconsistent with his present testimony, the alleged statements together with the circumstances of time, place and persons present must be related to him and he must be asked whether he has made such statements and he must be allowed to explain them.*

This provision encapsulates several procedural safeguards that are intended to ensure fairness towards the witness.

The law does not lay down that such previous inconsistent evidence must necessarily be in writing. The law, therefore, allows proof of previous inconsistent statements to be secured in any manner. However, if such proof is in the form of a written document, it must be shown to the witness:

> *586. (2) If the statements be in writing, they must be shown to the witness before any question concerning such statements is put to him.*

It is clear that this procedure is available equally in the case of questioning of one's own witnesses as well as in the case of witnesses produced by the opposite party. No other condition is imposed except that the witness must be given the opportunity to explain his earlier utterance.

Is the mechanism stipulated in section 586 (1) and (2) also available to rebut any declaration made contained in an affidavit filed by either of the parties? Section 584 refers to "statements inconsistent with his present testimony" and therefore it follows that this mechanism is available in order to challenge any form of testimony, be it 'viva voce' or evidence by affidavit.

The following illustration helps to identify the proper application of section 584 of Chapter 12. In a civil action for damages arising from a traffic accident in which a pedestrian had been killed, the plaintiffs (heirs of the deceased) produced as evidence a copy of the report submitted by the court referee appointed in the Criminal Inquiry, wherein the testimony given by the driver in the said Inquiry was reproduced. Subsequently, the defendant submitted his evidence by affidavit. During the cross examination of the defendant by plaintiffs' lawyer, he was asked to present a copy of his testimony in the criminal proceedings instituted against him by the Executive Police. Defendant's lawyer opposed this request, insisting that any documentary evidence should have been produced when the evidence of the plaintiffs was being heard and that it was not permissible to introduce fresh evidence when the evidence of the defendant was being heard. However, plaintiff's lawyer submitted that section 584 of Chapter 12 was triggered only when the defendant

submitted his evidence by affidavit. This was the first time that the defendant had testified in the civil action and therefore the request for the production of his testimony given in criminal proceedings was put forward at the appropriate time. Before the defendant actually testified, one could not refer to previous statements that were inconsistent with his present testimony. On 3 June 2014, the Civil Court, after hearing oral submissions on this legal issue, ruled that during cross examination reference can only be made to evidence that has already been admitted in evidence; no fresh evidence is admissible (**Carmen Portelli et vs. Jonathan Mifsud**, decided by the Civil Court on 11 January 2016, Case 879/2005 JPG).

(c) Confrontation of witnesses

Section 592 allows confrontation of witnesses:

> *592. (1) Each witness shall be examined separately. It shall, however, be lawful for the court to allow two or more witnesses to be confronted with each other; and in any such case, each of the witnesses may be questioned in the presence of the other witnesses.*

The following illustration helps to explain the principles underlying the particular procedure contemplated in section 592 of Chapter 12. In criminal proceedings instituted against the accused person on a charge of threatening a person who was shortly expected to testify against him in another set of criminal proceedings, the accused requested a confrontation between the alleged victim of intimidation while on the witness stand and a third party. The prosecution opposed the request, arguing that a confrontation could not take place at that stage and that the third party could be produced as a witness for the defence at the appropriate stage. Defence counsel contended that no such restriction was contemplated in the law of evidence. The third party would also be produced as a defence witness at the appropriate stage; however, there was nothing in the law which precluded the accused from requesting a confrontation between any prosecution witness and a third party (eventual defence witness) during the cross examination of the witness for the prosecution. The Court of Magistrates (Gozo) upheld the request made by the defence and allowed the

confrontation to take place limitedly to any earlier oral statements made by the prosecution witness with the said third party. The said third party subsequently took the witness stand a second time as a witness for the defence. (**The Police vs. Charles Paul Muscat**, 25 April 2014, Court of Magistrates (Gozo).

Relevant to this scenario is subsection (2) of section 580:

> *580 (2) When the party cross examining desires to prove by the same witness any circumstance not connected with the facts deposed in the examination, he must, unless the court, for just cause, shall direct otherwise, produce such witness in due time and examine him as his own witness; and in such case, it shall be lawful for the court, upon the oral demand of such party, to order the witness not to leave the court in order that he may be again called and questioned; and such order shall have the effect of the subpoena mentioned in article 568(1).*

This subsection is applied when the party cross examining seeks to put questions which go beyond what has been asked in the examination in chief but which are directly related to the point at issue. In these circumstances, the court will normally direct the party cross examining to recall the witness in due time and examine him as his own witness.

