



Court of Criminal Appeal

Madame Justice Dr. Consuelo Scerri Herrera, LL.D., Dip Matr., (Can)

Appeal Nr. 325/2017

**The Police
Inspector Godwin Scerri**

Vs

Salih Usta

Today, the 31st July, 2018

The Court,

Having seen the charges brought against the appellant Salih Usta holder of Maltese Identity Card Nr. 22538A charged before the Court of Magistrates (Malta), as a Court of Criminal Judicature with having:

On the 13th February, 2016 between 22:00 hours and 00:00 hours, as the person responsible for the establishment styled as Murphy's Bar, situated in Tourist Street, St. Paul's Bay:

1. Operated a loud speaker, gramophone, amplifier or similar instrument made or caused or suffered to be made which was so loud to have caused a nuisance to his neighbor Christopher Maggi;
2. Also accused of becoming recidivist after he was sentenced on the 12th February 2016 before Magistrate Dr. Charmaine Galea LL.D in terms of sections

49 and 50 of Chapter 9 of the Laws of Malta.

The Court was kindly requested that in case of guilt his license of said establishment shall be cancelled or suspended for anytime in its discretion (Art. 320 Cap. 10, Art. 20 Cap. 441).

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 11th July, 2017, by which, the Court, after having seen Sections 41(1) and 41(2)(a) of Chapter 10, declared the accused Salih Usta guilty of the first, charge laid against him and condemned him to the payment of a fine (ammenda) of fifty five euro (€55) whilst acquitted him from the second charge.

Furthermore, in terms of Section 533 of Chapter 9 of the Laws of Malta, the Court condemned Salih Usta to pay the sum of four hundred and sixty four euro and ninety eight cents (€464.98c) within six (6) months from the day of the judgement, being the sum of the expenses incurred the appointment of the Court expert AIC Robert Musumeci in this case.

Having seen the application of Salih Usta filed on the 19th July, 2017, wherein they humbly pray this Court varies the judgement of the Court of Magistrates (Malta) as a Court of Criminal Judicature given on the 11th July 2017 in the sense that while confirming that part of the judgement whereby he was acquitted of the second charge, revokes that part of the judgement whereby he was found guilty of the first charge and was condemned to the payment of a fine (ammenda) of fifty five euros (€55) and to the payment of the sum of four hundred (€464.98) as expenses incurred in the appointment of "the court expert in the sense that he is declared not responsible and consequently not found

guilty of the said charge and be acquitted similarly of the said charge and to the non-payment of the expenses related to the appointment of the Court expert.

That the grounds of appeal consist of the following:

Appellant operates a shop by the name Murphy's Bar in St. Paul's Bay. The whole area is renowned for its touristic amenities and attendances. It consists of a bar with all due permits and licenses necessary for its operation inclusive of the extension in time and allowance for music to be played within a certain time. Complainant filed a formal report with the Qawra Police Station that appellant caused a nuisance to him between a particular period of time.

In view of a repetition of similar complaints, the Honourable Court appointed AIC Robert Musumeci to examine the situation as related by complainant, whilst taking into consideration the submissions of appellant. An examination *in situ* was carried out by the said technical architect who released a formal report. This report duly confirmed on oath, which report militates in favour of appellant, was drawn up after the said court expert took all the readings necessary to arrive at his conclusions. However, the First Court opted to disregard technical conclusions basing itself on assertions, which were totally annihilated by the readings/measurements taken. It based itself on the purely subjective considerations instead of relying on scientific and technical data, which result in favour of appellant's rights. The First Court opted for a subjective interpretation, which with all due respect should have decided on an objective point of view. The Honourable Court did not refer to any scientific or technical data, which would water down or totally do away with the conclusions of the technical expert. If such is the case, it should not have appointed him in the first place. In a matter of technicalities, it should not have substituted itself in reaching

conclusions, which *per necessitatem* had to be based on objective criteria.

It is humbly submitted that the regular complainant was the only person who filed reports against appellant. Complainant lives down the road from the bar and occupies a converted commercial premises. The area in question is one hundred per cent touristic area. When complainant took the decision to reside in that particular area, he knew beforehand the atmosphere and environment which exists in that area.

The affidavit released by WPC 264 only reports the complaint filed by complainant which complaint was denied by appellant. The said affidavit is self-explanatory and music was being played during the legally permitted hours. In this sense therefore, it does not constitute as evidence against appellant. The alleged timing was within the rights of appellant to play music. The evidence of complainant was rebutted by appellant himself. In view of such lack of evidence in favour of the prosecution's case, more weight should have been accorded to the technical report which conclusions are self-explanatory. More so when appellant had taken all reasonable precautions to render his establishment safe from causing any inconvenience to neighbours, by rendering it soundproof. In fact, these conclusions were reached also by the technical expert. In fact, these conclusions nullify the inconvenience allegedly caused to complainant. It seems that scientific proven conclusions do not apply in the case of the present complainant.

