Court of Criminal Appeal

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

Appeal Nr: 72 / 2017

The Police

Inspector Elton Taliana

Vs

Ahmed Rasem. A Franka

Today the, 26th October, 2017

The Court,

Having seen the charges brought against Ahmed Rasem. A Franka bearer of Maltese Identity Card no. 115587 A before the Court of Magistrates (Malta) as a Court of Criminal Judicature of 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 *OMISSIS*) 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 *OMISSIS*.
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 *OMISSIS* 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 *OMISSIS*.

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 seen the judgment meted by the Court of Magistrates (Malta) as a Court of Criminal Judicature proffered on the 7th February, 2017 whereby 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, the accused was found guilty of the offences brought against him and condemns him to a term of imprisonment of four years.

Furthermore after seeing Article 412 C of the Criminal Code, the Court issued a protection order against the accused in favour of *OMISSIS*. This order is for a duration of three years.

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

Having seen the appeal application presented by the appellant, Ahmed Rasem. A Franka in the registry of this Court on the 20th February, 2017 whereby this Court was requested to vary the judgement *The Police vs*

[1] Fol. 88

Ahmed Rasem. A Franka delivered by the Court of Magistrates (Malta) on the 7th of February 2017 by confirming that part where it found him guilty of the fourth (4th) charge brought against him, while annulling and revoking the remainder of the judgement by declaring the appellant not guilty of the first (1st), second (2nd), third (3rd) and fifth (5th) charges hence freeing him of all punishments, or alternatively and without prejudice to the above, to vary the judgement *The Police vs Ahmed Rasem-A Franka* delivered by the Court of Magistrates (Malta) on the 7th of February 2017 by confirming that part where the First Court found appellant guilty while annulling and revoking that part of the judgement whereby the appellant was condemned to four years imprisonment and consequently imposing a lesser and more suitable punishment.

Having seen the acts of the proceedings;

Having seen the updated conduct sheet of the appealed, presented by the prosecution as requested by this Court.

Having seen the grounds for appeal of the appellant's grievances that are manifestly clear:

First Grievance: The First Court made an erroneous assessment of the evidence

a) *Omissis*'s testimony

In her *viva voce* testimony tendered just days after the incident, *Omissis* testifies that she had no recollection as to how she and the appellant ended up on the beach. Astonishingly, however, she very conveniently remembers all that took place once she was on the beach with the appellant: that the

appellant tried to undress her, tried to have sex with her, and that he punched her in the face when she resisted his advances (pages 24-25). In other words, we are meant to believe that while *Omissis* has no memory of the night in question, she recalls in vivid detail the few seconds during which the appellant supposedly forced himself upon her. She nevertheless conveniently forgets how she ended up having not one, but two love-bites on her breasts. The logical conclusion is that *Omissis* chooses to recall only the "facts" that give support to her allegations, while conveniently "forgetting" the proven facts that militate against her.

Moreover, her *viva voce* testimony completely contradicts the version of events she tendered to the police officers immediately after the incident. According to **PS1540 Edmond Fenech** (pages 134-137), *Omissis* remembers looking for a taxi at St George's Bay, when the appellant appeared out of the blue, assaulted her, dragged her onto the beach, pushed her to the ground and forced himself upon her. On the other hand, according to **Inspector Elton Taliana** (pages 154-151), she recounted how on the night in question she had been out drinking with friends when she suddenly fell ill and decided to leave. She also recalled how she walked down St Rita's Steps and toward St George's Bay to take a taxi back home. In this version, however, she remembers not only meeting the appellant, but she also remembers having a conversation with him!

Just days after the incident, in her *viva voce* testimony as well as in her deposition before the court-appointed expert during the *in genere* (a fol 17), *Omissis* instead claims to have completely forgotten how she ended up on the beach and denies ever having met the appellant!

Within a matter of days, *Omissis* thus gave not one, not two, but **three different versions of events**.

The deception of *Omissis* is further corroborated by the fact that her *viva voce* testimony was read verbatim from pre-prepared notes. Upon realising this, the First Court, originally presided by Magistrate Dr C Peralta, ordered her to stop reading and also found *Omissis* in contempt, describing her as a "*cheeky young lady*" whose "*attitude leaves a lot to be desired*."

