



**Court of Magistrates (Malta)
As a Court of Criminal Judicature**

Magistrate Dr. Donatella M. Frendo Dimech LL.D., Mag. Jur. (Int. Law)

Today, the 7th February, 2017

**The Police
(Inspector Elton Taliana)**

-vs-

Ahmed Rasem-A Franka, son of Rasem and Jamilla nee' Gnedi, born in Tripoli on the 26th September, 1986, residing in Flat 201, Palazzo Trigona, Victor Denaro Street, Msida, and bearer of Identity Card No. 115587A

Case Number 37/2015

The Court,

Having seen the charges brought against the accused Ahmed Rasem-A Franka who stands charged with having:

On the 11th January, 2015, at around 5am at St. George's Bay, St. Julian's-

1. With intent to commit a crime (rape of MGD) had manifested such intent by overt acts which were followed by a commencement of the execution of the crime, which crime was not completed in consequence of some accidental cause independent of his will.
2. Committed violent indecent assault on MGD.
3. Without a lawful order from the competent authorities, and saving the cases where the law authorizes private individuals to apprehend offenders, arrested, detained or confined the said MGD against her will as a means of compelling the said person to do an act or to submit to treatment injurious to the modesty of her sex.
4. Committed an offence against decency or morals, by any act committed in a public place or in a place exposed to the public.
5. Used violence in order to compel another person to do, suffer or omit anything.

6. Committed slight bodily harm on the person of MGD.

Having seen the articles of law sent by the Attorney General in his note of the 7th April, 2016, by means of which the accused was to be adjudged by this Court as a Court of Criminal Judicature.¹

Having heard witnesses.

Having seen all the acts and documents exhibited;

Having seen the submissions made by the defence in its note of the 12th December, 2016;

Considers:

Whereas the accused is charged with attempted rape, illegal arrest and confinement of a person, private violence, violent indecent assault, of the offence against decency or morals committed in public and of slight bodily harm on MGD, a 24-year-old.

Whereas by decree of the 16th December, 2016, the Court ordered that proceedings be continued in the English language.²

Whereas the **injured party** testified how on the night in question she had gone to Nordic Bar at around 1am with a couple of friends. Witness attributes the fact that she does not know how she found herself on the beach (which is a 5-minute walk from Nordic Bar)³ with the accused by alleging that her drink had been spiked although she does admit that she had been drinking beer and vodka with red bull.⁴ She adds *“At the beach he tried to have sex with me, I didn’t want to and I said no I don’t want. He was still trying and I started to scream... **he tried to have sex with me, when I said I don’t want to I start to scream and he start to punch me in the face.**”*⁵ Witness states that the accused had tried to undress her though she resisted him. At that point the police intervened.⁶ She was taken to St. Julian’s Police Station where the marks on her body were photographed. Subsequently she was also taken to Mater Dei Hospital. Witness says that

¹ Fol.88

² Fol.119

³ Fol.29

⁴ Fol.22 et seq.

⁵ Fol.24-25

⁶ Fol.28

her nose was swollen from the punch she had received from the accused whom she positively identifies in court.⁷

On cross-examination, she confirms that the swelling on her nose had subsided and she had no marks left.⁸ She admits that there is a period of time wherein she could not remember what happened. She does confirm that to get to the rocky part of the bay where she was found at around 5am,⁹ a certain distance had to be walked; she had been to the said beach (though not on the rocks) before.¹⁰ Witness denied proposing to the accused to have sex with him by the beach and also denied that the accused had instead suggested they go to his hotel, Blue Sea Hotel.¹¹ She could not remember whether the accused ran away when the police arrived though she remembered being hit due to the pain she had endured. Nor could the witness recall how she had two love-bites or that she had been fondling the accused and kissing him at the bar.¹² The injured party confirmed however that when the police arrived she still had her clothes on.