The accusation refers only to an alleged inconvenience albeit music being played in a loud pitch which may have caused a nuisance to complainant. Any reference to any other aggravation or whatever does not form part of this accusation. The reference made to permit/license is a gratuitous assertion which should not have

found itself in the ratio decidendi of the court.

Having seen the records of the case.

Having seen the updated conviction sheets of the defendant.

Now therefore duly considers.

The fact of this case are the following.

By examining the affidavit of WPC264 it transpires that the complainant went to report the incident to the police the following day of the alleged inconvenience at about 9.30a.m. and made a general complaint. He did not give any particulars with regards to the time frame when the music was being played. However, in the police incident report exhibited at *fol 14* the Police Sergeant states that the complainant stated that the music was being generated on the eve at about 10.00p.m.

Christopher Maggi, the complainant gave evidence *viva voce* in court and confirmed that he had gone to the police station on the 14th February 2016 and reported that on the 13th February 2016 at about 22.00p.m he was being disturbed from the music that was being generated in the bar named Murphy's Pub . Complainant also stated that this situation had been going on for a whole year and the situation had not changed and that he could no longer stand it.

Upon such evidence the first court went on to appoint a court expert to take the decibel readings of the noise from the house of the complainant when the music in the premises of the appellant is switched on . It transpired that when the

complainant has the windows of his bedroom closed and the music is on full blast in the bar the readings are 52dBA whereas when the sound is switched off, the sound level in the complainant's bedroom is 40 dBA. There seems to be no reading regarding the decibels which can be recorded when the volume is not full but let us say half. The court expert also stated that if the music is full on then the patrons of the bar would not be able to speak thus insinuating that it is unlikely that the music is set on full volume.

From the evidence brought forward by the prosecution namely PL Quentin Tanti who was giving evidence on behalf of the Malta Tourism Authority it results that the establishment Murphy's Bar is not covered with a license to operate amplified music though covered with a permit to remain open till 4.00a.m.

It also appears that the appellant took all the necessary measures to make his bar sound proof so as to cause less inconvenience to the neighborhood. This as fact is not contested.

Considers further

The principle regarding the "*burden of proof*" is one that he who alleges something has to prove it. In fact, reference can be made to what Manzini states in his book entitled *Diritto Penale*:

"il cosi della onere detto prova cioe' il carico di fornirla spetta a chi accusa," (onus probandi incumbit qui asserit).

Thus, the result is one that in criminal cases the onus of proof rests on the prosecution during the whole case and it is only by exception that the accused is

to dispute anything for example the defense of insanity. However, in this case the appellant did not rest solely on the evidence brought forward by the prosecution but also offered to give his testimony voluntarily to dispute what was being alleged in his regard.

The obligation to prove guilt of an accused person is absolute and this on a level beyond reasonable doubt and should there be any doubt this would mean that the prosecution did not prove its case beyond reasonable doubt. And therefore the Court would have to acquit the accused.

In the first instance, the accused is charged with the contravention of having at 10.00 p.m. on 123th February 2016 operated a loud speaker gramophone amplifier or similar instrument made or caused to suffer to be made which was so loud to have caused nuisance to his neighbor Christopher Maggi. .

The appellant in his application of appeal makes reference to the report carried out by Dr Robert Musumeci and said that this report was in his favour though the first Court still found the appellant guilty of such contravention. This Court however cannot understand what the appellant meant when he said that the technical report was in his favour. The expert only carried out a scientific test and the result was such that when the music in the bar is full volume the decibel readings are to the effect of 52DbA once the bedroom windows of the complainant are closed.

With reference to the charge under examination, the Court took note that the report filed by the complainant was one where he felt aggrieved by the noise generated in Murphy's bar at **10.00p.m.** (emphasis of this Court) The Court however noted that the appellant was licensed as an operator to keep this bar

open till four o' clock in the morning with effect from 27th august 2014 as stated by PL Quentin Tanti on behalf of Malta Tourism Authority. This witness also confirmed that the music would thus have to stop at eleven in the evening and if the bar is found in the road mentioned in schedule 5 then he could play music until midnight. Though not amplified music. The witness also confirmed that Triq it-Turisti is found in Schedule 5 and therefore the appellant can play music though not amplified until midnight.

However, the Court underlines that this does not mean that the appellant can play music without giving due consideration to the neighbours in the area and thus he is to ensure that he adheres to the laws relating to the playing of music in commercial premises with respect to the laws relating to the 'bon vicinat' despite having a valid license covering his premise.