In light of all this, it is the appellant's humble submission that the First Court incorrectly played down the implausibility of *Omissis*'s divergent versions of events, completely ignored her inconsistencies, and erroneously gave credence to the witness's every word notwithstanding her obvious lack of credibility.

b) The alleged exclamations of distress: "Stop" or "Help"?

The First Court also relies heavily on the conflicting testimonies of the police officers who attended the scene and apparently heard *Omissis* shouting in distress.

PC741 Keith Vassallo (a fol 54) claimed that *Omissis* was simply crying out 'help, help, help', while PC736 Martin Buttigieg (a fol 103) insisted that the girl was in fact shouting in some foreign language, with the occasional 'stop' in English. It is rather bewildering that, notwithstanding the fact that these two police officers were on the scene at the same exact time and in the same place, somehow they cannot agree on whether *Omissis* was crying out for help in English or instead shouting in a foreign language.

PS 1540 Edmond Fenech also describes the shouting as being in a foreign language, but this time interlaced with the English word "help" (a fol 134),

while his colleague PC1045 Noel Carabott heard the word “stop” and nothing else (a fol 141).

The four police officers who arrived on the scene are each convinced of what they heard but somehow cannot quite agree on which of the two very different-sounds exclamations were uttered by *Omissis* despite the apparently clarity in which she was expressing distress, and despite them being in a position to hear and see exactly the same things.

It is therefore the appellant’s submission that the police officers simply experienced what is known as Confirmation Bias: they interpreted what they heard in such a way that confirmed their pre-existing belief, which was that *Omissis* was in distress. But in truth, what they were actually hearing was *Omissis*’s drunken, enthusiastic and boisterous singing and shouting, which the appellant describes as “*oohh, oohh and singing*” sounds.

Alcohol is known to lower one’s inhibitions, inducing silly behaviour and exaggerated emotion, which explains *Omissis*’s euphoric shrieking after a long night of drinking in the Paceville. Euphoric shrieking can easily be interpreted as distress if witnessed in the wrong context; in this case a dark secluded beach in the early hours of the morning, following an alert that someone is being sexually assaulted.

In other words, it is not being alleged that the police lack credibility, but rather that they heard what they wanted to hear, especially in light of the fact that *Omissis* was not speaking English and therefore whatever she was saying could not be easily deciphered.

The only explanation is therefore that the police, having received the anonymous phone-call alerting them that someone was attempting to rape a woman, stormed to the scene expecting to hear a woman in distress. In these circumstances, they misheard her drunken enthusiasm, singing and shouting in a foreign tongue, as exclamations of distress, which simply corroborated their bias.

It is therefore the appellant's submission that the First Court erroneously glossed over these divergences, instead combining the police officer's testimonies as if they were one, and reaching the conclusion that the four police officers had each heard exactly the same thing, which is evidently not the case. The applicant humbly submits that the First Court should have questioned the soundness of these testimonies rather than giving them its full endorsement.

c) <u>The protracted period of time in which *Omissis* supposedly cried for help</u>

The Court observes that *Omissis* had probably been crying out from help for a long period of time, at the very least from the time of the anonymous phone-call alerting the police of the alleged incident, to the moment the police arrived on the scene. According to the First Court, this "*goes to prove that there was a persistent behaviour on the part of the accused*."

Yet, it is the appellant's submission that this protracted period of time actually militates against - rather than corroborates - the prosecution's version of events. The protracted period of time suggests that the appellant had absolutely no intention of doing anything unsavoury with *Omissis* and that the screams where in fact nothing but lively and alcohol-fuelled shrieking, as already explained.

How else could one explain the fact that in that protracted period of time between the phone-call and the arrival of the police, the appellant (who supposedly is strong enough to drag *Omissis* all along the beach, force off her shoes and socks and shove her onto the rocks) had only managed to pull down his trousers and lower *Omissis*'s top? Surely, in that long period of time, the strong and determined appellant could have done significantly more 'damage' to *Omissis*? How is it that in this protracted period of time he failed to undress a woman who just moments earlier he had supposedly assaulted and dragged all the way across the beach and onto the rocks, as well as removed her shoes and socks?

