



## **Court of Criminal Appeal**

**Mr. Juystice Dr. Antonio Mizzi LL.D., Mag. Juris (Eu Law)**

**Appeal Number: 238/2012**

The Police

v.

**Geoffrey Fisher**

born in England, on the 29th February, 1940, holder of identity card number 288605(L)

and

**Mary Fisher Giodimaina**

daughter of Anthony Giodimaina, born on the 7th January, 1940, holder of identity card number 69940(M)

Today, the 31st day of May, 2016

The Court,

Having seen the charges proffered against both the appellants in front of the Court of Magistrates (Malta), namely:

That on the first day of November, 2010 at 8.00 p.m. and in the months previous to this date in the apartment bearing the address of 26, Triq l-Gherien, Mellieha:

1. operated or caused to be operated any wireless loud speaker, gramophone, amplifier or similar instrument, make or cause to be made any noise which shall be so loud as to cause a nuisance to the occupants of apartment number 1, 26, Triq l-Gherien, Mellieha;

2. moreover, without intent to steal or to cause any wrongful damage, but only in the exercise of a pretended right, kept the keys leading to the door of the roof of the abovementioned apartments.

Having seen the judgement of the Court of Magistrates (Malta) as a Court of Criminal Judicature of the 3rd day of May, 2012 where after having seen section 41(2)(b) of Chapter 10 of the laws of Malta:

(1): found both the accused guilty of this charge and condemned them to pay a fine (ammenda) of Euro 58.23 each.

(2): found both the accused not guilty of this charge since it was not sufficiently proven and therefore acquits both the accused of this charge.

Having seen the application for appeal of the defendants Geoffrey Fisher and Mary Fisher Giordimaina filed on the 14<sup>th</sup> May, 2012, wherein they humbly prayed this Court to vary and reform the judgement delivered on the 3rd May, 2012 in the names: 'The Police v. Geoffrey Fisher and Mary Fisher Giordimaina' by the Court of Magistrates as a Court of Criminal Judicature presided by Magistrate Dr. Saviour Demicoli by confirming that part of the judgement wherein the court found the applicants not guilty of the second charge and revoke that part wherein the court found the applicants guilty of the first charge and imposed the payment of a fine of €58.23 and consequently acquits them under those conditions that this Court may deem fit and proper.

The grounds of appeal of defendants Geoffrey Fisher and Mary Fisher Giordimaina consist of the following:

The first ground of appeal is that offence under examination has two specific requirements, 1) the operating/ causing/ suffering of the playing of the instrument on one side and 2) the noise being such that it causes a nuisance to occupants or inmate of any premisses in the neighbourhood.

The first Court hearing the evidence seems to have been overawed by the theatrics and antics of the other complainants, in the sense that since the other party categorically denied having ever seen the alleged noisy instrument, whilst alleging it to be on the windowsill, there is no evidence of anyone concerned (neither the civil party nor the Police) that in any manner positively identifies the accused as being the perpetrators of the inconvenience. All the witnesses said was that they heard the noise allegedly coming out of their (closed) window, with the alleged radio being on the windowsill, and that they could not ascertain the presence of the radio/instrument as they never saw it.

A further point of contention in issue is that the witnesses confirmed that the playing of the alleged instrument took place between eight o'clock in the morning and three o'clock in the afternoon, whence we all know that this is the most reasonable and unobjectionable time for such playing of instruments.

The theatrics of the complainants when they gave evidence before the first court were so blatantly comical in them ascertaining that Mr. Fisher used to jump and clap to the music whilst here we are talking of a septuagenarian (albeit in good health) who is unable to cause the alleged disturbance as indicated. Defendant Mrs Fisher could not be said that she jousts about due to her physical incapacitation, though it be minimal, it is enough to ensure that there is no jumping about as alleged.

Mention was made during the proceedings to irrelevant allegations and over emphasised issues and past incidents which in effect were submitted to the court merely to increase the theatrics of falsity of the evidence proposed in an effort to acquire the such sought after conviction, these being issues which are currently under the Jurisdiction of the Civil court as regards condominium matters, and the relevant payments of sums due which are in arrears and/or being unfoundedly refused by the other party was conveniently glossed over.

The animus of the party giving evidence was clearly shown to be flawed and incorrect in their assumption that the alleged disturbing noise was emanating from and being perpetrated by defendants, The alleged instrument was never seen yet they assured the court it had been placed on the window sill. There was no way they could describe

anything they had never seen thus they avoided the issue, however this left them without the necessary requisite of evidence beyond doubt that the alleged annoying sound of the playing of the radio (at the most sensible hours) was being carried out by an ascertainable instrument under the control of the accused. The onus of proof rests on the prosecution, and the police had all the necessary power to enter the premises of the accused, as they had done on other occasions, and verify the state of the situation, something which was never carried out and which was unverifiable because of the simple fact that the allegation is completely unfounded in fact.

The second ground for the appeal is that the charge was issued that the accused, in the tenement 26, Triq l-Gherien, Mellieha. It is evident from the charge itself that there is a fundamental error in the accusation lodged against the applicants. If the complainants spouses Borg live in Flat 1, 26, Triq l-Gherien, Mellieha, and there are three apartments in the block and thus the spouses Fisher could not have played music in 26, Triq l-Gherien, Mellieha given that 26, Triq l-Gherien, Mellieha is a block of apartments.

Borg have alleged that the music was coming from the apartment belonging to Fisher even though they never saw the radio and there are other apartments that overlook the shaft of the block of apartments at 26, Triq l-Gherien, Mellieha. Notwithstanding this lack of evidence and clear mistake in the charge the first Court found the accused guilty of the first charge related to the playing of music.

Having seen the records of the case.

Having seen the updated conviction sheets of the defendants.

Now therefore duly considers.

First of all, it has to be pointed out that this Court had to hear all the evidence produced by the witnesses all over again for the simple reason that the evidence tendered in front of the first Court had not been committed to writing.

The evidence produced before this Court consisted only of two witnesses, namely, Mary Borg and Vincent Borg. The affidavits of two policemen were also considered.

From the evidence produced it results that the case to be considered happened on the 1st day of November, 2010.

Both witnesses who are married Borg live in apartment number 1, whilst the appellants live in apartment number 3 on top of the Borgs. Apartment number 2 lies between the two apartments afore mentioned and on the 1st November this apartment was empty. Both Mary Borg and her husband Vincent complained to the police that the appellants left their radio on and the noise emanating from the radio was causing a nuisance. This was confirmed in their evidence in court. However, Mary Borg gave evidence in the sense that on that particular day the appellant Geoffrey Fisher was not present in his apartment.

In the circumstances, for the above reasons this Court rejects the appeal of Mary Fisher Giodimaina and confirms the judgement of the first Court. With regards to Geoffrey Fisher, this Court confirms the judgement of the first Court wherein it found the appellant not guilty of the second charge proffered against him. With reference to the first charge proffered against the appellant, this Court revokes the judgement of the first Court declares the appellant not guilty and consequently sets him free of this charge.