IN THE COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE

MAGISTRATE
DR RACHEL MONTEBELLO B.A. LL.D.

THE POLICE
(INSPECTOR TREVOR MICALLEF)

-Vs-

BIONDY CLAYD RAAFENBERG
(ID:79399A)

Compilation No: 1005/14

Today, 30th July 2019

The Court,

Having seen that the accused **BIONDY CLAYD RAAFENBERG** son of Egbert and Michelle nee' Benadin, born on the 7th September 1989, resides at Camilleri Flat 6, St. Paul Street Naxxar and holder of identity card number 79399(A) was arraigned and accused of having:

In these islands on the 16th October 2014 at about four in the morning (04:00am):

1. Committed violent indecent assault on the person of omissis;

2. Accused further for having on the same date, time, place and circumstances without the intent to kill or to put the life in manifest jeopardy, caused slight bodily harm on the persons of Omissis;

3. Accused further for having on the same date, time, place and circumsatances assaulted with intent to insult, annoy or hurt Omissis;

4. Accused for having on the same date whilst in St. Julian's Police Station committed a simple escape whilst he was in custody of person/s in charge of his custody;

5. Accused with having on the same date outside the St. Julian's Police Station, assaulted or resisted by violence or active force not amounting to public violence against persons lawfully charged with a public duty when in the execution of the law or of a lawfully order issued by a competent authority.

6. Accused with having on the same date outside the St. Julian's Police Station willfully committed any spoil, damage or injury to or upon movable or immovable property police lanyard and police service number which damages does not exceed the amount of twenty-three euro and twenty nine cents (23.29) in the course of which she sustained bodily harm.

The Court was requested that if the accused is found guilty to provide for the safety of omissis according to article 383, Chapter 9 of the Criminal Law.

Having seen the consent given by the Attorney General on the 17th October 2014 in terms of Article 370(4) of the Criminal Code for the proceedings to be heard summarily[1];

Having seen the order given on the 17th October 2014 for these proceedings to be conducted in the English language;

Having seen the transcripts of the testimony of those witnesses who gave evidence before the Court as previously presided;

Having seen that the Prosecution, the alleged injured party and the defence declared that they did not require the Court as presided to again hear those witnesses who had previously testified before the Court as previously presided;

Having seen all the evidence produced;

Having seen all the acts of the proceedings;

Having heard the Prosecution declare that it has nothing further to add to the acts of the proceedings by way of final submissions;

Having heard the final submissions of the counsel for the injured party;

[1] Fol. 15.

Having seen that despite having been authorised to make its final written submissions, the Defence failed to make any submissions within the time-limit granted for the purpose;

Having seen that in terms of Article 517 of the Criminal Code, an order was given prohibiting the publication of the names of the alleged victim and the members of her family who testified in these proceedings;

Having seen that the case was adjourned for today for judgement to be delivered;

Having considered;

That the charges brought against the accused relate to an incident that occurred on the 16th October 2014 at circa 4.00 a.m. when the accused allegedly sexually assaulted omissis while on her way home from Paceville.

EVIDENCE BROUGHT BY THE PROSECUTION

The Statement Released by the Accused

As part of the evidence produced by the Prosecution, the statement released by the accused when he was interrogated by the Police upon his arrest on the 16th October 2014[2], was submitted in the acts of the proceedings and this statement was also

[2] Fol. 8 *et seq*.

referred to by Inspector Trevor Micallef in his testimony[3]. However the Court must here point out that the Law as it was at the time when this statement was made, did not afford the right to a person who was suspected of having committed a criminal offence but not yet formally charged with its commission, to choose whether to be legally assisted during interrogation by the Police. The Law prior to the amendments made to the Criminal Code in virtue of Act LI of 2016, only allowed a suspect the right to consult with a lawyer **prior** to being interrogated, for a limited time only.

The more recent case-law of our Constitutional Court, including the judgements in the cases of **Gordi Felice vs Avukat Generali**[4] and **Christopher Bartolo vs Avukat Generali et**[5], which were based on a series of decisions of the European Court of Human Rights, has reiterated the rule that Article 6(1) read in conjunction with Article 6(3)(c) of Chapter 319 of the Laws of Malta, requires that a suspect should be afforded a right to legal assistance at all stages of Police investigations unless it is shown that there are impelling reasons that justify that this right is withheld. In the recently-decided case **Fazli Kaya vs Turkey**[6], the European Court reiterated that the right to a fair hearing must be deemed to have been violated where the suspect was denied legal assistance during interrogation by the Police even where the national laws of the State did not provide the right, irrespective of whether the suspect may have made incriminating statements during the interrogation or even remained silent.

In the case **Dayanan vs Turkey**[7], the said Court authoritatively held that:-

"31. The Court is of the view that the fairness of criminal proceedings under Article 6 of the Convention requires that, as a rule, a suspect should be granted access to legal assistance from the moment he is taken into police custody or pre-trial detention.

[3] 13th October 2015.

[4] Deciza fis-27 ta' Novembru 2017.

[5] Deciza fil-5 ta' Ottubru 2018.

[6] Appl. No. 24820/05, deciz 17/09/2015.

[7] Appl. No. 7377/03 deciz 13/10/2009.

32. In accordance with the generally recognised international norms, which the Court accepts and which form the framework for its case-law, an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned (for the relevant international legal materials see Salduz, cited above, §§ 37-44). ... ...

33. In the present case it is not disputed that the applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see Salduz, cited above, §§ 27 and 28). A systematic restriction of this kind, on the basis of the relevant statutory provisions, is sufficient in itself for a violation of Article 6 to be found, notwithstanding the fact that the applicant remained silent when questioned in police custody." (sottolinejar tal-Qorti)

In the year 2014, when the accused was interrogated and released the statement exhibited at fol. 8 *et seq*. of the acts of the proceedings, the provisions of the Criminal Code which restricted the right of a suspect to legal assistance to one hour prior to the interrogation, were not in line with the prerequisites of the right to a fair hearing as interpreted in the relevant case-law of the European Court. Although since then, after the promulgation of Act LI of 2016, these rights have been enshrined expressly in the Code, the statement released by the accused in this case was evidently made by him without having been given the right to choose whether to be assisted by a lawyer during the interrogation, thus giving rise to the possibility, remote as it may be, of a violation of his right to a fair hearing.

In its recent judgement of the 14th December 2018, the Constitutional Court held:-

"... il-qorti xorta hija tal-fehma li ma jkunx għaqli li l-proċess kriminali jitħalla jitkompla bil-produzzjoni tal-istqarrija tal-akkużat Pistella ladarba din, għallinqas f'parti minnha, ittieħdet mingħajr ma Pistella kellu l-għajnuna ta' avukat. Għalhekk, għalkemm għadu ma seħħ ebda ksur tal-jedd għal smigħ xieraq, fiċ-ċirkostanzi huwa

għaqli illi, kif qalet l-ewwel qorti, ma jsir ebda użu mill-istqarrija fil-proċess kriminali sabiex, meta l-proċess kriminali jintemm, ma jkunx tniġġes b'irregolarità – dik li jkun sar użu minn stqarrija li ttieħdet mingħajr ma l-interrogat kellu l-għajnuna ta' avukat – li tista' twassal għal konsegwenzi bħal tħassir tal-proċess kollu."[8]

Taking into account the above considerations, the Court deems that in this case, where at the time when the accused released his statement during Police investigations, the law was not in conformity with the tenets of the European Convention, the necessary safeguards against the peril of a possible violation of the right to a fair hearing were not in place. Consequently, since anything that he may have said or not said during such interrogation must be gauged with extreme caution, the Court considers that in order to avoid the possibility that the proceedings might be compromised by irregularities which may lead to a violation of the accused's right to a fair hearing, it shall not rely on the said statement or refer to any answers provided by the accused to the questions put to him during the interrogation, when considering the evidence adduced in the acts of these proceedings.

