



**COURT OF MAGISTRATES (GOZO)
AS A COURT OF CRIMINAL JUDICATURE**

**Magistrate Dr. Joseph Mifsud B.A. (Legal & Int. Rel.),
B.A. (Hons), M.A. (European), LL.D.**

**The Police
(Inspector Bernard Charles Spiteri)**

vs.

Duale Abokor Mustafa

Number: 73/2015

Today 13th of February 2018

The Court;

Having seen the charges brought against **Duale Abokor Mustafa**, aged thirty three (33) years, son of Abokor and Hawia nee' Mohamed, born at Mogadishu, Somalia, on the 11th December 1980 and resides at 'Toni l-Iskultur', Windmill Street, Xewkija, Gozo and holder of identity card number 42359A or travel document 5121, charged with having on the 14th October 2015, at around 10.10p.m., whilst he was at St. John the Baptist Square, Xewkija, Gozo and/or in these Islands;

1. With the intent to kill or put the life in manifest jeopardy of Nurdin Farah Saad, manifested such intent by overt acts, which were followed by the commencement of the execution of the said crime, which has was committed with

arms proper, or with a cutting or pointed instrument, which crime was not completed in consequence of some accidental cause independent from his will;

2. And also with having on the same date, time, place and circumstances by the means of arms proper, or with a cutting or pointed instrument, caused grievous bodily harm on the person of Nurdin Farah Saad as certified by Dr. Mario V. Masini M.D. of Gozo General Hospital;
3. And also with having on the same date, time, place and circumstances with the intent to kill or put the life in manifest jeopardy of Jimale Sulub Ismail, manifested such intent by overt acts, which were followed by the commencement of the execution of the said crime, which has was committed with arms proper, or with a cutting or pointed instrument, which crime was not completed in consequence of some accidental cause independent from his will;
4. And also with having on the same date, time, place and circumstances by the means of arms proper, or with a cutting or pointed instrument, caused grievous bodily harm on the person of Jimale Sulub Ismail as certified by Dr. Joseph Vella M.D. of Gozo General Hospital;
5. And also with having on the same date, time, place and circumstances carried outside any premises or appurtenance thereof, a knife or cutting or pointed instrument of any description without a license or permit from the Commissioner of Police;
6. And also with having on the same date, time, place and circumstances made threats against Nurdin Farah Saad, be it even verbal, that contained an order or imposed a condition;
7. And also with having on the same date, time, place and circumstances with having committed a crime during the operational period of a suspended sentence that was

delivered by the Law Courts (Malta), presided by Magistrate Dr. Saviour Demicoli LL.D. on the 26th February 2014;

8. And also with having on the same date, time, place and circumstances for becoming a recidivist after being sentenced for an offence by a judgment which has become absolute and this in breach of Articles 49 and 50 of the Criminal Code;

The Court was kindly requested, where it deems expedient, in order to provide for the safety of Nurdin Farah Saad and Jimale Sulub Ismail for the keeping of the public peace, in addition to, or in lieu of the punishment applicable to the offence, require the offender to enter into his own recognizance in a sum of money to be fixed by Court;

The Court was also requested, for the purpose of providing for the safety of the injured party, to issue a Protection Order under section 412C of Chapter 9 of the Laws of Malta;

The Court was requested that when pronouncing judgment, to sentence the person convicted to pay the costs incurred in connection with the employment in the proceedings of any expert or referee, that were appointed in the examination of the Proces Verbal of the inquiry in accordance with article 533 of Chapter 9;

Having seen the documents exhibited and all the acts of the proceedings;

Having seen the Articles of Law sent by the Attorney General on the 23rd. November 2017 (*a fol.* 599):

- (a) Articles 41(1)(a), 214, 215 and 218 of the Criminal Code, Chapter 9 of the Laws of Malta;
- (b) Articles 214, 215, 216 and 217 of the Criminal Code, Chapter 9 of the Laws of Malta;
- (c) Articles 41(1)(a), 214, 215 and 2018 of the Criminal Code, Chapter 9 of the Laws of Malta;

- (d) Articles 214, 215, 216 and 217 of the Criminal Code, Chapter 9 of the Laws of Malta;
- (e) Articles 6 of the Chapter 480 of the Laws of Malta;
- (f) Articles 249 of the Criminal Code, Chapter 9 of the Laws of Malta;
- (g) Articles 28B and 28C of the Criminal Code, Chapter 9 of the Laws of Malta;
- (h) Articles 49 and 50 of the Criminal Code, Chapter 9 of the Laws of Malta.
- (i) Articles 17, 31, 532A, 532B and 533 of the Criminal Code, Chapter 9 of the Laws of Malta;