Naturally, credibility is a matter that concerns the quality of evidence and not the quantity of witnesses. This was highlighted in the case "**Elena Mallia proprio et nomine vs. Charles Sant Fournier et**" (Court of Appeal, (Case 441/2007) 28 February 2014, where the court of first instance so held:

> "The Court must weigh the evidence, not count the witnesses; so that if the evidence of one witness is in conflict with that of more than one witness, that single evidence should prevail if it better accords with the facts according to the ordinary course of human affairs and the usual habits of life. (**The Police vs Trevor Pressider**, Court of Criminal Appeal, 29 November 1958)."

(d) Reference to previous inconsistent statements

In "**Repubblika ta' Malta vs. Francis Casaletto**" (Court of Criminal Appeal, 22 March 1985) it was held:

> "……Fl-ewwel ipotesi, ghal kull wahda minn dawn l-imsemmija xhieda, kif del resto ghal kull xhud iehor, japplikaw id-disposizzjonijiet ta' l-artikolu 583 tal-Kodici ta' Organizzazzjoni u Procedura Civili, kif applikabbli ghall-Qrati ta' Gustizzja Kriminali bl-artikolu 641 tal-Kodici Kriminali. Ghalhekk, f'dan il-kaz, jekk ic-cirkostanzi jkunu hekk jirrikjedu ghall-finijiet tal-gustizzja, u kif stabbilit bl-artikolu 585 tal-Kodici ta' Organizzazzjoni u Procedura Civili (applikabbli wkoll ghall-Qorti Kriminali), il-kredibbilita` ta' kull wahda minn dawn iz-zewg xhieda tista' tigi attakkata billi kull wahda minnhom tigi konfrontata bi kwalunkwe dikjarazzjoni li kienet ghamlet qabel, komprizi, naturalment, kull stqarrija li kienet ghamlet lill-Pulizija u kull dikjarazzjoni bil-gurament minnha maghmula precedentement fi kwalunkwe stadju tal-proceduri."

Finally, with regard to the application of section 585 of Chapter 12 to criminal matters, in "**Repubblika ta' Malta vs. Meinrad Calleja**" (Criminal Court, 14 December 1998) the Attorney General objected to the admissibility of the testimony of witnesses tending to attack the credibility of witness Joseph Fenech by referring to specific acts. The Criminal Court held:

> "Bin-nota tieghu tal-5 ta' Settembru 1997 l-Avukat Generali beda biex eccepixxa l-inammissibilita' tax-xhieda .... u dan peress li ghar-rigward taghhom kollha "l-oggett tal-prova hu manifestament li jigi impunjat il-karattru tax-xhud Joseph Fenech meta tali prova tista' ssir biss permezz ta' provi tar-reputazzjoni generali tax-xhud u ma humiex ammissibbli provi ta' incidenti invidwali u specifici".
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> Kif gie accennat mill-Qorti ta' l-Appell Kriminali fis-sentenza taghha tas-27 ta' Novembru 1990 fl-ismijiet **Repubblika ta' Malta v. Edwin Cioffi**, u kif ukoll jidher car mill-Artikolu 585 tal-Kap. 12 (rez applikabbli ghall-proceduri penali bl-Artikolu 645 tal-Kap. 9), xhud ma jistax jigi attakkat bi prova ta' incidenti specifici li fihom kien involut u li ma jkunux altrimenti b'xi mod relevanti ghall-"facts in issue" kif aktar 'il fuq spjegat. Xhud (f'dan il-kaz Joseph Fenech), invece, jista' jigi attakkat bi prova li hu ghandu generalment fama li ma jghidx is-sewwa (apparti,

naturalment, bi prova kuntrarja – “contradictory evidence” – ta’ dak li jkun qal).

The more familiar one is with these rules forming part of Maltese Law of Evidence, the less likely it is that one will commit procedural errors, whether or not these will have an adverse effect on the outcome of the proceedings.