Other Evidence

Omissis, the alleged victim, testified that on the 15th October 2014 she met up with friends and went to Paceville where they ended up at Havana Club. During the time spent at this establishment, at around 1.00 a.m. on the 16th October 2014, she began to be **pestered by a man who approached her several times while she was dancing, telling her that he likes her and wants to take her home. She claimed that this person persisted in his advances despite her telling him directly to his face that she had a boyfriend, that she wished to dance by herself and that she did not wish to have anything to do with him. She described the said person as carrying a snap bag, and wearing a cap, a white top with the words "Just do something"**

[8] **Il-Pulizija vs Aldo Pistella**.

written in black and dark red jeans and shoes. She confirmed that the person was with a group of friends and he approached her around eight times between 1.00 a.m. until the time she left the establishment at around 3.50 a.m.

She explained that since the said person was bothering her to a great extent, when she decided to leave the establishment to return home alone, she tried to ensure that he would not follow her. She did this by first entering another establishment called Nordic, which is around two minutes away from Havana Club, however when she emerged from there, she saw the said person outside a nearby establishment, Native and according to her, he was looking for her. At this point, the alleged victim explained that she saw a friend of hers, Stefano, and asked him to tell the said person to leave her alone so that she can walk home in peace. She said that Stefano did this in her presence.

After she saw that the said person walked back up the stairs, and thinking he had left the scene, she then started to walk home, passing through the car park at Bay Street, then up the hill and towards Sunrise Bar. She saw two persons walking behind her in the distance and increased her pace until she approached Sunrise Bar on the main road, St. Andrew's Road. This was at around 4.00 a.m., and at this point, while she was around six paces away from the said establishment, **she felt a person from behind her grab her from her mouth, covering it, and put her in a headlock. She explained that the person was trying to rip her shirt while holding her and she fought as much as she could to get out of the headlock. As she managed to wriggle her way out of the person's hold, and saw the person's face, she recognised him as the man who was annoying her at Havana Club earlier on**.

The witness claimed that while the said person remained silent all throughout, she was screaming and as he was trying to pull her, he managed to rip her shirt

open. Meanwhile as she was facing him and holding onto the wall, she managed to kick the person in the crotch, at which point he took two steps back and she flew to the ground trying to crawl towards the main road:-

"*... I crawled to the main road because I'd rather get hit by a truck than get raped.*"

At this point, the witness explained that there was another person walking from the main road approaching her as he noticed that something was wrong, and when the person who assaulted her saw this, he simply walked away without running. After assuring the person who stopped to enquire whether she was alright, she picked up her phone and bag, **closed her shirt which was ripped open with a piece of it on the floor**, and continued to walk home. Witness also explained that **when the said person grabbed her and also when she fell to the ground, she was bruised**.

After she arrived home, her mother accompanied her to the Police Station where she also took the shirt she was wearing. Together with the Police, **she retrieved the piece of her shirt that had been ripped off and left on the road near Sunrise Bar** and went on to look for the man who had assaulted her. She described the said person to the Police as being dark skinned with short hair and wearing the clothes she had previously mentioned. She identified him talking to another girl in Paceville while she was in the Police car, and the said person after much resistance, was arrested.

She was also present at the Police Station a short time afterwards when, while giving her version of events to the Police, she saw the said person get out of the handcuffs and run out of the Police station but was immediately apprehended by the police officers who ran out after him. She also confirmed that the said person was aggressive

and when one of the officers returned inside the Police Station after having managed to apprehend the suspect, she saw that the officer's uniform was ripped.

Witness also explained that the experience affected her negatively since she is scared to walk anywhere alone any more and has never been able to again walk the road where the assault took place. She no longer feels safe and feels "broken".

She also identified the accused present in the court room as the person who allegedly assaulted her.

In cross-examination, Omissis explained that when she went to Havana Club that night, she was accompanied by two friends Naomi Summers and Christa Porter and although there were several other persons who she knew in the Club, she spent the time between 1.00 a.m. and 3.50 a.m. mainly dancing on her own. **She confirmed that she was approached by the said person around eight or nine times, and he did not accept that she refused to speak to him or be next to him and that she did not want his company or conversation. She also confirmed that while at Havana Club, the person had asked her to go to his house and he would call a taxi to take her to University in the morning, and repeated this request even after she told him that she has a boyfriend.** She denied having told the person that she had to go to University the next morning and stated that he could have seen her looking through her bag and could have seen her books as she had not yet gone home from University that day. She claimed that the last time that he approached her was around ten minutes before she left that club.

She also confirmed that she did not report the fact that a person was harassing her to anyone or any of the Club's security personnel and when she left the club, she noticed

that he was walking behind her and it was at that point that she decided to go to a different club, Nordic, before proceeding to walk home. She also reiterated that when she left Nordic she saw the same person outside Native which is further up the steps from Nordic and at this point she saw her friend Stefano.

As for the actual assault, the witness confirmed the same sequence of events already described in her testimony and also further explained, upon being asked by the defence, that she did not scream for help but shouted at the person telling him "*What the fuck are you doing*?" She explained that she shouted at him in this way as if she knew the person, because she did indeed know him since he had been annoying her for an entire two and a half hours only just before. She also added that because she thought that he had long gone and left her alone, she never imagined that he would follow her, assault her and try to rape her.

Upon being asked by the defence, she confirmed that at 1.00 a.m. on the night in question, the accused was indeed at Havana Club and was the person who was bothering her as she saw him face to face and he started to annoy her as soon as she had walked in. **Upon the suggestion being made that the accused was not even at Havana Club at 1.00 a.m. on that day**, the witness replied:-

"*I reply that unless he has a twin brother that he was dressed exactly as he was dressed that night, then maybe that so.*"

Upon being asked whether she recognised anyone in the images exhibited at fol. 159 of the acts of the proceedings, the witness replied that although she cannot see a face, she recognises the shirt as either the same or very similar to that of the man who assaulted her and she also recognised herself on the same image as

speaking to Stefano telling him that the person behind her was following her down the steps. In the images at fol. 164, 165, 166, 167, 169 and 170 till 173 she identified that same person walking in her direction or lingering around her.

Witness also confirmed that she had recently read through the transcript of her testimony in examination but stated that notwithstanding that, every detail of the incident is imprinted vividly in her memory.

Omissis, mother of Omissis, testified that when her daughter returned home at about 4.15 a.m. on the 16th October 2014, she was frantic, and was sobbing and crying and she noticed that "*her top was torn completely ripped from top to bottom and it was in two pieces*". She explained that her daughter was wearing a white top and jeans. The witness confirmed that her daughter told her that she wanted to go to Havana in order to find the person who assaulted her as she knows who he is as her was pestering her all night. She also told her that he didn't manage to rape her[9].

The witness confirmed also that she put her daughter's torn top in a plastic bag and drove to the police station. Later on, when accompanied by the Police and they drove past Sunrise Bar, the Police elevated the piece of torn shirt from the road and eventually, they found and arrested the person who had assaulted her daughter. Witness identified this person as the accused present in Court, while observing that he had shaved his head.

Omissis also testified that she was present at the Police Station while her daughter was filing the report, when the accused escaped from Police custody and the Police ran

[9] Fol. 69.

after him to apprehend him, and she confirmed that one of the Police officers returned to the Station with his shirt ripped.

She also confirmed that on the Sunday evening after the incident she had gone to Sunrise Bar and spoke to Carlos the owner and asked whether there was any footage of the assault. Although he informed her that he could not give her the recording from the CCTV camera, he took a recording of the screen with his phone and gave her a USB with the recorded footage.