The police found him standing still, at some distance from *Omissis*, and with his trousers just partially drawn down. *Omissis*'s breasts were partly exposed, but she was otherwise fully-clothed (a fol 54). In other words, in this protracted period of time, the appellant had apparently only succeeded in taking *Omissis*'s shoes and socks off; a rather strange choice for the appellant, given his supposed prolonged and determined intent to commit rape.

d) <u>The appellant's version of events is the only plausible one</u>

In light of all the above, the appellant humbly submits that his own version of events is far more plausible and probable: he met *Omissis* in Paceville, and after hours of partying and drinking together, she led the appellant to the beach, intending to have sexual relations with him. She took off her shoes and socks as she crossed the shallow waters towards the section of the beach, which she herself concedes she was familiar with. There is absolutely no other explanation as to why *Omissis*'s shoes and socks were off, when she was otherwise fully clothed.

The slight bruises and marks are not indicative of any resistance or struggle, but rather corroborate the fact that *Omissis* and the appellant were being intimate on an uncomfortable, rocky surface. The 'gentle' love bites on her breasts (a fol 93-94) suggest consensual intimacy.

Her alcohol consumption explains her boisterous shrieking, which one can easily interpret as signs of distress if witnessed in the wrong context. It is easy to assume that someone is in distress just because they happen to be with man on a secluded beach, being loud and making a fool of themselves. Alcohol lowers one's inhibitions, often influencing people's personalities, which is manifested by the exaggeration and amplification of one's feelings. This is the impact that alcohol typically has on the brain, and it explains *Omissis*'s euphoric shrieking.

As she saw the police approach, that feeling of euphoria quickly disappeared, replaced instead with feelings of regret and humiliation, as one reasonably would, having being caught topless with a man she had just met, and in a public place. She elected to blame the whole thing on the appellant, avoiding both embarrassment and prosecution. But the fact that she had removed her shoes and socks, as well as the gentle love bites on her breasts, are clear evidence the *Omissis* was on the beach with the appellant on her own volition. Moreover, her inconsistent versions of events further show *Omissis*'s penchant to lie and twist the facts to suit her needs. Consequently, she should not have been deemed a credible witness by the First Court.

One sympathises with *Omissis*: surrounded by four male policemen, tipsy and topless on a public beach in the early hours of the morning, and with a man she had just met. It is not surprising that her instinctual reaction was to hide her sins and portray herself as the victim, first by claiming that she had been assaulted and dragged to the beach, and just days later, upon

realising that her story just did not add up (seeing that she had taken her shoes and socks off, and seeing that she had two love bites on her breasts) she changed her story, claiming instead that she had no recollection as to how she ended up on the beach.

In light of all the above, the version of events presented by the prosecution is riddled with inconsistencies and could not be any more ludicrous and implausible. It follows that the First Court's decision to convict the appellant of all charges brought against him was manifestly unreasonable. It is the appellant's submission that he should have instead been acquitted of all charges against him with the exception of the fourth (4) charge pertaining to public indecency.

Second Grievance: Lack of a specific intent to commit rape

Without prejudice to the above, even if one had to concede that *Omissis* was in fact in distress the moment the police officers arrived on the scene, the appellant humbly submits that the First Court made an erroneous application of the facts and the law when it concluded that the accused had the "*illicit intention and volition to perpetrate the crime of rape*" and that "*the accused intended and willing what could have resulted into the competed [sic] offence of rape*" (pages 9-10 of the judgment).

The First Court therefore concluded that the prosecution had proven, beyond a reasonable doubt, that the appellant had manifested the intent to rape *Omissis*. Aside from *Omissis*'s testimony, which is being strongly contested by the defence owing to its numerous inconsistencies, the First Court came to this conclusion on the basis of the alleged calls for help heard by the police (which are also being contested) when they arrived on the

scene, as well as the fact that they found both the appellant and *Omissis* partly undressed.

Even if one were to concede that *Omissis* was manifesting some degree of distress, the distress alone does not suffice to show a specific intention to commit the specific crime of rape. Likewise, the state of partial nudity of the appellant cannot be deemed a manifestation of a specific intent to commit rape.

As held by the Court of Magistrates (Malta) on the 3rd of February 2010 in the case of *Il-Pulizija vs Abdelsalam M.N. Hassin*, in order to be convicted of attempted rape, the accused's intention must be manifested through preparatory acts. These preparatory acts must be carried out with the specific and clear intention to commit the specific crime of rape, in such a way that they leave no doubt in the mind of the Court the accused intended to rape the victim. It follows that preparatory acts in themselves do not suffice: they must be followed by the commencement of execution of the crime.

