



# THE COURT OF CRIMINAL APPEAL

*The Hon. Mr. Justice Aaron M. Bugeja M.A. (Law), LL.D. (melit)*

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Appeal number - 20/2018

**The Police**

**vs**

**Deidre Nyasa Rolfe HORNYOLD STRICKLAND**

Sitting of the 10<sup>th</sup> December 2020

The Court:

1. Having seen that this is an appeal lodged by Deidre Nyasa Rolfe HORNYOLD STRICKLAND from a judgment delivered by the Court of Magistrates (Malta) on the 18<sup>th</sup> January 2018 against, holder of a Maltese identity card number 52870A, who was charged with having:

On the 28/09/2015 at about 1.30hrs and on the previous days whiles at 36 Villa Parisio, Triq Mabel Strickland, Lija :

- i. Pursued a course of conduct which amounts to harassment of John Cachia, and which she knew or ought to know amounts to harassment of such other person;

- ii. Uttered insults or threats not otherwise provided by for in this Code, or being provoked, carried her insult beyond the limit warranted by the provocation to John Cachia;
  - iii. Without intent to steal or to cause any wrongful damage, but only in the exercise of a pretended right, of his own authority, compelled another person to pay a debt, or to fulfil any obligation whatsoever, or disturbed the possession of anything enjoyed by another person or in any manner unlawfully interfered with the property of John Cachia.
2. By means of the said judgment, the Court of Magistrates (Malta), after having seen the charges brought against the accused, after having seen section 85 of Chapter 9 of the Laws of Malta, acquitted the accused from the first and second charge while it found her guilty of the third charge and after having seen article 383 of the Criminal Code, the Court bound the accused on a personal recognisance for a period of twelve months subject to a penalty of eight hundred euro (€800) in lieu of punishment.
3. HORNYOLD STRICKLAND filed an appeal wherein she requested this Court **to vary** the said judgment by confirming the part where the appellant was found not guilty of the first and second charges brought against her while **revoking** the part of the judgment wherein she was found guilty of the third charge and of that part imposing punishment thereby acquitting her therefrom. The appellant argued, in brief, as follows:
  - i. It was not clear on what evidence the Court based its judgment finding against the appellant. There was an allegation that the appellant removed a chain that was placed on the gate after that she locked the gate leading to the gardens; following which John Cachia claimed that this barred his access to the rest of the property. However, John

Cachia was never vested with the possession to the property. Only the Strickland Foundation could lodge such a claim. Cachia could only accede to the property in order to render services on behalf of the Strickland Foundation who engaged him. Otherwise Cachia had no right to accede to the property as he had no legal title or right thereto. Hence the first element of the offence of arbitrary exercise of pretended rights was lacking.

- ii. It was not true that Cachia was locked in the gardens as he had other modes of exit and entry apart from the gates in question. Cachia alleged that he could not exit that part of the gardens on account of the fact that the appellant had locked all points of entry. However, there were other points of entry and exit to these gardens; and access thereto was not exclusively restricted to the gates. Cachia had other modes of access to the other parts of the gardens and he was free to exit and enter these premises.
- iii. It was not true that the appellant took away all the keys to the property. It was not clear on which evidence the Court of Magistrates reached this conclusion. Indeed, the opposite happened as it was Cachia himself who took away the padlock, chain and following original set of keys that locked the gardens of the villa.
- iv. The appellant did not intrude or affect the possession or other rights claimed by Cachia. The villa and its contents did not belong to Cachia, who was simply engaged by the Strickland Foundation to work for it as a gardener. Rights over the villa and its contents were the subject of civil proceedings between the appellant and Strickland Foundation. Cachia could never be disturbed in the enjoyment of these tenements. To the contrary it was Cachia who committed arbitrary exercise of pretended rights when he abusively removed the chain from the gate. All the appellant wanted was to secure her home from intruders and to live safely in her home. This safety was disturbed by Cachia's actions and thus she did not want Cachia's presence in her home. Hence the *mens rea* required for the commission of this crime was missing.