Omissis also testified as to the effect that the incident had on her daughter and described how she no longer sleeps well at night, takes Nytol and does not walk anywhere alone any longer.

In cross-examination, omissis confirmed that her daughter told her that she did not drink alcohol that night and she herself could tell that her daughter did not smell of alcohol. She also explained that she was in her car exactly behind the Police car in Paceville close to Burger King, when the Police apprehended the suspect who was together with another three persons. She saw the suspect when he was taken to the Police car and she also saw him when he escaped from the Police station later on and when he was returned to the Police station. She confirmed that he was wearing a top and maroon trousers with tennis shoes.

<u>Stefano Persiano</u> testified[10] that he is a friend of omissis and explained that on the 16th October 2014 he was in Paceville on the stairs near an establishment called Nordic, **when omissis came down the stairs and told him she was scared as there was a man who was harassing her at Havana.** He confirmed that omissis was in a

[10] 4th February 2015.

state of panic and when he asked her who the person was, she pointed at a person and who at that point was about one metre away from her but closer to him. **The witness recognised this person in the court room as being the accused while stating that although he had shaved his hair, he was one hundred percent certain that it was the same person.** He confirmed that he spoke to this person, telling him that he was to leave omissis alone. According to the witness, the accused denied having bothered her and he left to go up the stairs.

P.S. 1320 Sean Axiaq testified that he had accompanied Omissis to Paceville to search for her assailant and that he was arrested near the Burger King outlet as soon as he was identified by the said complainant. He also confirmed that after having been arrested, the suspect was taken to the St. Julian's Police Station for questioning, when he escaped from the Station and said witness together with P.C. 1052 and another Police Officer ran after him and managed to apprehend him close by. Witness further confirmed that he recognised the accused present in Court as the person who was identified by Omissis as her assailant and as the person who escaped from Police custody soon after.

The witness also explained that while he was trying to re-arrest the suspect after he had escaped from the Police station, said suspect tore his shirt, the service number and the lanyard of his uniform with the result that the service number needed to be changed. Witness also declared that during the arrest, the accused had claimed that this was a case of mistaken identity and was shouting that he had been arrested for nothing.

He described the suspect as having been wearing a white t-shirt with black ink and a cap with a shiny sticker on it, which clothes, together with trousers and a pair of shoes, which clothes the same witness exhibited in the acts of the proceedings.

P.S. 928 Ramon Mifsud Grech[11] testified about the circumstances leading to the arrest of the accused and added that after he was arrested and taken to the St. Julian's Police Station, he was handcuffed to the iron bench but managed to extract his wrist from the handcuffs and fled the Police Station. Witness also confirmed that he together with another two colleagues, apprehended the suspect near Tony's Bar when he tore part of the uniform of his colleague P.C. 1320.

P.C 1052 Brian Tonna confirmed the aggressive behaviour of the suspect, his temporary escape from Police custody, the damage to the service number and lanyard of the uniform of P.C. 1320, and also identified the clothes worn by the suspect at the time of his arrest as the clothes exhibited by P.C. 1320. The witness, in cross-examination, also confirmed that Omissis was in the Police car when she identified the suspect in Paceville close to Burger King, and that at this point the Police car was around five metres away from the suspect.

P.C. 1052 further explained that at the time of his arrest in Paceville, the suspect's exact words were "*you are arresting me for nothing*" and this after he had explained to him that he was a suspect in a case of alleged violent indecent assault.

Dr. Steven Farrugia Sacco, who was appointed by the Court[12] in order to reproduce the content of the pen-drives and CDs exhibited by the Prosecution during the hearing of the 11th December 2014, and to extract relevant still images therefrom, presented his report Dok. SFS[13] containing a number of still images obtained from the footage.

[11] 4th February 2015.

[12] 11th December 2014.

[13] 13th October 2015.

The court-appointed expert concluded that the footage on the device Dok. USB2[14], although originally captured by a CCTV camera, was recorded by a separate device but was not captured directly by that device and consequently, since he did not himself record the copy of this footage, he was unable to confirm the real date and time appearing on the said footage, even that contained on the other DVDs exhibited.

Carlos Bonello, manager of the establishment Sunrise Inn at the time of the incident, identified Dok. USB 2[15] (marked as Studio Seven) during his testimony, as being the pen-drive that he had given to the Police some time in 2014 containing footage showing a recording from one of the CCTV cameras outside the said establishment.

Joseph Pace confirmed in his testimony[16] that he works for the company Lifetime Limited and recalls handing over to the Police Inspector footage taken from one each of the CCTV cameras, property of Lifetime Limited, that are installed outside the premises Havana and Rocco Café`, situated in in St. George's Road and in Saint Rita Steps, Paceville, respectively. He confirmed that the footage in question related to the time indicated to him by said Inspector.

Dr Carlo Refalo testified[17] that omissis had abrasions on both elbows when he examined her at the Emergency Department of Mater Dei Hospital on the 16th October 2014, as well as a bruise on the left elbow. The relative medical certificate is exhibited at fol. 7 of the acts of the proceedings.

[14] Fol. 147 and 174 *et seq*.

[15] As marked in the report Dok. SFS.

[16] 3rd February 2016.

[17] 21st March 2017. Transcript of the testimony given by same witness on the 24th March 2015 is not available in the acts of the proceedings.

VERSION OF THE DEFENCE

Apart from the cross-examination of various witnesses carried out by the defence, the following evidence was brought by the defence.

Brian Hansen testified[18] that he was a work colleague and flat-mate of the accused and on the 15th October 2015 he was with the accused and with another friend named Junior. He said that they arrived in Paceville at circa 1.00 a.m., went to Havana Club, ordered some drinks and were dancing. He explained that at 3.30 p.m. they decided to leave in order to return home so they called a taxi but on the way out of the club, he was called by some girls and for about twenty minutes lost sight of the accused and his other friend. The witness stated that it was at around 4.00 a.m. when he saw the accused again. They were outside Burger King in Paceville where they spoke for a while and eventually the witness saw Police cars arriving on the scene and realised that the accused was being arrested.

The accused, Biondy Clayd Raafenberg, chose to testify during the hearing of the 9th January 2018. The following are the relevant parts of his testimony:-

"*I have been residing here in Malta since the year two thousand and thirteen (2013). At the moment, I work for a mobile shop in Bay Street, St Julian's. I remember that on the sixteenth (16) of October two thousand and fourteen (2014) at the beginning of the night I was together with a friend of mine named Brian at home together with Aleandro Borg. At about half past midnight (00:30) we decided to go out, however Aleandro Borg wanted to go home. I subsequently booked a cab for us all. Two (2) cabs stand up one to take Aleandro Borg home and the other cab to take me and my*

[18] 26th April 2017.

friend Brian out. Brian and myself in the cab went to Ta' Giorni to pick up another friend named Junior and we arrived subsequently in Paceville next to the steps in Bay Street, the three (3) of us all together. This was sometime past one o'clock in the morning (1:00am) of the seventeenth (17th) of October.

We then went from place to place and had a few drinks; subsequently we ended up in a Club called Havana. Whilst we were in Havana the three (3) of us together shared a bottle of Vodka. As far as I recollect we approached nobody whilst in Havana. I know that we were also dancing whilst we were there. We stayed in Havana till about 4:00am. I remember that Brian was most intoxicated out of us three (3). Prior that he was talking to some lady outside the club asking him to go into this Club known as a Gentleman's Club whilst I was talking to some other friends whom I know here in Malta. We also said our goodbye's and I and Brian walked towards Burger King and that is where the police came and arrested me.