Whereas **PC741 Keith Vassallo** testified that on the 11th January, 2015, whilst on duty at St. Julian's Police Station, at around 4.45am the police were informed that a woman was heard shouting and screaming for help at St. George's Bay by the Corinthia sports club, on the left-hand side of the bay. He had gone on site together with PS1540, PC736 and PC1045. Having parked by the sports club and in the company of PS1540 he could immediately hear the screams coming from the vicinity and on the rocks he could see a person who was also screaming.¹³

Having reached the said person they noticed that the girl had her breasts showing and her pants had been drawn down whilst the man was wearing underwear and his sexual organ was showing.¹⁴ The man was taken to the police station. As for the woman who appeared agitated, confused and disoriented, she had immediately told the police that the man was not her boyfriend.¹⁵ Her demeanour led the constable to believe she was

⁷ Fol.32

⁸ Fol.33

⁹ Fol.37

¹⁰ Fol.38

¹¹ Fol.36

¹² Fol.39-40

¹³ Fol.53

¹⁴ "*bil-qalziet mnizzel.*" per PC Vassallo a fol.53. PC Buttigieg later clarifies that the girl was wearing a skirt. Thus this leads one to conclude that "qalziet" was a reference to her underwear "*Is-Sinjura kellha libsa bid-dublett mhux kemm tigbidha l'isfel.*" - (fol.106). This is confirmed a fol.134 by PS1540.

¹⁵ Fol.54

intoxicated. The witness stated that the woman had been heard crying out “*Help help help*” and was screaming out these words.¹⁶ The witness estimates that the distance between the road and the rocks where the said persons were found is that of 2 metres and it took around a minute to reach the place.¹⁷ He continues “*hu kien qieghed wieqaf bil-qalziet imnizzel bl-organu l-parti tieghu jidher u x’hin raghna nhasad u tella’ l-qalziet..... Hu bbies x’hin raghna ha nghidlek il-verita*”.¹⁸ In cross-examination he adds that the woman was on the ground screaming and shouting whilst the man was towards the back in a place which was quite dark “*Tghajjat u twerzaq u tipanikja.... Wahedha kienet, hadd hdejha. U hu ftit distanza qisu minn hawn ghall-hajt boghod.*” She was bare-foot and her socks and shoes were found a few steps away on the beach, where she had indicated.¹⁹ The constable denied ever hearing the accused tell the police that the girl had gone with him voluntarily, adding that he found it strange that the accused had not tried to flee the scene “*Le ma rrezistiex u ma tkellimx pero ma qal xejn.*”²⁰

Whereas **PC736 Martin Buttigieg** testified that whilst on duty at St. Julian’s Police Station an anonymous phone call was received reporting that there was a girl screaming and it was possible that a rape or a fight was underway. Upon arriving at the bay the constable heard the word “*stop*” several times “*Ghajjat, hafna diskors mhux bil-Lingwa la Maltija u lanqas Ingliza biss il-kelma stop instemghet kemm il-darba.*”²¹ They then decided to approach the place from where the screams were heard and found their colleagues having already handcuffed the male person on site. The girl was wearing a dress with a skirt “*Is-Sinjura kellha libsa bid-dublett mhux kemm tigbidha l’isfel.*”²²

Whereas **PS1540 Edmond Fenech** corroborates the details which emerged in the previous testimonies namely that a phone call had reported a possible rape taking place and “*Kif wasalna fuq il-post bdejna nisimghu xi ghajjat “help” u xi kliem bil-barrani fejn ma stajniex nifhmu u hafna hekk, biki u ghajjat u storbu u morna immedjatament fejn it-tarag, minn fejn it-tarag jiena u PC741 stajna ninnutaw femminili mara bil-qalziet ta’ taht ftit imnizzel qisu ma rkuptejha u sidirha barra kif ukoll [l-impitat] bil-parti tieghu mahruqa barra u kif rana, dahhalha u tella’ l-qalziet*

¹⁶ Ibid

¹⁷ Fol.57

¹⁸ Fol.55-56

¹⁹ Fol.58

²⁰ Fol.60

²¹ Fol.103

²² Fol.106

immedjatement.....u l-ewwel kelma li qallilna "she is my girlfriend"."²³ The witness states that **the injured party immediately denied that the accused was her boyfriend** and thus he was taken under arrest to the station for further investigations.²⁴ The sergeant adds that once the injured party was taken home to collect her ID card she had recounted that she was slightly drunk and had proceeded to St. George's bay to get a taxi home when all of a sudden someone approached her from behind, dragged her to the rocks and forced her to have sex with him. She refused his advances. PS Fenech exhibited the current incident report which contains details of the incident.²⁵ In cross-examination he confirms that the injured party was seen on the ground with her underwear down to her knees, her breasts were showing whilst the man was found with his penis exposed. She had told the police that she was attacked by the accused "*Qaltilna "dan prova jattakani"*". Interestingly the officer clarifies that **had he not heard the screams he would not have proceeded to arrest the accused "l-ghajjat minn naha taghna li smajnieh...Hi qalet "dan dahhalni hemm gew kontra r-rieda tiegh[i] u prova jaghmel is-sess mieghi."**"²⁶