In discussing the distinction between preparatory acts and the actual attempt, the above-cited Court quotes Professor Mamo, who had this to say:

> *"…**in order to decide whether such act represents a commencement of the execution of the crime it must be seen whether it forms part of that series of acts which, <u>in their natural completeness</u> would constitute the actual commission of the crime**. If the act forms an integral part of this series of acts which in their completeness would consummate the crime, that act is one of execution**. If, on the contrary, the act merely precedes the criminal action, to which it***

was directed and is such that, <u>however much repeated, it could never accomplish the consummation of that crime</u>, the act is not an act of execution."

The distressed calls and the partial nudity are, at best, a manifestation of unsavoury and lascivious intentions on the part of the appellant. The circumstances therefore may, at best, show that there was a criminal purpose. But they certainly do not prove, beyond any reasonable doubt, that the appellant had a precise, clear and specific intent to rape *Omissis*.

The demeanour of the appellant may, at best, constitute a manifestation of his intent to carry out some kind of sexual act, but it goes without saying that not all sexual acts are tantamount to rape. The First Court therefore came to an erroneous legal conclusion when it found that the prosecution had proven beyond a reasonable doubt that the appellant had commenced the execution of the crime of rape simply because he was found standing in close vicinity of *Omissis* with his genitals exposed.

By way of comparison, and by contrast, in the case of *Il-Pulzija vs Mohammed Muse Ali et*, decided by the Court of Appeal on the 2nd of March 2011, the Court concluded that the two accused had attempted to rape the victim since they were both caught *in flagrante delicto*: "**<u>kif waslu [l-Pulizija] ra lill-vittma ma' l-art gharwiena wiccha 'l fuq u l-appellant Ibrahim jaghmel l-att sesswali</u>**." The accused was effectively caught on top of the victim in what clearly appeared to be, at the very least, an attempt to have sexual intercourse with the victim. As for the second accused, the Court notes that:

> "Hekk kif l-appellant Muse Ali **ppozizzjoni ruhu fuq il-vittma bejn saqajha, huwa beda l-esekuzzjoni tad-delitt ta' stupru**..."

The cited judgment thus effectively convicts the two accused only because the perpetrators had positioned themselves on top of the victim: an act which constitutes an unequivocal manifestation of the specific intent to rape.

Similarly, in *Il-Pulizija vs Abdelsalam M.N. Hassin* decided by the Court of Magistrates (Malta) on the 3rd of February 2010, it was held that the accused had commenced execution of the crime, "*u dana meta l-imputat inezza il-hwejjeg tal-vittma, jinza il-hwejjeg tieghu,* ***jitla' fuqha.... u susseguentement ikun hemm kuntatt karnali***...". In fact, the Court observed that the victim "**kellha ukoll slieh fuq in-naha ta' barra tal-parti taghha**".

On the other hand, *Il-Pulizija vs Joseph Xerri* decided on the 12th of September 2013, the Court of Magistrates (Gozo) acquitted the accused, motivating its decision as follows:

> "... *ghalkemm l-imputat* ***esprima ix-xewqa li ikollu avventura sesswali ma' Aquilina u wera dan b'atti esterni****, madanakollu dawn qatt ma jistghu jikkostitwixxu il-bidu ta'l-esekuzzjoni tad-delitt ta' stupru.* ***Il-fatt illi l-imputat qabad lil Aquilina minn taht sidirha, ghannaqha mieghu, biesha fuq hugbejha*** *u qalilha xi diskors suggestiv, certament* ***ma humiex atti li jistghu jigu ikkunsidrati bhala tali li iwasslu ghal kummissjoni tar-reat ta'l-istupru*** *li huwa l-kongungiment karnali bi vjolenza u kontra r-*

rieda talvittma. Dana certament ma giex ippruvat f'dana il-kaz u kwindi lanqas t-tentattiv ta'l-istess ma jista' jirnexxi billi lebda att maghmul mill-imputat ma jista' qatt remotament jikkostitwixxi il-bidu ta'l-esekuzzjoni tar-reat ta'l-istupru."