*Considers the following: -*

4. On the 28th September 2015, at around 11:30am, the appellant filed a report at the Birkirkara Police Station claiming that she was frightened by John Cachia, a gardener, who had entered her house without her consent. She claimed that this behaviour was becoming a nuisance to her. She explained that on the 27th September 2015 she and her husband returned home at 20:15. Upon arriving she noticed all the lights of the property lit up. When she called out to see if there was anyone, she noticed Cachia removing pieces of cloth from the CCTV cameras that were situated around the villa. The appellant requested Cachia to leave the villa, but instead he went back in the dining room. The appellant added that she was afraid of Cachia, even though she was not assaulted or injured by him. She added that there were civil proceedings against the Strickland Foundation concerning the ownership of the property.
5. The Police spoke to John Cachia who claimed that he was called in by the security company who informed him that the CCTV cameras were not transmitting anything. He called in to check and noticed that all CCTV cameras were covered in cloth blocking their field of vision. As Cachia removed these pieces of cloth, the appellant and her husband walked in.
6. Cachia added that he was employed by the Strickland Foundation. As far as he knew the Strickland Foundation were the owners of the property, whilst the appellant and her husband had the use and enjoyment of two rooms.

7. Following the incident that happened on the 28<sup>th</sup> September 2015, and acting on the instructions of the Strickland Foundation, John Cachia filed a police report against the appellant and her husband. Cachia reported that on the 28th September 2015 he returned to the villa and its gardens to perform gardening works; however his access to other parts of the property was blocked after that a padlock fixed to a gate was changed and his original set of keys to the other gates and doors around the villa went missing. This therefore blocked his access out of that part of the gardens and to the other parts of the villa and gardens. From the evidence it resulted that the padlock was affixed by the appellant who claimed to have done so after Cachia removed the keys and the padlock himself, hence leaving the property unsecured.

### *Considers further*

8. First of all this is an appellate Court tasked with the revision of the judgment delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature. This Court does not change the findings of fact, legal conclusions and the decisions made by the Court of Magistrates when it appears to it that the Court of Magistrates was legally and reasonably correct. In the judgment delivered by the Court of Criminal Appeal in its Superior Jurisdiction in the case *Ir-Repubblika ta' Malta vs Emanuel ZAMMIT*<sup>1</sup> it was held that this

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<sup>1</sup> 21st April 2005. See also, inter alia, *Ir-Repubblika ta' Malta vs Domenic Briffa*, 16 th October 2003; *Ir-Repubblika ta' Malta vs Godfrey Lopez* and *Ir-Repubblika ta' Malta v. Eleno sive Lino Bezzina*, 24th April 2003, *Ir-Repubblika ta' Malta vs Lawrence Ascjak sive Axiak* 23rd January 2003, *Ir-Repubblika ta' Malta vs Mustafa Ali Larbed*; *Ir-Repubblika ta' Malta vs Thomas sive Tommy*

Court makes its own detailed analysis of the record of the proceedings held before the Court of first instance in order to see whether that Court was reasonable in its conclusions. If as a result of this detailed analysis this Court finds that the Court of first instance could not reasonably and legally arrive at the conclusion reached by it, then this Court would have a valid, if not impelling reason, to vary the discretion exercised by the Court of first instance and even change its conclusions and decisions.

9. In the ordinary course of its functions, this Court does not act as a court of retrial, in that it does not rehear the case and decide it afresh; but it intervenes when it sees that the Court of Magistrates, would have mistakenly assessed the evidence or wrongly interpreted the Law - thus rendering its decision unsafe and

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*Baldacchino*, 7th March 2000, *Ir-Repubblika ta' Malta vs Ivan Gatt*, 1st December 1994; *Ir-Repubblika ta' Malta vs George Azzopardi*, 14th February 1989; *Il-Pulizija vs Andrew George Stone*, 12th May 2004, *Il-Pulizija vs Anthony Bartolo*, 6th May 2004; *Il-Pulizija vs Maurice Saliba*, 30th April 2004; *Il-Pulizija vs Saviour Cutajar*, 30th March 2004; *Il-Pulizija vs Seifeddine Mohamed Marshan et*, 21st October 1996; *Il-Pulizija vs Raymond Psaila et*, 12th May 1994; *Il-Pulizija vs Simon Paris*, 15th July 1996; *Il-Pulizija vs Carmel sive Chalmer Pace*, 31st May 1991; *Il-Pulizija vs Anthony Zammit*, 31st May 1991.