Whereas **PC1045 Noel Carabott** also recounts how an anonymous call was made to the Police reporting the rape of a woman. The time of the call appears on the Police report as being that of 4.45am.²⁷ "*..kif ipparkajjna fejn il-bajja, bdejna nisimghu certu ghajjat. Ahna mill-ghajjajt li bdejna nisimhu bil-lingwa Ingliza bdejna nifmu l-kelma "stop"....*"²⁸ He adds "*..it-tfajla li kienet qeghda nofsha mnezza mill-parti ta' fuq ta' gisimha jigifieri kienet qeghda b'sidirha barra.*"²⁹ PC Carabott offers a vivid description of the scene he encountered when he parked around 50 metres away from where they found the injured party and the accused "*Hemm qisu hamsin metru...smajna l-ghajjat iva, stop...fejn ipparkajjna. Jigifieri qisu hemm dak il-hamsin metru distanza meta **smajt l-ghajjat.. "stop"...***"³⁰

The evidence tendered by the Police clearly manifests that the screams had prompted unknown persons to call the police and not, as is being alleged by the defence, that the injured party started screaming upon seeing the police!! Moreover, one must also factor that a certain time elapsed between the moment when the screams were heard, when the call was made to the

²³ Fol.134

²⁴ Ibid.

²⁵ Dok. EF a fol.123

²⁶ Fol.137

²⁷ Fol,123

²⁸ Fol.141

²⁹ Fol.142

³⁰ Fol.142

police and the arrival of the police on the scene where it results that the screams were still being heard. This goes to prove that there was a persistent behaviour on the part of the accused who, upon seeing his advances so strongly rejected should have desisted long before and most definitely once the injured party started crying out for **'help'** and begging him to **'stop'**; words which were overheard by the police once they arrived at the bay and hence at some distance from the scene of the crime where the accused was apprehended. PC Carabott states that the woman was suffering from a severe shock.

Whereas **Inspector Elton Taliana** gave an overview of the investigations he conducted into the incident. He had questioned the victim who was crying when recounting the incident. She had explained how she had been drinking with friends and then suddenly she decided to leave as she wasn't feeling well. Her intention was to get a taxi when she was attacked by the accused. Although she admitted to having been drinking and couldn't remember certain details, she denied that she consented to having sex with him. The inspector interrogated the accused who released a statement.³¹ The accused had denied that he had attacked the injured party although he could not answer a number of questions since he said he could not remember details. The accused had also sustained injuries to his face which were recently incurred. The accused could not even remember what he was doing on the bay with the woman and he said that he had been drinking. In cross-examination, the inspector said that at no point did the injured party allege she was carried on to the rocks but only that she was forced to go there; she had been in a tired state when she left the bar.³² It was for this reason she had descended down St. Rita steps to get a cab from the taxi stand which is at the end of that lane.

Whereas **Proces Verbal** no. 570/2015 was exhibited. When testifying before the court appointed expert the injured party stated that she could not remember why she was on the beach and that when she got to the beach the accused had tried to rape her and became aggressive.³³

Whereas **Dr Mario Scerri** who examined the injured party at 2.30pm on the date of the incident, in his report³⁴ concludes that although there had been no penetration the injured party had suffered a recently-sustained bruise on the right-hand side of her neck which was **compatible to a grip**.

³¹ Dok.ET3 a fol.10 et seq.