Similarly, in the present case none of the acts carried out by the appellant can even remotely amount to the commencement of execution of the offence of rape. The appellant was discovered at some distance from *Omissis*, with his pants only partly pulled down, while *Omissis* was fully-clothed apart from her breasts which were partly exposed. The medical examiner confirms that "**on the genital area there is nothing**." (a fol 98). The clear and specific intent of the appellant simply cannot be known. The 'natural completeness' of the preparatory acts carried out by the appellant is not necessarily the crime of rape. There are numerous other plausible scenarios in which this event could have unfolded, many of which may include lewd acts which do not amount to rape.

In light of the insufficient evidence on the appellant's *mens rea*, the applicant humbly submits that the First Court should have dismissed the first charge against the appellant and instead found him guilty of the alternative charge, namely the lesser offence of violent indecent assault.

Third Grievance: Erroneous application of the law on illegal detention

Without prejudice to the above, and even if this Honourable Court concludes that the appellant is guilty of either attempted rape or violent indecent assault, it is the applicant's submission that he should nevertheless not have been found guilty of illegally detaining or arresting *Omissis*.

Article 86 of the Criminal Code provides:

> Whosoever, without a lawful order from the competent authorities, and saving the cases where the law authorizes privte individuals to apprehend offenders, arrests, detains or confines any person against the will of the same, or provides a place for carrying out such arrest, detention or confinement, shall, on conviction, be liable to imprisonment for a term from seven months to two years.

Our domestic courts have interpreted this provision consistently. In *Il-Pulizija vs Paul Xerri et* delivered on the 7th of February 2017, the Court of Magistrates (Gozo) cited Maino, who noted that the main ingredient of this offence is the **absolute deprivation of liberty**, to the extent that the victim has no possibility of escaping or seeking help.

The same Court made reference to *Il-Pulizija vs Andrew Bonnici*, decided by the Court of Appeal on the 23rd of January 1998, where it was held that the victim **must have been taken to the place in question against his will**. The Court also noted that the Courts often rely on medical evidence to determine whether this offence subsists.

In the present case, Dr Mario Scerri (a fol 92-99) examined *Omissis* and found that she had "fresh" and "gentle" love bites on her breasts, indicating consensual intimacy with the appellant. The fact that her shoes and socks were off furthermore proves that she went to the beach with the appellant on her own volition.

Dr Scerri also notes that "**there is no impression that she was beaten up**". While she did have a few lesions and bruises, these are perfectly compatible with the fact that *Omissis* and the appellant were being intimate on an uncomfortable rocky surface. Moreover, the appellant was discovered at some distance from *Omissis* – she was not tied up, nor was she being held in any way, which means that she was free to leave at any time.

The applicant therefore humbly submits that the First Court made an erroneous interpretation of the law and the facts when it concluded that the applicant had unlawfully detained *Omissis*.

Fourth Grievance: The charge of Rape is an alternative charge to that of Violent Indecent Assault

The First Court, on page 12 of its judgement, "*finds the accused guilty of the offences brought against him…*" It would therefore appear that the Court found the appellant guilty of the second charge brought against him, that of violent indecent assault.

The applicant humbly submits that in doing so, the First Court misinterpreted and misapplied the law, which precludes a concurrent finding of guilt of both the crime of rape and that of violent indecent assault. Article 197 of the Criminal Code quite clearly stipulates that:

> *Whosoever shall be guilty of any violent indecent assault,* ***which does not, in itself, constitute any of the crimes, either completed or attempted****, referred to in the preceding articles of this sub-title, shall on*

conviction, be liable to imprisonment for a term from 3 months to 1 year."

The Court in *il-Pulizija vs Paul Attard* decided by the Court of Appeal on the 24th of June 1972 amplifies on the exclusionary element of this crime:

"*…dan ir-reat jikkomprendi dawk l-atti impudici kollha, kommessi fuq persuna kontra l-volonta` taghha, li* ***la jkunu konsumativi ta' delitt iehor u lanqas principju ta' esekuzzjoni tieghu kostitwenti tentattiv punibbli****, imma atti preparatori, ossia, kif isejhulhom awturi ohra, atti li jippreludu ghall-estenwazzjoni tal-libidini."*

In *Il-Pulizija vs John Gera*, decided by the Court of Magistrates on the 14th of November 2008, it was likewise held that *"Id-definizzjoni li taghti l-Ligi taghna tal-attentat vjolenti ghall-pudur* ***hija wahda li telimina*** *– ghax tnehhi dawk ir-reati msemmijin specifikament fl-artikoli precedent ta' dan is-sub-titolu."*