They did not say anything to me at that moment in time. I know that they were a bit violent and grabbed me and they took me with them. I asked them why they arrested me; however they did not tell me anything and they were speaking to me in the Maltese Language. I was accompanied to the St Julian's Police Station. Brian was asked, Brian wanted to join me however the police did not allow him and they asked him to back off. I do not recall the time I was under arrest and taken to the Police Station.

… … …

I never saw omissis before she testified in Court and then I tried to see if I had met her the day before and I also tried to see if we have any few mutual friends between us, however it results that we have no friends in common either. I am being shown some images in the acts of these proceedings namely those found fol. 150 to 184. I can confirm that these photographs were taken between 3:52 minutes in the morning on the seventeenth (17th) of October and 4.03 minutes over a span of about ten (10) minutes. Asked if I recognised any persons in these photographs, this is a bit difficult for me to say that. I can't really say that I know any one of them. However, I can

confirm that the first photographs indicate the locality Havana, those in colour where there is red and in fact there's also indicated the name Havana on them. However, I'm not recognising anybody whom I know in these pictures. Asked if I specifically recognise any of the persons shown in the last four (4) photographs, I say no, I do not recognise anybody.

Asked[19] ***where I was between 3:52 minutes and 4:03 on the day in question, I say that I was in the Club Havana****. I never knew why I actually was under arrest by the police. Nobody ever told me anything.*

… … …

I am not sure whether I was assisted or not on the first day of my arraignment, claiming that this is a case of mistaken identity. I do not know what time the incident took place, however between 3:52 and 4:03 I was in Havana. I left Havana at about four o'clock in the morning (4:00am). I did not even see the incident take place.

… … …

I also remember for sure that I was in the Club that night and I also remember that I was intoxicated; however I was not drunk because I remember what had happened. For me intoxication and drunk means the same thing.

I was wearing a white shirt, a cap and dark trousers on that night, which clothes were later exhibited in Court and confirmed by me*. In spite omissis stating that in actual fact she had met me before we were in Havana and I was speaking to her, I deny this categorically and I say that I never spoke to her.* ***I confirm that this was all a case of mistaken identity****.*

… … …

I definitely deny I haven't spoken to omissis prior to the incident and also during the incident. I never saw the films which are exhibited in these proceedings. ***I am being shown fol. 163 of these proceedings. In this photo there is a coloured person who is***

[19] Questions put forward by the lawyer of the complainant.

wearing shoes similar to the ones I was wearing that evening, jeans that were similar to the ones I was wearing that evening, also a T-Shirt which was similar to the one I was wearing that evening and also a cap which was similar I am being told, and I confirm that I am hundred percent (100%) sure that this photograph is not of me. I am not a twin. I was in Paceville that evening from about one (1:00) to four o'clock (4:00am) in the morning. Asked if I saw anybody dressed exact like me on that evening, I say I have no, I did not pay attention to others, so I did not."[20]

Having considered;

THE FIRST CHARGE

The first charge brought against the accused is evidently based on the offence envisaged by Article 207 of the Criminal Code which, at the time of its alleged commission in 2014 and before the amendments brought into effect by Act XIII of 2018, was designated as the offence of violent indecent assault. This provision stipulated:-

207. *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 three months to one year:-*

Provided that in the cases referred to in article 202, the punishment shall be increased by one degree.

[20] The Court's own emphasis.

With the introduction of Act XIII of 2018, the designation of the offence of violent indecent assault was changed to that of "*a non-consensual act of a sexual nature*", thus broadening extensively the category of those acts that would come to fall within the scope of this provision of law and thus punishable as a criminal offence. Indeed, the requirement of proving force or violence as an essential material element of this offence was removed and substituted with the requirement of proving a mere lack of consent on the part of the complainant to the performance of an act which is "*sexual*" in character.

However, in the case at hand, the relevant charge brought against the accused is that of having committed the offence of violent indecent assault and the Court shall, in order to determine his guilt or innocence, examine whether from the evidence adduced, the existence of the substantive elements of the offence as required by Law at the time of the alleged commission of the offence on the 16th October 2014, has been duly proven. This would be in keeping with the fundamental principle against the retroactive application of the substantive criminal law - *nullum crimen, nulla poena sine lege* - such that any amendments brought into effect subsequently to the commission of the crime but before the determination of the proceedings, do not receive retroactive application unless the amended subsequent law is more favourable to the accused than the previous law. After all, this principle is enshrined in Article 39(8) of the Constitution[21] as well as in Article 7 of the European Convention for the Protection of Human Rights[22] and Fundamental Freedoms.

In its judgement **Il-Pulizija vs Joseph Grima**, dated 2nd May 1994, the Court of Criminal Appeal while referring to Professor Mamo's Notes on Criminal Law, held that:-

[21] 39(8) *No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.*
[22] Chapter 319 of the Laws of Malta.

"*9. F'materja kriminali, ghall-inqas, il-ligi procedurali hija min-natura taghha retroattiva. Jigifieri bhala regola, ghal dak li jirrigwarda procedura, il-ligi li ghandha tigi applikata hija dik in vigore fi zmien il-proceduri, minkejja li fi zmien il-kommissjoni tar-reat il-proceduri setghu kienu regolati b'ligi differenti. Dan huwa applikabbli irrispettivament minn jekk il-ligi precedenti kinitx izjed jew inqas favorevoli ghall-imputat.*

10. Il-ligi sostanzjali, ghall-kuntrarju, bhala regola, ma tapplikax retrospettivament. Ghandha tigi applikata l-ligi in vigore fid-data tal-kommissjoni tar-reat, sakemm ma tkunx inqas favorevoli ghall-imputat."

Having considered;

The elements of the offence of violent indecent assault were examined in depth by the Court of Criminal Appeal in the judgement delivered on the 9th June 1977 in the names **Il-Pulizija vs Orazio Godwin sive Horace Laudi**:-

"*Kif inghad fis-sentenza "Rex vs* [Carmelo] *Delia" 2.12.1901, App. Krim*[23]., *dan ir-reat "comprende qualunque atto che si estriusica nell' oltraggio violento all' altrui pudore per qualsiasi motivo diretto senza che nulla influisca sulla mozione del reato la diversita' della cause che abbia spinto ad agire semprecche l' azione abbia prodotta il risultato di ostreggiare violentemente il pudore altrui".*

… … …

"Il-vokabolu "attentat" huwa fis-sens ta' "osare, ardire, thebb" u mhux fis-sens ta' tentattiv –A.K. Il-Pulizija vs G.[Gerald] Cassar 18.7.59 (xliii.iv.1114).

[23] Vol. XVII.iv.7.

*"**Wiehed mill-elementi ta' dan ir-reat huwa il-vjolenza u din tikkonsisti filli s-suggett passiv tar-reat jigi kostrett jissubixxi dak li jrid l-imputat**. Il-Carrara (Vol. II 1549 pag. 403) jghid li din il-vjolenza tikkonsisti "**dal concorso di due volonta' con-tradicentesi e poste direttamente in reciproca guerra: quella del soggetto passivo che non vorebbe patire sifatto oltraggio e quella dell' agente che vuole l' oltraggio e vuole altresi vincere colla forza fisica o col timore la conosciuta volonta del soggetto passivo e renderla come che sia impotente e resistere al suo desiderio**" (App. Krim. Pul. vs F. Debono 27.10.45 Vol. xxxii.iv.938).*

"Il-gurisprudenza tal-Qorti taghna hija fis-sens li, biex ikun hemm dan ir-reat, l-att impudici irid jkun sar fuq il-persuna tas-suggett passiv. Din il-gurisprudenza hija bazata fuq dottrina taljana, specjalment fuq il-Carrara u il-Maino li jinstabu citati f' diversi sentenzi. Meta l-att ma sarx fuq il-persuna, izda fil-prezenza taghha, il-Qrati qalu li dana ma jinkwadrax ruhu taht l-artikolu 222, izda fir-reat ta' korruzzjoni ta' minuri jew offiza ghall-pudur jew morali maghmula fil-pubbliku - skond il-kaz.