And decided in terms of Articles 370(3)(a) of the Criminal Code to send the accused for trial by this Court subject to no objection being made by the accused in accordance with Article 370(3)(b)(c)(e) of the Criminal Code;

Having seen that, during the sitting of the 30th November 2017, the Articles of Law sent by the Attorney General on the 23rd. November 2017 were read out;

Having seen that during the sitting held on the 30th November 2017(*a fol.* 600) the Prosecution declared that it was resting its case and on the same sitting in terms of Article 370(3)(b) of the Criminal Code, the Court, after reading out the contents of the formal accusatory document to the accused (*a fol.* 599), requested the accused whether he found any objection to his case being dealt with summarily. After giving the accused a reasonable time within which to reply, and after consulting his Legal Counsel, he declared

that he had no objection to his case being dealt with summarily. The Court therefore took note of this declaration in writing in the records of these proceedings in terms of Article 370(3)(c) of the Criminal Code;

Having seen that the accused declared that he did not have any witnesses to produce and Defence Counsel declared that it was resting its case;

Having heard the final oral submissions of the Prosecuting Officer and of the Legal Counsel to the accused following which the Court adjourned this case for judgment in terms of Article 377 of the Criminal Code.

The facts

The case concerns a fight between a group of Somali citizens, on the 14th October 2015, at around 10.10 p.m. at St. John the Baptist Square in Xewkija, Gozo. The police that were on site reported that the persons involved had a strong smell of alcohol. Nurdin Farah Saad and Jimale Sulub Ismail suffered grievous bodily harm.

Witnesses

Nineteen (19) witnessess were heard by the Court in this case:

PS1061 Justin Zammit (a fol. 34 et seq.), PS552 Matthew Grech (a fol. 49 et seq.), PC382 Josef Cardona (a fol. 52 et seq.), Inspector Bernard Charles Spiteri (a fol. 54 et seq.), Dr. Marvic Masini (a fol. 56 et seq.), PC1365 Chris Formosa (a fol. 62 et seq.), Nurdin Farah Saad (a fol. 65 et seq.), Abdirizaq Yusuf Muuse (a fol. 67 et seq.), Dr. Jean Paul Grech (a fol. 73), Max Xuereb (a fol. 116), Architect Cornelia Tabone (a fol. 155), PC932 Louis Bigeni (a fol. 169), PS715 Lucian Gatt (a fol. 170 et seq.), PS342 Johan Said (a fol. 172), PC688 Josmar Muscat (a fol. 173), PC696 Marvic Mercieca (a fol. 174 et seq.), Paul Camilleri (a fol. 180), Dr. Marisa Cassar (a fol. 181), WPC133 Althea Sammut (a fol. 210) and Dr. Marisa Cassar (a fol. 238).

Legal Considerations Regarding the Level of Proof Required

That the Prosecution is bound to bring forward evidence so that the Court can find the accused guilty as charged. Manzini¹ notes the following:

“Il cosi detto onero della prova, cioe il carico di fornire, spetta a chi accusa – onus probandi incumbit qui osservit”.

In the Criminal field it is the burden of the Prosecution to prove the charges beyond reasonable doubt. With regards to the defence, enhanced by the presumption of innocence, the defence can base or prove its case even on a balance of probabilities meaning that one has to take into consideration the probability of that version given by the accused as corroborated by any circumstances. This means that the Prosecution has the duty to prove the tort attributable to the

¹ Diritto Penale (Vol. III, Chapter IV, page 234, Edition 1890).

accused beyond every reasonable doubt and in the case that the Prosecution is considered as not proving the element of tort the Court has a duty to acquit the accused.

That the following principles, as clearly outlined by the Constitutional Court in its judgment of the 1st. of April 2005 in the case **The Republic of Malta vs. Gregory Robert Eyre et**, must be applied:

“(i) it is for the Prosecution to prove the guilt of the accused beyond reasonable doubt; (ii) if the accused is called upon, either by law or by the need to rebut the evidence adduced against him by the Prosecution, to prove or disprove certain facts, he need only prove or disprove that fact or those facts on a balance of probabilities; (iii) if the accused proves on a balance of probabilities a fact that he has been called upon to prove, and if that fact is decisive as to the question of guilt, then he is entitled to be acquitted; (iv) to determine whether the Prosecution has proved a fact beyond reasonable doubt or whether the accused has proved a fact on a balance of probabilities, account must be taken of all the evidence and of all the circumstances of the case; (v) before the accused can be found guilty, whoever has to judge must be satisfied beyond reasonable doubt, after weighing all the evidence, of the existence of both the material and the formal element of the offence.”