Similarly, but in the context of the crime of defilement, in the case of *Il-Pulizija vs Odette Micallef et* delivered on the 3rd October 2013, the Court of Appeal declared:

"…il-kriterju differenzjali senjat mill-ligi stess bejn ir-reat ta' korruzzjoni ta' minorenni u dak ta' attentat vjolent ghall-pudur hu wiehed negattiv, fis- sens li jekk jikkonkorru fil-fatt addebitat li l-imputat irrekwiziti tal-korruzzjoni ta' minorenni hemm dan id-delitt, jekk le

hemm l-attentat vjolent ghall-pudur. Fi kliem iehor ***dawn ir-reati huma alternattivi - jew jirrizulta r-reat ta' korruzzjoni ta' minorenni jew ir-reat ta' attentat vjolent ghall-pudur. Jidher car li dan il-fatt gie kompletament injorat mill-Qorti tal-Magistrati u nstabet htija fiz-zewg reati meta huwa evidenti li reat jeskludi ill-iehor."***

The definition of violent indecent assault under Article 207 of the Criminal Code therefore excludes all other more serious sexual offences, including that of rape. In order for one to be found guilty of violent indecent assault, the sexual and violent act cannot constitute any other crime of a sexual nature. The first and second charges against the applicant were therefore alternative charges, and the applicant humbly submits that the First Court was therefore erroneous when it found the appellant guilty of both.

Fifth Grievance: Punishment is Excessive

Without prejudice to the foregoing, it is the applicant's humble submission that the punishment imposed by the First Court was excessive and disproportionate in the light of the appellant's clean criminal record, his willingness to fully cooperate with the police, and the fact that he made absolutely no attempt to flee despite ample opportunity for him to do so.

In addition, no matter which version of events this Honourable Court elects to give most weight to, it is amply clear that *Omissis* went to the beach with the appellant on her own volition and consensually engaged with the appellant in intimate acts for a long period of time, as evidence by Dr Mario Scerri's report and the fact that she took her shoes and socks off while on the beach. This is further corroborated by the medical examiner's testimony

that there were no signs of violent assault and most importantly that "*on the genital area there is nothing*."

In these circumstances, the applicant humbly submits that even if found guilty of all charges, the punishment should be substantially decreased to correspond with the aforementioned mitigating factors.

Considers,

That appellant puts forward a series of grievances directed towards the finding of guilt by the First Court in its judgment lamenting that the First Court made an erroneous assessment of the evidence brought before it, that the specific intention to commit rape was lacking and finally that the legal elements needed to substantiate the crime of illegal arrest do not subsist. This apart from the final grievance related to the nature and *quantum* of the punishment inflicted. The Court will deal with these grievances *seriatim*, starting with the assessment of the evidence found in the acts as being the main grievance appellant has brought forward against the judgment of first instance.

Now it has been firmly established in local and foreign jurisprudence that both in cases of appeals from judgments of the Magistrates' Courts as well as from judgments 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 judgment 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 :"I**r-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 judgment 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 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].

This Court has accordingly evaluated the evidence anew with a view to establishing whether the Court of first instance could have legally and reasonably found the accused guilty of the main charge brought against him being that of attempted rape. Appellant criticizes the appreciation of evidence by the First Court in four main instances being the credibility of the evidence tendered by the alleged victim Marica *Omissis*, her alleged

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

exclamations of distress, the protracted period of time in which *Omissis* supposedly cried for help and the credibility of the version of events as explained by appellant. Therefore it is evident that appellant considers that more weight should have been given by the First Court to his version of the facts and therefore should have discarded the alleged victim's accusation of the exercise of force by appellant to commit the sexual act as untrue. This especially in view of the fact that in his opinion, injured party gave three conflicting versions as to the details of events leading up to the alleged assault.

It results from the acts that in the early hours of the 11th January 2015, both accused and injured party had been out drinking and partying in Paceville to the extent that they were both heavily intoxicated and inebriated. It also results that these two people were found on the beach in St. George's Bay, being the rocky part of the beach, next to the Corinthia sports club by the Police and this following an anonymous report filed at the St.Julians police station. These two people were found to be partially clothed, injured party with her breasts exposed and her underpants down to her knees, and accused with his trousers down and penis exposed. It is a proven fact also that injured party was shouting and screaming thus attracting the attention of unknown third parties to the extent that these felt the need to report the incident to the police. This noise also immediately drew the attention of the police on arriving on site thus being able to spot the persons involved.