³² Fol.149

³³ Fol.17

³⁴ Fol.38 Dok.MS

A bruise on the left side of her chin was also recently sustained and this was compatible to blunt force trauma as were the bruises sustained on the anterior aspect of her left fore-arm and the abrasions on her right elbow. The injured party also recently sustained **grip marks on her left arm**. The accused had also been examined and he was found to be suffering from a bruise on his forehead, a bruise on the left temporal region compatible to blunt force trauma and an abrasion on his forearm which was compatible to scratch. This report was confirmed when the medical expert testified before this Court holding that all injuries were of a slight nature.³⁵ Dr Scerri testified that the victim had told him that she had been “*gripped and she was mishandled*”, that she had been assaulted but there had been no allegation of penetration.³⁶ He had also seen bruises on her breasts which were violet in colour, denoting they were recently sustained and which were compatible with love bites.³⁷ The witness confirmed that the victim had sustained lesions on the arms and face although no evidence that she had been beaten.³⁸ In conclusion the medical expert states that the said injuries were caused by a slight trauma.³⁹

Whereas **the accused** chose to testify and explained that he had met a friend of his, Azil Amran, at around 10.30pm-11pm at Hugo’s Bar. He stated that a girl had pulled up her top and asked him whether he liked her breasts. They then proceeded to go onto the bar’s terrace and spent some time dancing and talking about various subjects.⁴⁰ Around 3am she asked the accused to join her as they left the bar and whilst he wanted to head to Paceville she took his hand and led him towards the beach saying she knows of a nice place although the accused preferred to go to his hotel room in the Blue Sea Hotel. They had proceeded to the beach across the sand and made their way across a shallow part of the sea to reach the water sports centre. At that point he says that she was singing and shouting “*oohh*”. The accused continues that they started embracing and rolling on to each other whilst kissing and during all this “*she was I think a bit drunk, just singing...Then once she was on top of me she opened my belt...I opened my trousers...*”⁴¹ At that point the police arrived and he states that the victim began crying and she denied that she was his girlfriend at which point he hoped she had said that because she was tipsy and would chose to tell the

³⁵ Fol.91

³⁶ Fol.92

³⁷ Fol.93-94

³⁸ Fol.96

³⁹ Fol.98

⁴⁰ Fol.125

⁴¹ Fol.128-129

truth to the police later when she sobered up.⁴² Asked by the Court whether the fact that the victim opened his belt he understood this that she wanted to have sex with him, he states *“She wanted that”* and so did he.⁴³ The accused states that he had been drinking Vodka Absolute after buying a whole bottle.⁴⁴

In cross-examination, the accused finds difficulty explaining why he failed to tell the police the version of events he mentioned in his testimony saying *“I think in all the questions I gave the same answer that I was drunk and I can’t remember anything”* notwithstanding that the statement was taken at 3pm whilst he had been arrested at 5am, 10 hours later!⁴⁵ In his statement⁴⁶ the accused had admitted going Paceville with friends and having drunk heavily *“Xrobt hafna. Naf li hemm waqajt u sturdejt u kien hemm xi nies li poggewni fuq xi tarag....li niftakar hu li kont bilqeghda fuq it-tarag.”* Hence at no time does the accused mention that the girl led him to the beach as he testified before this Court. It is hard if not impossible to reconcile the two versions given by the accused. In his statement, he could not recall how he had got to the beach, how he suffered abrasions himself and what had actually happened on the beach *“Le jien ma niftakarx x’gara fejn ix-Xatt, la niftakar il-bahar u xejn u wara indunajt meta qajmuni il-Pulizija x’hin kont l-Ghassa.....Jien ma niftakarx li hrigt ma tfajla.”* In the same statement, he denies that the girl had been screaming out for help *“Le ma smajtiex”* and asked whether he held the victim against her will says *“Le ma niftakarx le.”* Thus, at no point does he inform the police that she was his girlfriend or that anything that occurred between them was consensual after it was the girl that led him to the beach as he testified before this Court. A few hours after the incident he fails to recollect details but almost two years later manages to give a detailed step by step reconstruction of events.

The accused also testified that he was prevented from informing the police of these facts because he was scared and he wanted a lawyer to be present although he also states that he was embarrassed to speak to his lawyer as to what really happened that night. With all due respect the Court finds this assertion bordering on the absurd. The accused was no minor but a 28-year old who had every interest in deflecting any guilt cast upon him. Just as on the rocks he had told the police that the victim was his girlfriend he could

⁴² Fol.130

⁴³ Fol.131

⁴⁴ Fol.132 whilst

⁴⁵ Fol.133

⁴⁶ Dok.ET3 a. fol. 10 et seq.

just as easily, once he could witness that serious charges were being brought against him, remonstrate his innocence to show he was being unjustly accused.