In *Ir-Repubblika ta' Malta vs Domenic Briffa* it was further stated:

Kif gie ritenut diversi drabi, hawn qieghdin fil-kamp ta' l- apprezzament tal-fatti, apprezzament li l-ligi tirrizerva fl- ewwel lok lill-gurati fil-kors tal-guri, u li din il-Qorti ma tid-disturbahx, anke jekk ma tkunx necessarjament taqbel mija fil-mija mieghu, jekk il-gurati setghu legittimament u ragonevolment jaslu ghall-verdett li jkunu waslu ghalih. Jigifieri l-funzjoni ta' din il-Qorti ma tirrizolvix ruhha f'ezercizzju ta' x'konkluzjoni kienet tasal ghaliha hi kieku kellha tevalwa l-provi migbura fi prim'istanza, imma li tara jekk il-verdett milhuq mill-gurija li tkun giet "properly directed", u nkwadrat fil-provi prodotti, setax jigi ragonevolment u legittimament milhuq minnhom. Jekk il- verdett taghhom huwa regolari f'dan is-sens, din il-Qorti ma tid-disturbahx (ara per ezempju *Ir-Repubblika ta' Malta v. Godfrey Lopez* u *r-Repubblika ta' Malta v. Eleno sive Lino Bezzina* decizi minn din il-Qorti fl-24 ta' April 2003, *Ir-Repubblika ta' Malta v. Lawrence Ascjak sive Axiak* deciza minn din il-Qorti fit-23 ta' Jannar 2003, *Ir-Repubblika ta' Malta v. Mustafa Ali Larbed* deciza minn din il-Qorti fil-5 ta' Lulju 2002, *ir-Repubblika ta' Malta v. Thomas sive Tommy Baldacchino* deciza minn din il-Qorti fis-7 ta' Marzu 2000, u *r-Repubblika ta' Malta v. Ivan Gatt* deciza minn din il-Qorti fl-1 ta' Dicembru 1994).

unsatisfactory. In that case this Court has the power, and indeed, the duty to change the findings and decisions of the Court of Magistrates or those parts of its decisions that result to be wrong or that do not reflect a correct interpretation of the Law.

10. Two very important articles of Maltese Law of Evidence are articles 637 and 638 of the Criminal Code. According to article 637 of the Criminal Code:

Any objection from any of the causes referred to in articles 630, 633 and 636, shall affect only the credibility of the witness, as to which the decision shall lie in the discretion of those who have to judge of the facts, regard being had to the demeanour, conduct, and character of the witness, to the probability, consistency, and other features of his statement, to the corroboration which may be forthcoming from other testimony, and to all the circumstances of the case: Provided that particular care must be taken to ensure that evidence relating to the sexual history and conduct of the victim shall not be permitted unless it is relevant and necessary.

11. Furthermore, article 638 of the Criminal Code states that:

(1) In general, care must be taken to produce the fullest and most satisfactory proof available, and not to omit the production of any important witness.

(2) Nevertheless, in all cases, the testimony of one witness if believed by those who have to judge of the fact shall be sufficient to constitute proof thereof, in as full and ample a manner as if the fact had been proved by two or more witnesses.

12. These principles have been confirmed, time and again in various judgments delivered by this Court.<sup>2</sup> Moreover as it was held in *Il-Pulizija vs Joseph Thorne*,<sup>3</sup>

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<sup>2</sup>*Il-Pulizija vs Joseph Bonavia* per Judge Joseph Galea Debono dated 6 ta' November 2002; *Il-Pulizija vs Antoine Cutajar* per Judge Patrick Vella, decided on the 16th March 2001; *Il-Pulizija vs Carmel Spiteri* per Judge David Scicluna, decided on the 9th November 2011; *Ir-Repubblika ta' Malta vs Martin Dimech*, Court of Criminal Appeal (Superior Jurisdiction), decided on the 24th September 2004.