That Lord Denning in the case **Miller vs. Minister of Pension** explained what constitutes “*proof beyond a reasonable doubt*”.

He stated:

“Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence ‘of course it is possible but not in the least probable’ the case is proved beyond reasonable doubt, but nothing shall of that will suffice”.

This Court considered that: -

In general terms, personal violence offences may be differentiated according to the degree of harm inflicted upon the victim and the intention of the offender, ranging from common assault to those offences where the offender has the intention to inflict a particular type of harm, such as the intentional infliction of grievous bodily harm. The nature of the injury caused to the victim will, to a very significant degree, determine the seriousness of the offence and the appropriate sentence. The degree of violence used or ferocity of the attack is a material consideration on judgement. This is so even if the consequences of the attack on the victim are minimal. The intention with which the offender inflicts harm is an important consideration.

The Court is convinced beyond a reasonable doubt that the accused committed the offences which he stands charged with regarding imputations two, four, five and six. In point of fact he does not deny or contest the fact that he did hit the *parte civile* but he is arguing that he was so drunk that he does not remember anything.

On the otherhand, the *parte civile's* version of events speaks of an unjustified, uncalled for and sudden aggression. Both Nurdin Farah Saad and Jimale Sulub Ismail had a strong smell of alcohol.

As for the grievous nature of the bodily harm caused, according to the medical records and testimony of the medical doctors involved, the *parte civile* suffered greivous injuries. The *parte civile* Nurdin Farah Saad and Jimale Sulub Ismail were operated and following a checkup it was confirmed that both were healing uneventfully. There was no disfigurement on both persons.

In the circumstances however, in the light of the explanation given by the medical doctors, this Court cannot consider the bodily harm committed on the persons of Nurdin Farah Saad and Jimale Sulub Ismail as falling under the provisions of Article 218 but rather under the provisions of Article 216 of the Criminal Code, which is deemed to be minor but comprised and involved in Article 218 of the Criminal Code quoted by the Attorney General.

In passing judgement, the Court has to consider the triad i.e. the crime, the offender and the interests of society. A balance has to be struck between the three factors.

The Court is taking into consideration that the offence of causing grievous bodily harm, is undoubtedly considered as a very serious offence and unless there are reasons or circumstances showing otherwise, the offence of causing grievous bodily harm should attract an effective prison sentence.

An aggression, a violent act against a human being, and the infliction of grievous bodily harm, with no excusable factors in the equation, must be addressed with an effective punishment – a punishment which will make the aggressor realise that such behaviour is not tolerated.

There is simply no room for violence in a democratic and law-abiding state.

Being in a state of intoxication is not an excuse or a legal defence to use violence.

Society needs to be protected. Justice is to be done.

The Court notes that the overwhelming majority of foreigners in this country are peaceful and law-abiding.

The Court expresses concern on the increasing number of crimes being committed by a small number of foreigners. Such a situation is intolerable.

Decide :-

Consequently, this Court, declares the accused not guilty of charges one, three and eight (the suspended sentence of the 26th February 2014 was still in operation) and after having seen the Articles of the Law quoted by the Attorney General, that is to say Articles 214, 215, 216, 217, 218 and 249 of the Criminal Code, Chapter 9 and Article 6 of Chapter 480 of the Laws of Malta finds the accused guilty of the second, fourth, fifth and sixth charges brought against him and condemns him to twenty four months imprisonment;

Furthermore in order to provide for the protection of the parte civile, the Court is making an order under Article 412C of the Criminal Code whereby it is prohibiting the accused from approaching, contacting, or molesting Nurdin Farah Saad and Jimale Sulub Ismail for a period of two years from the date of this judgment.

With regard to the seventh charge brought against the accused, in terms of Section 28B(2) of Chapter 9 of the Laws of Malta, the Court abstains from making an order under Section 28B(1) of the said Chapter of the Laws of Malta and therefore the operational period of the judgment delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature against the accused on the 26th February 2014 when he admitted to damaging a car and was found drunk in a public place shall remain in force and extended till 26th February 2019.

The Court explained in simple and clear language to the accused the consequences of this Protection Order and the extension of the suspended sentence of the 26th February 2014.

Dr. Joseph Mifsud
Magistrate