"Jekk wiehed jikkompara l-artikolu 222 tal-Kodici Taghna mal-artikolu tal-ligi Taljana, li fuqu ikkommentaw l-awturi citati, jirrizulta li, waqt li il-ligi Taljana tghid espressament li l-att irid jigi kommess fuq il-persuna - "commette su persuna dell uno u dell' altro sesso atti di libidine", il-ligi Maltija tghid biss "kull min jinsab hati ta' attentat vjolenti ghall-pudur……"

"Il-kommentaturi tal-Kodici Taljana kellhom necessarjament jghidu li l-att irid ikun gie kommess fuq il-persuna, ghaliex dan l-element huwa rikjest espressament mill-ligi minnhom kommentata, izda ma jidhirx li ghandu ikun rikjest fil-kaz taghna, meta id-disposizzjoni tal-ligi ma tesigihiex."[24] [enfasi ta' din il-Qorti]

[24] Vide **Il-Pulizija vs Joseph Micallef**

The Court here also makes reference to the teaching of the Court of Criminal Appeal in its judgement of the 13th November 1998 in the names **Il-Pulizija vs Joseph Micallef**:-

"L-iskop li ghalih ikun sar l-att hu rrelevanti.

... ...

Id-definizzjoni li tagħti l-Liġi tagħna tal-attentat vjolenti għall-pudur hija waħda li telimina – għax tneħħi dawk ir-reati msemmijin speċifikatament fl-artikoli preċedenti ta' 'dan is-sub-titolu.' L-att libidinuż m'hemmx għalfejn jissoddisfa lil min jagħmlu. Huwa biżżejjed li jissodisfa l-ġibda sesswali ta' min jagħmlu. Is-suġġett attiv jista' jkun kull persuna, taħt l-eta' jew maġġorenni, maskil jew femminil waqt illi s-suġġett passiv jista' jkun kull persuna wkoll. L-istat ta' deġenerazzjoni morali tas-suġġett passiv huwa rrelevanti minħabba li r-reat fih l-element ta' vjolenza. L-atti indiċenti m'hemmx għalfejn li jkunu saru fuq il-persuna."[25]

Antolisei, in connection with this offence, maintains that:-

"Il codice vigente ……considera 'atto di libidine' lo sfogo dell'appetito di lussuria diverso dalla congiunzione carnale. Rientrano, pertanto, nella figura criminosa in parola tutte le manifestazioni dell'istinto sessuale, e cioe' tutte le forme in cui puo` estrinsecarsi la libidine, escluso il coito… Affinche' questi atti cadano sotto le sanzioni della legge si esige che essi siano compiuti usando dei mezzi o valendosi delle condizioni indicae negli articoli 519 u 520, e cioe' mediante violenzia o minaccia….

" L'elemento materiale del delitto consiste nel compimento dell'atto di libidine, il quale puo' assumere le forme piu' svariate, dal semplice palpamento alle piu' aberranti anomalie. Con la realizzazione dell'atto di libidine il reato e' consumato, non essendo necessario che il soggetto sia pervenuto a soddisfare la sua

[25] Cited in: **Il-Pulizija vs John Gera**, decided on the 14th November 2008, Court of Magistrates (Malta) as a Court of Criminal Judciature.

concupiscenza. ***Un solo atto e' sufficiente per concretare il delitto… Quanto all'elemento psichico, basta a concretare il dolo la volonta' fi compiere atti di libidine con la coscienza del carattere libidinoso dei medesimi e della violenza o abusivita' del comportamento.***[26] [enfasi tal-Qorti]

Having considered;

As a starting point, it must be pointed out that the accused's only line of defence at least against the first two charges brought against him, is that of mistaken identity: he claims that he is not the person who was harassing Omissis at Havana Club and elsewhere, and neither was he the person who assaulted her.

During the arraignment[27], specifically during submissions concerning the accused's request to be released on bail, the defence maintained that since the accused was in the company of two other persons on the date and at the time of the alleged assault, he is extraneous to the alleged assault and as such, this is a case of mistaken identity.

In essence, however this account eventually developed into the version that the accused was indeed present at Havana Club on the date of the incident and that he was in Paceville that evening between 1.00 a.m. and 4.00 a.m., having left Havana Club around 4.00 a.m. While he stated that he was intoxicated at the time, he claimed that he recalls what had happened, denied having spoken to Omissis and confirmed that the person in the image shown at fol. 163 of the acts of the proceedings shows a coloured person wearing a t-shirt, jeans and shoes similar to the ones he was wearing that evening. He declared however that while he is absolutely certain that the person shown in the said image is not himself, he did not see any other person dressed exactly like him that evening.

[26] Antolisei F. Manuale di Diritto Penale Parte Speciale – 1 Giuffre' par.83 pagina 441 u 442.

[27] 17th October 2014.

It is therefore necessary to determine at the very outset whether there is sufficient evidence in the acts of the proceedings to morally convince the Court of the accused's involvement in the events described by the alleged victim, and likewise, whether the accused's allegation of "mistaken identity" can be said to be proved on a balance of probabilities.

Having considered;

The Court would that this juncture, deem it fit to cite Lord Denning's description of the expression *'proof beyond a reasonable doubt*', as made in the decision **Miller vs Minister of Pension**[28]:-

"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."

Identification of the Accused

After having considered at length the comprehensive and always consistent testimony of Omissis, the Court is morally convinced that the person who the victim described as having continually pestered her at Havana Club and made sexual advances towards her, is the accused. The Court is also equally satisfied that that the very same person, that is the accused, followed Omissis after she left Havana Club and proceeded towards the establishment 'Nordic', and later down Saint Rita Steps.

[28] 1974 - 2 ALL ER 372.

At this point, it is pertinent to note that the said Stefano Persiano in his testimony also identified the accused as the person who he spoke to on St. Rita's Steps, at Omissis's behest, and told him to stop following her and to leave her alone.

The Court is also convinced also that Omissis correctly identified the person who eventually assaulted her a few minutes later, as this very same person, that is the accused, who she also identified later on in Paceville when, accompanied by the Police, she sought to identify her assailant. The Court's conviction of this positive identification of Omissis's assailant is further reinforced by the fact that the victim declared that during the assault, she had the opportunity to look at the face of her assailant, at which point she recognised him as the person who was harassing her while she was dancing at Havana Club. After all, it is established that she had been bothered by this person for at least two and a half hours at the Club, claiming that there were eight or nine instances in which that person persistently approached her, so just as it is reasonable to assume that Omissis had ample opportunity to look directly at this person's face, so it is also reasonable to assume that her recognition of this same person only a few minutes later, albeit in a different place, must have likely been correct. The Court also finds that this identification fits in well with the victim's reaction when she described how she shouted at her assailant instead of crying for help, upon recognising him as the same person who was previously harassing her at the Club, and therefore as a person with whom there had been some interaction and not as a complete unknown stranger.

As already observed, the victim also identified the said person at the Police station a few hours after he was arrested and upon being asked whether she was sure that he was the person who assaulted her, she replied:-

"*And I told him that I am 100% sure that it is him. I have never been more sure about anything than this*."