The accused admits that he was also aware of the place they had gone to since *“Because often I go to the sand site”* although he denies ever going on the rocks where they were found.⁴⁷ He also denied that the victim had screamed out for help and insists that *“No that was not screaming, that was shouting. It was like oohh, oohh and singing.”*⁴⁸ At this point the Court remarks that the words heard by the Police upon arrival at the scene were not those of “oohh”. Nor was any singing taking place. Instead the police heard cries of *“help, help, help”*⁴⁹ and *“stop”*.⁵⁰ The accused also finds difficulty remembering whether he gave the victim a love-bite; nor can he offer an explanation as to why the victim ended up suffering multiple abrasions on her body.⁵¹ It is to be recalled that when the police arrived on the scene the victim had her breasts, where the love bites were sustained, exposed: *“jiena u PC741 stajna ninnutaw femminili mara bil-qalziet ta’ taht ftit imnizzel qisu ma rkuptejha u sidirha barra kif ukoll [l-impitat] bil-parti tieghu mahruga barra u kif rana, dahhalha u tella’ l-qalziet immedjatament”*.⁵² Also *“it-tfajla li kienet qeghda nofsha mnezza mill-parti ta’ fuq ta’ gisimha jigifieri kienet qeghda b’sidirha barra.”*⁵³

Whereas from the evidence produced before this Court there is no doubt that the victim suffered slight injuries. Notwithstanding there had been no penetration, the fact that she had clearly manifested her unwillingness to partake in the advances being made upon her by the accused, so much so that the public had been alerted by her screams which were deemed serious enough to cause an individual to report the fact to the police, coupled to the fact that by the time the police from St. Julian’s Police Station got to the scene, the victim was still being subdued by the accused, leaves no doubt in the Court’s mind of the accused’s illicit intention and volition to perpetrate the crime of rape. As defence rightly contends after citing the judgement **Il-Pulizija vs Antonio Grech**⁵⁴ that *“Proving the mens rea is ultimately dependent on the nature of the acts committed by the agent, or by*

⁴⁷ Fol.136

⁴⁸ Fol.137

⁴⁹ Per PC741 a. fol.54; Per PS1540 a fol.133

⁵⁰ Per PC736 a. fol. 106”... *il-kelma stop instemghet kemm il-darba.” And PC 1045 “Jigifieri qisu hemm dak il-hamsin metru distanza meta smajt l-ghajjat..”stop”...* a.fol. 142

⁵¹ Fol.139

⁵² Fol.134 per PS1540 Edmond Fenech

⁵³ PC1045 Noel Carabott a fol.142

⁵⁴ Court of Criminal Appeal. Dec.25.06.1955

the acts which the agent was about to commit at the moment when the interruption took place.”, the Court finds that on the basis of the evidence before it, the accused intended and willed what could have resulted into the completed offence of rape.

Whereas the Court cannot but recall the evidence by the police officers arriving on scene that the victim was found with her underpants drawn down to her knees and the accused had his genitals exposed.⁵⁵ The victim may have been tipsy from alcohol ingested but certainly was conscious enough to resist and repel the advances made by the accused notwithstanding the injuries she suffered. The victim may have flirted with the accused even urging him on as he alleges and as defence counsel rightly points out in the note of submissions. However, she clearly did not want matters to be taken to the most intimate of levels, sexual intercourse. This appears to have irritated the accused who had left the bar manifestly expecting intimacy to follow so much so that he had offered that they go to his hotel room. The accused clearly could not accept rejection and instead of accepting that **“NO” means NO**, and that the word **“Stop” is unequivocal in its purport**, forced his way upon the victim thus commencing the execution of the hideous crime of rape, spurred on by the incapacity of the victim to offer that resistance which a totally sober person is capable of offering; a crime thwarted by the timely arrival of the Police who found the victim confused, in shock and agitated.⁵⁶