These facts are not in dispute. What the accused however alleges is that the sexual intimacies performed between him and injured party were consensual to the extent that it was upon *Omissis*'s suggestion that they ended up on the rocky beach this being evidenced by the fact that her shoes and socks had been removed by herself when they had walked in shallow water from the sandy part of the beach to reach the secluded spot chosen by her. Appellant opines that this piece of evidence coupled with the love bites found on injured party's breast indicate her consent to the sexual activity carried out between them.

This Court, however cannot concur with appellant's arguments, nor does his version of events manage to rebut, and this on a balance of probabilities, the evidence brought forward by the prosecution. The first piece of evidence to suggest otherwise is the police report itself filed on the date of the incident and exhibited in the court records, describing the anonymous call made to the police. This unknown third party dutifully informed the police that next to the water sports stand in St. George's Bay there was a person raping or trying to rape a female. It was upon this information that the police went to the place indicated confirming therefore the veracity of the report. In fact the four police officers separated in groups of two, one group witnessed the incident from the part of the sandy beach and the other group from next to the steps leading down to the rocky part of the beach were these two people were found. They all confirm that the cries and shouting of a female person was heard initially from the street. All four in fact confirm that this female person was neither singing nor making 'ooh' sounds as alleged by appellant. The cries were cries of help and of distress, probably the same sounds which triggered the unknown person to file a report a little earlier. Injured party was lying on the floor with appellant next to her with his penis exposed. Therefore even were this Court not to take into consideration the versions of both parties to this incident, the circumstantial evidence found in the acts all point in one direction and this that the accused was forcing himself upon injured party against her will and this in order to perform sexual intercourse. Even the report filed by the medico-legal expert indicates this scenario. In fact upon medical examination it resulted that *Omissis* was suffering from a bruise on the right hand side of her neck, on her chin, and on her forearms together with abrasions in this latter area all compatible with grip marks and pressure marks. This is indicative of a person being held down with force. Even the abrasions found on her knees according to the expert were compatible with blunt trauma resulting on impacting with the floor or a wall. Not only but appellant suffered also from a number of scratch marks on his arms, and also bruises to the forehead and back suggesting as scuffle. This is the conclusion of the expert who clearly states

that the injuries are indicative of the fact that injured party "*offriet resistenza ghall-agressur*" and that appellant "*qala xi daqqiet u gie migruf*."

Consequently this Court finds no reason to differ from the conclusions reached by the First Court that appellant was trying to force himself onto injured party and this with the intent to have sexual intercourse with her. This is clearly evidenced from the preparatory acts leading to the commencement of execution of the offence wherein accused was found *in flagrante* with his pants down and penis exposed and injured party was lying down with her back to the floor, her pants down to her knees and her breast exposed, having love bites on both her breasts indicating clearly that there had been physical contact between appellant and injured part. Therefore although falling short of actual penetration or carnal knowledge, as the law states, it is evident that appellant was in the throes of commencing the execution of the crime of rape which crime was not completed due to the resistance offered by the victim herself and the timely intervention of the police. For the above reasons therefore the Court cannot uphold this first grievance since as the First Court rightly points, even though *Omissis* might have been at first complacent to the attentions of appellant, however he should have immediately realised that upon the commencement of a degree of intimacy between them, she was not consenting to the sexual act and therefore he should have refrained immediately from carrying on further his sexual advances. However it seems that appellant was completely oblivious to *Omissis*'s cries for help, which cries were clearly heard not only from the person filing the report but also even some time later when the police arrived on the scene and witnessed appellant about to commence the sexual act. Consequently this first grievance is being rejected.