In fact in the judgment given in the names **il-Pulizija vs Raymond Spiteri**¹ the Court held the following:-

"Illi pero l-ġestjoni ta' din l-attività permezz ta' liċenza ma tfissirx li huwa jista' jopera mingħajr konsiderazzjoni xierqa għar-regoli tal-bwon vicinat jew mingħajr ma possiblment jinkorri fi ksur ta' liġi penali ordinarja fil-każ t'infrazzjoni ta' tali liġi sempliciment għax huwa fil-pussess ta' liċenza".

In addition any license does not prejudice the rights of third parties to be protected from the law.²

¹ obiter *Il-Pulizija vs. Raymond Spiteri*, Qorti tal-Appell Kriminali, VDG, deciza nhar 1-20 ta' Novembru 1998.

²Vide **Bugeja vs. Washington** decided from the Court of Appeal civil jurisdiction on the -5th Mayu 1897 as quoted by the late Judge William Harding in the case **Il-Pulizija vs. Anthony Cuschieri et**, decided by the Criminal Court of Appeal decided on the 16 th December 1946.

The appellant is bound to adhere to the conditions of his license as clearly stated in the judgement in the names Il-Pulizija vs. Anthony Cuschieri et³

“...għandu jqis bħala insita fil-liċenza, bla ebda bżonn li tiġi espressament enunċjata, illi l-użu awtorizzat għandu jkun skont, eżerċitat b’rispett u fil-limiti tal-liġi.”

The golden question is whether the appellant was transgressing the law whilst playing music on the day, time and place indicated in the charge and this is what the Court is basically asked to decide upon.

According to regulation 13 of Legal Notice 1 of 2006 :-

13. (1) A licence shall be issued in the name of an individual personally or on behalf of a commercial partnership or company and the address shall be the address of the commercial premises.

(2) The licence shall be issued by reference to the applicable categories and types of the commercial activities according to the Development permit issued by the relevant authority.

(3) Without prejudice to any other provision of law applicable in relation to a commercial activity, a licence issued under these regulations shall be subject to the applicable conditions contained in the Second Schedule to these regulations

The Second Schedule entitled Conditions for Carrying Out a Commercial Activity provides that-

The following conditions shall apply to all commercial premises whether unlicensed or licensed by any authority and regulated by any legislation.

02. The commercial activity carried out in the premises or things stored within the premises shall not:-

02.1 cause annoyance to neighbours;

02.2 be likely to occasion any fire or explosion;

³ Decided on the 16th December 1946 by the Criminal Court of Appeal

02.3 emit exhalation, fumes, vapours, gases, dust or emit noxious or offensive odours into the atmosphere that may cause damage or are injurious to health; 02.4 cause annoyance by way of noise

04. Any commercial activity which carried out from any premises or outside a premises is regulated under these regulations.

The same Schedule provides further that:-

09. "No Commercial Activity located in an urban area can generate noise that can be heard from outside the premises that causes annoyance and disturbance to neighbours by playing of music by live bands or amplified music or other means between the hours of 11.00 p.m. and 9.00 a.m. of the following day".

Therefore in view of the above the Court does not feel it is necessary to explain further on this matter since the complaint filed by the complainant relates to the playing of music at ten o' clock in a commercial place which is duly licensed. No person ever mentioned that the music was amplified and also the playing of music is permitted by law till 12.00 in this particular road according to Schedule 5 of Legal Notice 1 of 2006.

The prosecution had to bring further evidence to the Court to prove that on the day in question the music that was played in the time-frame that the law provides was of disturbance to the neighbourhood or to a number of neighbours for the test to be object. Otherwise, this court would be deciding the matter on a subjective test carried out by the complainant who might have an ulterior motive for filing such a complaint.

The Court is not convinced that the noise that was generated by the appellant at ten o'clock in the evening was such as to annoy him. The fact that the appellant

did not call the police and report the matter on the same day is also indicative that he was not truly annoyed perhaps slightly disturbed, in which such disturbance would have to be tolerated on the basis of *bon vicinat*. The complainant himself was rather skimpy in the evidence he gave so much so that he did not even bother to describe the type of noise that was being generated.

With regards to the second charge being that of recidivism. The Court notes that the first court had acquitted appellant of it and thus no appeal was filed in this regard .

The Court therefore, upholds the appeal of the appellant varies the judgement of the first court in the sense that it is confirming the part where the appellant was acquitted from the second charge, revokes the finding of guilt of the first charge and the punishment meted therein together with the payment of court expenses and therefore declares appellant not guilty of all charges.

(ft) Consuelo Scerri Herrera

Judge

TRUE COPY

Franklin Calleja

Deputy Registrar