Having considered;

In this regard, the Court refers to the decision in the celebrated case of **Turnbull**[29], which dealt in depth with the matter of the identification of the accused and where it was held that when the case against the accused depends uniquely or substantially on the correctness of one or more instances of identification of the accused which the defence alleges are erroneous, great caution must be exercised in the analysis of the quality of the identification evidence, and account must be taken of various factors including the clarity of vision that the witness might have had of the suspect, the distance between him and the suspect, whether or not they were previously acquainted or whether the witness had previously seen the suspect on a different occasion and the time lapse between the original observation and the identification made to the Police:-

"*The visual identification of suspects or defendants by witnesses has long been recognised as problematic and potentially unreliable. It is easy for an honest witness to make a mistaken identification, even in some cases where the suspect is well known to him, and some evidence suggests that a confident identification is no more likely to be correct than a cautious or hesitant one.*

… … …

In some cases, a witness may have qualified his identification by admitting that he was 'not quite certain', or was only '90 per cent sure'. A defendant cannot properly be convicted on qualified identification evidence alone (George [2003] Crim LR 282; Brown [2011] EWCA Crim 80). But as with other kinds of weak identification evidence, a qualified identification may have a legitimate role to play alongside other, more reliable, evidence."[30]

[29] (1977) QB 224, cited in Archbold, 1997, p. 1255-1256.
[30] Ara Blackstone's Criminal Practice, 2012 Ed.

While bearing in mind the above considerations, the Court cannot legitimately discount Omissis's consistent identification of the accused not only as her assailant but also at various other instances during the early morning hours of October 16th. Indeed, while her recognition of the accused was effortlessly based on the encounters made during the first part of the evening when the accused was persistently approaching her at Havana Club, subsequent identification was made at other junctures and all in the matter of a few hours. While these factors cause the identification made by the victim to be increasingly convincing, matters might be different had the victim identified or recognised her assailant with intervals of days or weeks between each encounter.

Moreover, the Court observes that no evidence was brought to weaken these instances of categorical identification of the accused by both Omissis and Stefano Persiano, *multo magis* when it also results that the accused's presence in Paceville and more specifically at the same establishment, Havana Club where Omissis described the repeated advances made by the accused, and at the very same time (1.00 a.m. till 4.00 a.m.), is undisputed.

It is pertinent to note at this stage that even though the accused denied having been the person described by Omissis, he was nonetheless arrested in the same area a short time afterwards wearing the same attire described by Omissis and Stefano Persiano and clearly visible in the images where he is shown following said victim on Saint Rita Steps. The accused also admits that he was at Havana Club during the same time-frame in which Omissis in her testimony described the accused's persistent advances and requests while she was on the dancefloor. At no point did the accused deny having been at Havana Club on the relevant date and at the relevant time and indeed, Brian Hansen, the only witness whom he produced to testify in his defence, confirmed this.

Having considered;

The Court cannot also fail to observe that Omissis's version is not excluded or even undermined by the evidence produced by the defence, particularly when Brian Hansen expressly claimed that although he had arrived at Havana Club in the company of the accused at circa 1.00 a.m, he could not give an account of the accused's whereabouts at the relevant time when the accused was allegedly following Omissis on her way home. Certainly, when confronted by the consistent and unqualified evidence produced by the Prosecution, the testimony of the witnesses produced by the defence including the accused's own version of events, fail to create any reasonable doubt in the Court's mind as to the veracity of the Prosecution's version.

While Brian Hansen confirmed that he was indeed with the accused at Havana Club between 1.00 a.m. and 3.30 a.m., he never denied having seen the accused approach Omissis and moreover failed to account for the accused's actions and whereabouts between 3.30 a.m and 4.00 a.m. Although it is true that according to Brian Hansen he later caught up with the accused outside the Burger King establishment in Paceville where the accused was soon after arrested, there is no evidence of the time when this meeting actually took place and the Court does not deem that this testimony can serve to exclude or undermine the accuracy of the victim's testimony and the time-frames that she described, particularly when the other person, a certain Junior, who according to Brian Hansen and the accused himself, was at the establishment that night together with the accused and the said Brian Hansen, was not produced as a witness for the defence.

At this stage, the Court refers to the judgement in the names **The Executive Police vs Bernard Pintaric**, where it was stated:-

"*Of course, this Court is not holding that the identification of a person should always be discarded. No textbook on Evidence says this and a person may be convicted on the identification by another person if the Court is convinced that the identification is a reliable one. This even more so when the identification is corroborated by other evidence.*"[31]

In this case, the Court firmly believes that the identification of the same person, that is the accused, made at various stages in the matter of only a few hours and in no uncertain terms by his victim, when the identification of this same person was also made by another witness who actually spoke to the person, instructed him to leave the victim alone and during the proceedings recognised this person as the accused, must be given its due weight.

Having considered;

The Court cannot in any event ignore that the description given by both Omissis and Stefano Persiano of the clothes worn by the person who was following said victim outside the establishments in St. George's Road and down Saint Rita Steps, that is a white top with black writing, red trousers and a cap with a shiny sticker, matches the description of clothes worn by the accused when he was apprehended by the Police and taken to the Police Station from where he eventually also tried to escape, which attire was also duly described and also exhibited in the acts of the proceedings by P.C.1320 Sean Axiaq who actually arrested the accused in Paceville.

This attire also tallies with the clothes worn by the person shown in the images taken from the CCTV camera footage forming part of the report of the court-appointed expert and which **the accused himself confirmed as being very similar to the**

[31] Deciza mill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali, fid-19 ta' Ottubru 2005.

clothes that he was wearing on the night between the 15th and 16th October 2014. Although the footage reproduced in the court-appointed expert's report cannot be confirmed with absolute certainty as being the footage in real time of the actual instance where the accused was following the victim down Saint Rita Steps, the Court is morally convinced that this is so, both after considering the accused's own testimony and also the fact the Omissis identified herself and the accused in the said image at fol. 159 of the acts of the proceedings.

Although, as already pointed out, the time indicated on the images[32] taken from the footage recorded by the cameras on St. Rita Steps, cannot be established with certainty as being the real time of the recorded events, the relevant stills at fol. 159 until fol. 173 show a timeframe between 3.52 a.m. and 4.01 a.m. by which time Omissis and the person who she identified as the accused are still in the vicinity of St. Rita Steps.

The Court would underline that although its conclusions are not based in any substantial manner on the images shown in the footage exhibited in the acts of the proceedings, in any event such images do indeed serve to amply reinforce the conclusions it has already otherwise reached.

In any event, Omissis testified, when asked to explain who her assailant was, thus:-

"Pros: Did you get a good look at his face?

Witness: I got a very good look at this face.

Pros. Are you sure it was the same person?

Witness: I am positive that it was the same person.

[32] Fol. 159.

Pros: What was he wearing now?

Witness: He was wearing the same things that he was wearing at Havana."[33]

Having considered;

In view of the above considerations, the Court concludes that the Prosecution has proven beyond reasonable doubt that the accused was present at the establishment Havana Club, that he was the same person who approached and harassed Omissis on the dancefloor and who followed her down St. Rita Steps where he was warned off by Stefano Persiano, that he was the person who assaulted her near Sunrise Bar on her way home and that he was soon after identified at Paceville in the vicinity of the Burger King outlet where he was eventually arrested.

The Violent Indecent Assault

After considering Omissis's comprehensive description of the assault, which corresponds accurately in all particulars with the footage shown on Dok. USB2 which was closely examined by the Court and from which the images at fol. 175 until 184 were extracted by the court-appointed expert, it is evident that the assault launched by the accused upon Omissis close to Sunrise Inn, was not only violent but an extremely violent physical and indecent assault.

With reference to the "*indecent*" nature of the assault, the Court of Criminal Appeal in the case Il-**Pulizija vs Thomas Wiffen**[34], while considering the constituent elements of a libidinous act, held that:-

[33] Fol. 51.

[34] Decided on the 8th January 1996.