<sup>3</sup> Decided on the 9th July 2003 by the Court of Criminal Appeal presided by Mr. Justice Joseph Galea Debono.

mhux kull konflitt fil-provi ghandu awtomatikament iwassal għall-liberazzjoni tal-persuna akkuzata. Imma l-Qorti, f' kaz ta' konflitt fil-provi, trid tevalwa l-provi skond il-kriterji enuncjati fl-artikolu 637 tal-Kodici Kriminali w tasal għall-konkluzzjoni dwar lil min trid temmen u f' hix ser temmnu jew ma temmnux'.

13. This jurisprudence shows also that the main challenge faced by Courts of Criminal Jurisdiction is the discovery of the truth, historical truth, behind every *notitia criminis*. Courts of Criminal Jurisdiction are legally bound to decide cases on the basis of direct and indirect evidence brought before them. But evidence and testimony produced in criminal trials do not necessarily lead the Court to the discovery of the historical truth. A witness may be truthful in his assertions as much as he may be deceitful. Unlike a mortal witness, circumstantial evidence cannot lie. But if this evidence is not univocal, it may easily deceive a Court of Criminal Jurisdiction thus leading it to wrong conclusions.

14. A Court of Criminal Jurisdiction can only convict an accused if it is sure that the accused committed the facts constituting the criminal offence with which he stands charged, and this on the basis that the Prosecution would have proven their case on a level of sufficiency of evidence of proof beyond a reasonable doubt. Courts of Criminal Jurisdiction need only to be sure of an accused's guilty; they do not need to be absolutely sure of his guilt. But if a Court of Criminal Jurisdiction is sure<sup>4</sup> of an accused's guilt, then it is obliged to convict and mete out punishment in terms of Law. These principles relating

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<sup>4</sup> *R v Majid*, 2009, EWCA Crim 2563, CA at 2.



to the level of sufficiency of evidence also reflect the standard adopted by the English Courts of Criminal Justice and they were also expressed by Mr. Justice William Harding as applicable to the Maltese Courts of Criminal Jurisdiction in the appeal proceedings *Il-Pulizija vs Joseph Peralta* decided on the 25th April 1957 as being at the basis of a conviction reached by a Maltese Court of Criminal Jurisdiction.

15. However if Defence Counsel manage to propound sound factual and legal arguments such that, on a balance of probabilities, manage to create a reasonable doubt in the mind of the Court as to the guilt of the accused, then the Court of Criminal Jurisdiction is obliged to acquit the accused.

16. Maltese Law entrusts the Court of First Instance with the exercise of analysis and assessment of the evidence of the case. The Court of Magistrates is one such Court. That Court is normally best placed to make a thorough assessment of the evidence brought before it as it would have, most of the time, physically lived through those proceedings, and also being able to make a proper assessment of the witnesses who would have testified before it, thus making full use of the criteria mentioned in articles 637 and 638 of the Criminal Code.

17. But even where, for some reason, the Court of Magistrates would not itself have heard the witnesses, the law still entrusts that Court with the primary analysis and assessment of the facts of a case as well as the eventual decision on the guilt or innocence of the

accused. On the otherhand, the Court of Criminal Appeal is a court of second instance, entrusted with the analysis of whether, on the basis of the evidence and legal arguments submitted, the Court of Magistrates could legally and reasonably arrive at the conclusions reached in its judgment.

18. The Court of Criminal Appeal does not disturb the conclusions reached by the Court of Magistrates lightly or capriciously. In the case *Il-Pulizija vs Lorenzo Baldacchino* decided by the Criminal Court on the 30 th March 1963 by Mr. Justice William Harding it was held as follows : -

Ma hemmx bzonn jinghad li l-komportament tax-xhud (*demeanour*) hu fattur importanti ta' kredibilita (ara Powell, On Evidence, p. 505), u kien, ghalhekk, li inghad mill-Qrati Inglizi segwiti anki mill-Qrati taghna, illi "great weight should be attached to the finding of fact at which the judge of first instance has arrived" (idem, p. 700), appuntu ghaliex "he has had an opportunity of testing their credit by their demeanour under examination".