Appellant further laments that there is no evidence to indicate that he intended to rape injured party and that the acts performed by him do not amount to the commencement of execution of the crime of rape, and can only remotely constitute the crime of violent indecent assault which charge is alternative to the crime of rape. In fact in his fourth grievance appellant

affirms that the First Court by an erroneous application of the law found him guilty of both charges. As already pointed out this Court considers that the conclusion reached by the First Court with regard to the finding of guilt for the first charge brought against appellant is both legally and factually well-founded since as pointed out there was a physical contact between the two people as evidenced in the medico-legal report and that the intention of accused was clearly that of having sexual intercourse with injured part to the extent that both parties were exposed indicating such a course of action. However, appellant is correct in stating that the charge dealing with the crime of violent indecent assault is alternative to the first charge of attempted rape as clearly results from the wording of section 207 of the Criminal Code which clearly states that this offence will result where the act "***does not, in itself, constitute any of the crimes, either completed or attempted, referred to in the preceding articles of this sub-title....***"

This clearly means that the offences are alternative the one to the other, and if there results the crime of attempted rape, as is the case, therefore there cannot be a finding of guilt also for the crime of violent indecent assault and the First Court had to abstain from taking further cognisance of the charge relating to this offence[3].

The same cannot however be said of the third grievance brought forward by appellant regarding the erroneous application of the law on illegal detention. As already stated it is undoubted that injured party was held against her will by appellant so that she had no means of escape although it is evident that she tried to resist her 'confinement'. Professor Mamo has this to say on this offence in his notes on Criminal Law:

"***the words "arrest" "detention" and "confinement" are not synonymous: each indicates a special manner in which an attempt can be made on personal liberty: "Il reato preveduto nell'articolo 169 (our Section 86) esiste sia quando alcuno si fermi nel mentre che agisce o camina; sia quando si faccia rimanere suo malgrado in quell luogo ove si trova; si quando finalmente si trasporti da un luogo ad un***

[3] Vide judgments Il-Pulizija vs Paul Attard – 24/06/1972, il-Pulizija vs Odette Micallef et – 26/01/2017

altro." (ROBERTI – ibid, para 323) Thus a person may be arrested without being incarcerated or confined in any place; or may be detained in his own house without having been previously arrested."

The offence in this case however will subsist only as a means to the commission of the crime of rape and in fact the First Court considered the finding of guilt in this regard applying the provisions of article 17(h) of the Criminal Code when meting out punishment against accused. Therefore this grievance is hereby being rejected.

Finally appellant laments that the punishment inflicted by the First Court is excessive in the light of his clean conduct sheet, his co-operation with the police compounded with the fact that he made no attempt to flee from arrest. Now it has been constantly affirmed by local and foreign jurisprudence that a court of second instance will very rarely vary the punishment meted out in the appealed judgment and this where such punishment falls within the parameters defined by law. Therefore the function of this court of second instance is to examine the circumstances leading to the decision being subject to appeal and this to examine whether such punishment was excessive in the circumstances.

Now the crime of rape carries with it a punishment of imprisonment for a term between three and nine years. By application of section 41(1)(a) of the Criminal Code, this term of imprisonment has to be decreased by one or two degrees in view of the fact that appellant has been found guilty of attempt and not the consummated offence. However, since it results from the evidence that injured party suffered slight injuries as explained in the medico-legal report therefore in terms of section 202(f), the punishment has to be increased by one or two degrees in view of bodily harm. As already pointed out the First Court should have abstained from taking cognisance of the charge relating to violet indecent assault, however with regard to this and the other offences of which appellant had been found guilty, the First Court found that these served as a means to the commission of the offence of attempted rape, and therefore applied the provisions of Section 17(h) of the Criminal code thus inflicting the punishment solely for the most serious

offence being that of attempted rape. Now appellant has been condemned to a period of four years imprisonment which falls within the parameters of the punishment for the crime of attempted rape as aggravated by the commission of bodily harm. In fact the punishment meted out by the First Court is close to the minimum. For these reasons therefore, this Court finds no reason at law to vary the punishment inflicted by the First Court in its judgment.

Consequently, for the above-mentioned reasons the Court upholds only the fourth grievance put forward by the accused, consequently varies the judgment of the First Court only with regard to the finding of guilt for the second charge brought against the accused and therefore revokes the same and abstains from taking further cognisance of the said charge this being alternative to the first charge relating to attempted rape, however otherwise confirms the judgment of the First Court with regard to the rest, including the punishment meted out of four years imprisonment, and therefore also rejects all the other grievances brought forward by the accused.

Orders a ban in publication of the name of injured party as ordered by the First Court in its judgment.

(ft) Edwina Grima

Judge

TRUE COPY

Franklin Calleja

Deputy Registrar