Whereas there remains no doubt that, as rightly cited by the defence in its note of submissions, the element of violence must be linked to the unlawful carnal knowledge for the crime envisaged by Article 198 of the Criminal Code to be successfully proven. Article 201 of the Code also provides that violence is presumed when the person abused was unable to offer resistance due to any other cause independent of the act of the offender. Hence it is immaterial that it was not the accused to lead her to that state of being unable to offer resistance, as defence submits. The officers arriving on the scene as well as the investigating officer all attested to the victim’s state of agitation and confusion. The victim whilst never pointing a finger directly at the accused, did state that she had thought her drink was spiked although she also admits of drinking considerable amounts of alcohol. Clearly this is one circumstance on account of which the victim proved unable to offer

⁵⁵ PC741 Keith Vassallo a fol.53 *“bil-parti ta’ fuq tidher u anke bil-qalziet mnizzel u sibna persuna ohra maskili bil-qalziet ta’ that u bl-organu tieghu jidher”*; PS1540 Edmond Fenech a fol. 134 *“bil-qalziet ta’ taht ftit mnizzel qisu ma rrrkuptejha u sidirha barra...[bl-imputat] bil-parti tieghu mahruqa barra u hekk kif rana dahhalha u tella’ il-qalziet”*;

⁵⁶ Fol.54

resistance due to a cause independent of the act of the accused, so much so that it was only following the police's arrival on the scene of the crime that her screams for help subsided; it was only upon the police's intervention that the victim was freed from the grasp of the accused. Hitherto that moment she remained incapable of resisting him as her calls for help which alarmed passers-by so much that the police were summoned for help, and which screams persisted until the police arrived, clearly and unequivocally attest to such a fact.

Whereas in order to deflect from the heinousness of his acts upon apprehension by the police the accused justified his actions by claiming that the victim was his girlfriend, a fact she was quick enough to refute instantaneously.⁵⁷ Such an assertion points towards the confirmation that his actions were such as could lawfully occur between a man and his girlfriend, consensually. This could well have been the case had the victim not resisted as best she could the accused's advances crying out as she did for help for a protracted period of time. The words of the victim are recalled: *"At the beach he tried to have sex with me, I didn't want to and I said no I don't want. He was still trying and I started to scream... **he tried to have sex with me, when I said I don't want to I start to scream and he start to punch me in the face.**"* adding that whilst the accused tried to undress her the police intervened.⁵⁸ The findings by the forensic expert corroborate the victim's version in that whilst concluding that there had been no penetration, victim had suffered a bruise on the left side of her chin which was compatible to blunt force trauma as were the bruises sustained on the anterior aspect of her left fore-arm, the abrasions on her right elbow and grip marks on her left arm. Reference has already been made to the fact that the victim was found with her top drawn up and her underpants brought down to her knees thereby corroborating her version that the accused indeed tried to undress her.

Whereas on the basis of the evidence before it, the Court finds that the prosecution has amply proved its case and thus finds the accused guilty of the offence of attempted rape in terms of article 198 of the Criminal Code.

Whereas the other offences tantamount to concurrent offences which served as a means for the commission of the first offence in terms of Article 17(h) of the Criminal Code. However it must be pointed out that the fifth offence of which the accused stands charged, is not that foreseen by article 251B of the Criminal

⁵⁷ Fol.134 per PS 1540 Edmond Fenech: "...l-ewwel kelma li qallilna "she is my girlfriend".

⁵⁸ Fol.24-25

Code, as stated by the defence in its note of submissions, but the offence in terms of Article 251 of the said Code.

Consequently, the Court after having seen articles 17, 31, 41(1)(a), 86, 87(1)(c), 87(1)(g), 198, 202(f), 207, 214, 215, 221 and 251 of Chapter IX of the Laws of Malta, finds the accused guilty of the offences brought against him and condemns him to a term of imprisonment of four years.

Furthermore after seeing Article 412C of the Criminal Code, the Court is hereby issuing a protection order against the accused in favour of MGD. This order shall be for a duration of three years.

In order to further protect the injured party, the Court prohibits publication of the name of the said party in all sections of the media and on the Justice Services website.

Dr Donatella M. Frendo Dimech LL.D., Mag. Jur. (Int. Law)
Magistrate