19. To recapitulate, in *Il-Pulizija vs. Vincent Calleja* decided by this Court on the 7th March 2002, the Court of Criminal Appeal, as a court of revision of the sentence of the Court of Magistrates does not pass a new judgment on the facts of the case but makes its own independent evaluation and assessment of the facts of the case in order to see whether the decisions reached by the Court of Magistrates were "*unsafe and unsatisfactory*". This Court does not substituted the decision of the Court of Magistrates unless that decision is deemed "*unsafe and unsatisfactory*". If this Court finds that on the basis of the evidence and legal arguments submitted to it the Court of Magistrates could legally and reasonably arrive at its

conclusions mentioned in its judgment, then this Court does not vary the conclusions reached by that Court : - even if this Court, as a Court of Criminal Appeal could have arrived at a different conclusion to that reached by the Court of Magistrates had it been tasked with the same role.

20. In *Ir-Republika ta' Malta vs. Ivan Gatt* delivered by the Court of Criminal Appeal on the 1st. December, 1994, it was held that where an appeal was based on the evaluation of the evidence the exercise to be carried out by this Court was to examine thoroughly the evidence and see if there are contradictory versions tendered by witnesses. If it results to the Court that there were contradictory versions - as in most cases there would be - this Court has to assess whether any one of these versions could be freely and objectively believed without going against the principle that any doubt should always go in accused 's favour. If the said version could have been believed by the Court of First Instance, the duty of this Court was to respect that discretion and that evaluation of the evidence even if in the evaluation conducted by this Court, this same Court came to a conclusion different from the one reached by the jury. This assessment made by the Court of First Instance will not be disturbed and replaced by the assessment of this Court unless it was evident that the Court of First Instance would have made a manifestly wrong assessment and evaluation of the evidence and consequently

that they could not have reasonably and legally have reached that conclusion.<sup>5</sup>

### *Considers further*

21. The offence of arbitrary exercise of pretended rights or *ragion fattasi* is regulated by Article 85 of the Criminal code and reads as follows:

85. (1) Whosoever, without intent to steal or to cause any wrongful damage, but only in the exercise of a pretended right, shall, of his own authority, compel another person to pay a debt, or to fulfil any obligation whatsoever, or shall disturb the possession of anything enjoyed by another person, or demolish buildings, or divert or take possession of any water-course, or in any other manner unlawfully interfere with the property of another person, shall, on conviction, be liable to imprisonment for a term from one to three months:

Provided that the court may, at its discretion, in lieu of the above punishment, award a fine (multa).

22. This crime is based on article 168 of the *Codice per Lo Regno delle Due Sicilie*. That Code provided for the crime of *vie di fatto* as follows<sup>6</sup> :-

Chiunque senza oggetto di furto o di recar danno per ingiuria, ma solamente per l'esercizio di un preteso diritto, obblighi altri al pagamento di un debito, o alla soddisfazione di un'obbligazione qualunque, o disturbi un'altrui possesso, demolisca fabbricati, devii acque e simili, e' punito col primo al secondo grado di prigionia, salve le pene maggiori nel case di un reato per se stesso maggiore.

23. Article 85 of the Criminal Code is practically identical to the corresponding article of the crime of *vie di fatto* in the *Codice per Lo*

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<sup>5</sup> See *Ir-Republika ta' Malta vs. Mustafa Ali Larbed* decided by the Court of Criminal Appeal on the 5th July, 2002.

<sup>6</sup> Napoli, Presso Angelo Trapani, 1819, fol 73 : *De' reati contra l'amministr. pubblica*, Sezione III, *Dell'uso privato de' mezzi della pubblica' autorita'*.

*Regno delle Due Sicilie*. Hence for interpretation purposes, this Court may make reference to the jurisprudence developed from the said defunct Borbonic Code and other Continental Codes that were consonant to it.