"Francesco Carfora, writing in the Digesto Italiano in connection with Section 335 of the Zanardelli Code … has this to say as regards the notion of "lewd acts": "Atti di libidine debbono ritenersi tutti quei contatti e quelle manovre, ***che possono eccitare i sensi, anche se non giungono allo sfogo completo della libidine****. Senza poi entrare nelle varie questioni sorte nella pratica e nella giurisprudenza circa alla valutazione di singoli atti per vedere se debbasi o no attribuir loro il carattere di atti di libidine, specie in ordine al bacio, del quale lungamente si occupa il Carrara, noi rileveremo come norma generale che gli atti, a cui si riferisce la legge,* ***debbono essere materiali e di una certa entita' e tali da aver rapporto prossimo e diretto colle funzioni sessuali****" (Vol. VIII, parte 3, p.967).*

Lewd acts are therefore all those acts "diretti ad eccitare la propria concupiscenza verso piaceri carnali turpi per se stessi o per le cirostanze in cui si cerca di provocarli, ovvero diretti a sodisfare siffatta concupiscenza" (Manzini, V., op. cit., p. 359). The duration of these acts is immaterial for the notion of a lewd act." [Emphasis made by the Court]

Bearing this in mind, there is no doubt in the mind of this Court that when the same person who just earlier on was pestering Omissis to spend the night with him, subsequently assaulted her, visibly[35] grabbed her chest, ripped her shirt open and tore part of it off while he tried to hold her in position, that person, identified positively as the accused, was manifestly committing a lewd act. That her shirt was ripped open is a fact that has been sufficiently established by the testimony of the victim herself and her mother Omissis[36], and this in itself is sufficient, even without reference to the actual physical attack, to satisfy the element of violence. After all, it is evident and undisputed that the victim was vehemently opposed to the will of the offender, that is in other words, she did not consent to the actions of the accused.

[35] Reference *inter alia* to image at fol. 175.

[36] Also evident from the recorded footage Dok. USB2. Reference is also made to the testimony of P.C. 1052 Brian Tonna, fol. 104.

On the basis of all the above considerations, the Court finds that the offence of violent indecent assault has been proven in all its elements just as it has been proven that the perpetrator of this offence was the accused, Biondy Clayd Raafenberg.

THE SECOND CHARGE

The Court deems that it has also been sufficiently proven that the accused during the assault caused slight injuries to Omissis, consisting in abrasions on both elbows and bruises on her left elbow as confirmed by Dr Carlo Refalo in his testimony and in the medical certificate he released after having examined her on the 16th October 2014.

At this point, it must be observed that although the Court[37] acceded to a request by the Prosecution for the correction *inter alia* of paragraph six (6) of the charge sheet to refer to the wording of Article 202(f) of the Criminal Code, that is, by the addition of the wording "*in the course of which she sustained slight bodily harm*", it is evident that this aggravating factor was intended to be attached to the offence object of the first charge, that is, the violent indecent assault and not to the offence object of the sixth charge which is completely unconnected with the violent indecent assault and which attributes to the accused the offence of voluntary damage to property of a Police Officer in terms of Article 325 of the Criminal Code.

Consequently, the Court cannot consider the offence of violent indecent assault as being aggravated by the injuries caused to the victim, also and most significantly because the aggravating factor contemplated by Article 202(f) of the Criminal Code, is only applicable to: "*... any of the crimes referred to in the* ***preceding*** *articles of this sub-title...*"

[37] 11th December 2014.

The Court however shall consider the offence of having caused slight bodily harm to omissis as a separate offence subject of the second charge brought against the accused, rather than as an aggravating factor of the violent indecent assault.

Having considered;

In this case the Court is not satisfied that the bodily harm caused omissis, were caused merely as a means for the accused to commit the offence of violent indecent assault, considering the extremely violent nature of the assault, and therefore cannot be justified in this manner. Consequently the Court chooses not to apply the provisions of Article 17(h) of Chapter 9 and shall apply the appropriate punishment for this separate offence taking into account the provisions of Article 17(b) of Chapter 9.

THE THIRD CHARGE

This charge attributes to the accused the offence contemplated by Article 339(1)(d) of Chapter 9 of the Laws of Malta, that is of having attempted to use force against Omissis with intent to insult, annoy or hurt such person or others, unless the fact constitutes some other offence under any other provision of the Code.

Since as already established, the accused's actions as considered with reference to the offence of violent indecent assault, also constitute the lesser charge based on the said Article 339(1)(d), the Court cannot but find the accused guilty but for the purposes of punishment, it shall apply the provisions of Article 17(d) and (h), as it is evident *inter alia* that this lesser offence was committed as a means to committing the graver offence of violent indecent assault and the Court shall only apply the punishment attached to the graver offence.

THE FOURTH CHARGE

It has been amply proven from the evidence brought by the Prosecution, namely the testimony of P.S. 1320 Sean Axiaq, P.S. 928 Ramon Mifsud Grech and P.C. 1052 Brian Tonna, not to mention the testimony of Omissis and Omissis, that the accused while in Police custody at the St. Julian's Police Station after having been arrested in Paceville, somehow freed himself from the constraints of his manacles and escaped from the Station, only to be re-apprehended a few minutes later close by, near the roundabout in the vicinity of the establishment Tony's Bar, and brought back to the Police Station. The accused never contested and did not even refer to this incident in his testimony, although he chose to testify in the course of these proceedings.

The charge brought against the accused is based on the wording of Article 151 of the Criminal Code which, although evidently referring to the crime of simple escape of "*a person sentenced*" or of a "*prisoner*", is deemed to apply also to the escape from places of custody by "*suspected*" persons[38]. This is made possible through the application of Article 160 which stipulates that the provisions of inter alia Article 151 shall apply in the case of escape of any person lawfully confined from any place appointed for his custody.

Having considered;

As already pointed out, the evidence clearly shows that the accused was in the custody of the Police officers who had arrested him a short while before in Paceville, and that he escaped from such custody. Consequently, the Court therefore finds no difficulty in reaching the conclusion that by virtue of the application of Article 160 of the Criminal Code, the accused must also be found guilty of the offence envisaged by Article 151.

[38] After all, the part of Subtitle V of Title III of Part II of Chapter 9, to which Article 151 pertains, deals with the "*… Escape of Persons in Custody or **Suspected** or Sentenced…*"

THE FIFTH CHARGE

This attributes to the accused the crime of assault or resistance committed against a person lawfully charged with a public duty when in the execution of the law or a lawful order issued by a competent authority (Article 96 of Chapter 9).

According to Professor Sir Anthony Mamo for the offence under section 96 to subsist three elements are required. The first element consists in an attack or resistance. The second element refers to the condition or capacity of the person against whom the attack or resistance is directed; the law speaks of a person lawfully charged with a public duty. In the third place it is necessary that the attack or resistance take place in the act of the execution by them of the law or of a lawful order from a competent authority.

Regarding this third element Professor Mamo states that:-

"The question arises whether resistance would be punishable if the officer was at the time abusing his powers or exceeding his jurisdiction, or otherwise acting unlawfully or arbitrarily. .... In our law the solution of this question is clear. So that the crime under section 96 may arise it is essential that the officer to whom resistance is offered should be acting ***in the execution of the law*** *or of a* ***lawful order of the competent authority."***[39]

In a more recent judgement given by the same Court of Criminal Appeal it was held, regarding the crime contemplated in Article 96, that:-

"Dana l-artikolu jirrikjedi mhux biss li l-vittma tkun "persuna inkarigata skond il-ligi minn servizz pubbliku" (l-istess bhalma jirrikjedi l-Artikolu 95(1)), izda wkoll li r-reat ikun sar fil-waqt li dik il-persuna hekk inkarigata minn dak is-servizz pubbliku "tkun qed tagixxi ghall-ezekuzzjoni tal-ligi jew ta' xi ordni moghti skond il-ligi minn xi

[39] Notes on Criminal Law Vol II pagna 49/50.

awtorita` kompetenti". Din l-espressjoni hi differenti minn dik uzata fl-Artikolu 95(1) – "waqt li jkun jaghmel jew minhabba li jkun ghamel dan is-servizz, jew bil-hsieb li jbezzghu jew li jinfluwixxi fuqu kontra l-ligi fl-esekuzzjoni ta' dan is-servizz". ..... Mhux kull min qed iwettaq servizz pubbliku qed jezegwixxi l-ligi jew ordni moghti skond il-ligi."[40]

Here, the Court of Criminal Appeal also made a distinction between assault or resistance in a situation where a police officer is arresting, or has just arrested, somebody and assault or resistance in a situation where a police officer is trying to convince somebody to do something. According to the Court of Appeal whilst in the first instance the police officer is executing the law and consequently the assault or resistance can constitute the offence contemplated under Article 96, the same cannot be said of the second instance because in this second instance the police officer is not executing the law but discharging his public duty[41]. In a judgement given on the 12th September 1996 the Court of Criminal Appeal in fact held that:-

"... biex jissussisti dana r-reat irid ikun hemm mhux biss attakk jew opposizzjoni ossia resistenza kontra persuna inkarigata skond il-ligi minn servizz pubbliku (f'dan il-kaz pulizija), izda wkoll li dana l- attakk jew resistenza isir bi vjolenza jew b'hebb u jsir fil-waqt li dik il-persuna ***tkun tagixxi ghall-ezekuzzjoni tal-ligi jew ta' ordni moghti skond il-ligi mill-awtorita' kompetenti15****. Meta ufficjal tal-pulizja jintima li jkun ser jarresta lil xi hadd, jew ikun effettivament qed jipprocedi biex jarresta lil xi hadd, jew ikun ga arresta u qed izomm lil xi hadd arrestat, huwa jkun certament qieghed jezegwixxi l-ligi. Izda meta ufficjal tal-pulizija ikun qieghed jipprova jipperswadi lil xi hadd bil-kelma t-tajba sabiex iwarrab minn fuq il-post u ghalhekk minghajr ma dak il-pulizija jezercita s-setgha tieghu li jarresta, ma jistax jinghad li dak il-pulizija jkun qed jagixxi "ghall-ezekuzzjoni tal-ligi" fis-sens tal-Artikolu 96, ghalkemm huwa jkun qieghed jaghmel is-servizz pubbliku tieghu fis-sens tal-Artikolu 95.*

[40] **Il-Pulizija vs Joseph Zahra**; decided 9th September 2002.

[41] **The Police vs Polina Gutshabes**, decided by this Court differently presided, on the 17th July 2017.

In view of the prevailing doctrine and jurisprudence on the topic at hand it should be clear that for an offence under Article 96 to subsist, it is essential that it is shown that the Police Officer, who was resisted or even assaulted, was executing the law.

Having considered;

Applying these principles to the case at hand, the Court agrees that the arrest of the accused in Paceville as soon as he was identified by the victim as her assailant, was an act carried out in the execution of the law as required by Article 96, in terms of the authority granted to a Police Officer in terms of Article 355X of Chapter 9 to arrest any person who has just committed a crime punishable with imprisonment, or whom he reasonably suspects of having just committed such a crime.

However the evidence brought by the Prosecution does not convince the Court that the accused, then a suspect, violently resisted the initial arrest in Paceville, in violation of Article 96. In fact, P.C. 1052 Brian Tonna upon being asked whether the accused resisted the arrest at any time, testified that:-

"*At the beginning he started telling us that we arrested him for nothing … he started to resist a bit at the beginning but then he came with us, ans then he escaped. At that time we had to put him to the floor to hold him, because he was trying to escape.*

Asked if he was aggressive, the witness replied:-

"Yes, he was trying to get rid of us."[42]

However, as for the subsequent arrest of the accused after he escaped lawful custody at the St. Julian's Police Station subsequently to his initial arrest in Paceville, the

[42] Fol. 112.

Court deems that while it has been sufficiently and satisfactorily proven that the Police were entitled and authorised[43] to re-arrest the accused, then still a suspect, who was knowingly disobeying Police lawful orders by escaping from custody, there is no evidence that proves beyond reasonable doubt the element of violent resistance as required by Article 96. Although it does result that the accused tore part of the uniform of P.C. 1320 Sean Axiaq, at no time did the said witness explain how this damage was actually caused and in any event, the mere finding of guilt for the crime of simple escape from custody and/or the crime of voluntary damage to a Police Officer's uniform - in the absence of clear and detailed testimony of the persons charged with a public duty when executing the Law as to the nature and circumstances of the violent resistance, over and above and in addition to the outcome of such violent resistance - is not sufficient in itself for the finding of guilt for the commission of the crime contemplated in Article 96.

Consequently, since the Court is not convinced that the offence under Article 96 of the Criminal Code has been sufficiently proven for purposes of law, it does not find the accused guilty of the fifth charge.

THE SIXTH CHARGE

As already pointed out in the considerations made for the purposes of the fifth charge brought against the accused, it has been amply proven through the testimony of the Police Officers who gave evidence regarding the escape of the accused from custody at the St. Julian's Police Station, that when P.C. 1320 Sean Axiaq returned to the Police Station after apprehending the accused, part of his uniform, that is the lanyard and service number on the shirt, were torn off. This was also confirmed by Omissis who was present at the Police Station when the escape took place and when the

[43] Article 355X(3) of Chapter 9.

accused was re-apprehended and returned to the Police Station, and who testified as to the damaged uniform of one of the Police Officers upon his return to the Station.

Consequently the charge of voluntary damage to property in terms of Article 325 of Chapter 9 has been satisfactorily proven and the Court, on the basis of the consistent evidence attesting to this damage, is morally convinced that this damage was caused even though it results that the damaged uniform was not exhibited as part of the acts of the proceedings.

PUNISHMENT

For the purposes of punishment, the Court shall take into account the violent and simultaneously pusillanimous nature of the indecent assault, the fact that it took place on a person who, in the circumstances in which the crime was committed, must be deemed to have been a vulnerable person, and the detrimental effect that this assault results to have caused to the victim as detailed in her and her mother's testimony.

DECIDE

For the above-mentioned reasons, the Court while finding BIONDY CLAYD RAAFENBERG not guilty of the fifth charge and consequently acquits him of the fifth charge only, after having seen Articles 17, 151, 160, 207, 214, 215, 221(1), 325(1)(d) u 339(1)(d) of the Criminal Code, finds the said BIONDY CLAYD RAAFENBERG guilty of the first charge that is of having committed a violent indecent assault on the person of Omissis, and also finds him guilty of the second, third, fourth and sixth charges brought against him, and consequently condemns him to imprisonment for an effective term of twelve (12) months.

In terms of Article 382A of Chapter 9 of the Laws of Malta, a restraining order is hereby issued against BIONDY CLAYD RAAFENBERG for the purpose of providing for the safety of Omissis, which order shall remain in force for a

period of three (3) years which shall commence to run from the date of the expiration or remission of the punishment hereby inflicted.

In terms of Article 533 the Court condemns BIONDY CLAYD RAAFENBERG to the payment of the sum of seven hundred and five Euro and fifty-nine cents (€705.59) representing the costs incurred in the employment of experts appointed in the acts of these proceedings, which sum is to be paid by not later than one (1) year from today.

DR. RACHEL MONTEBELLO
MAGISTRATE.