24. In the appeal proceedings *Il-Pulizija versus Eileen Said* decided by this Court on the 19th June 2002 presided by Mr. Justice Joseph Galea Debono it was held that :-

Illi l-appellanti instabet hatja tar-reat ta' "ragion fattasi" jew dak li jissejjah "the exercise of a pretended right". Illi din l-azzjoni bazata fuq l-Artikolu 85 tal-Kap.9 tal-Ligijiet ta' Malta hija speci ta' zona grigja bejn il-kamp civili u dak kriminali, tant li Sir Andrew Jameson meta kien qed jigi abbozzat il-Kodici Penali Malti kien osserva fir-Rapport tieghu fir-rigward li :- "It is doubtful whether acts of this kind would not be better left to the operation of the ordinary civil remedies by way of interdict of or claim for damages....." (Ara Prof. Sir Anthony Mamo - Notes on Criminal Law" (Parti Speċjali) Vol. II).

25. An analysis of this case law shows that Maltese Courts interpreted Article 85 of the Criminal Code in line with jurisprudence based on the Borbonic Code as well as the corresponding article in the *Codice Penale* that was later promulgated by the subsequent Kingdom of Italy. Maltese Courts have also followed the writings of jurist Francesco Carrara on this subject and who was commenting on the said Italian Penal Code, then also called *Codice Zanardelli*. The reason behind this was that the wording used for the promulgation of this crime was very similar.

26. The text of the *Codice Zanardelli* creating the crime of *ragion fattasi* read as follows:-

286. Chiunque con violenze verso le persone, ed al solo oggetto di esercitare un preteso diritto, taluno a pagare un debito, o ad eseguire un' obbligazione qualunque, o, turba l'altrui possesso, demolisce fabbricati, devia abbatte alberi, siepi vive o ripari stabili sarà, punito :

1. Colla relegazione estensibile ad anni dieci, se, la violenza sarà, stata fatta con armi ed'accompagnata da percossa o ferita;

2. Col carcere non minore di tre mesi, se si sarà fatto uso d'armi, ma senza percosse nè ferite ovvero se siano intervenute percosse o ferite, ma senz'armi;

3. Col carcere estensibile a tre mesi, se 'la violenza sarà seguita senza percossa o ferita e senza armi.

Alla pena del carcere sarà aggiunta una multa estensibile sino al doppio del danno recato.

Sono salve in tutti i casi le maggiori' pene pei reati per se stessi più gravi.

287. Se la demolizione di fabbricati, o la deviazione d'acque, o l'abbattimento di alberi, siepi vive o ripari stabili, fu bensì commessa allo scopo di esercitare un preteso diritto, ma non v'ebbe violenza verso le persone, il colpevole sarà punito con una multa non maggiore del doppio del danno recato.

27. This crime fell under *Capo 3* dealing with crimes of disobedience against public authorities. Carrara described the crime of *ragion fattasi* as follows:

La ragion fattasi (1) e' il delitto di chiunque - credendo di avere un diritto sopra altro individuo lo esercita malgrado la opposizione vera o presunta di questo, pel fine di sostituire la sua forza privata all'autorita' pubblica, senza per altro eccedere in violazioni speciali di altri diritti.<sup>7</sup>

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<sup>7</sup> *Esposizioni dei Delitti in specie - parte speciale del Programma del corso di diritto criminale*, Volum 5, Lucca, 1868, pagina 486, paragrafu 2849.

28. This definition reflects the elements of this crime, which, according to the same Carrara are:

1.o Un *atto esterno* che spogli altri di un *bene che gode*, e sia eseguito contro la opposizione o espressa o presunta di questo – 2.o *Credenza* di far quest'atto in esercizio di un diritto – 3.o *Coscienza* di fare di privato braccio quello che dovrebbe farsi per autorità di magistrati – 4.o *Mancanza di titolo piu' grave*.<sup>8</sup>

29. The *Codice Zanardelli* required a further element – that of violence against the person. However this element is absent from the crime of *ragion fattasi* found in Maltese Law and Borbonic Law. Otherwise, all the other elements, including the formal element, are practically identical. In fact the elements of this crime were elaborated by Mr. Justice William Harding in the case *Il-Pulizija vs. Giuseppe Bonavia et* (App.Krim. 14.10.1944 , Vol.XXXII - IV , p.768) as well as other more recent judgments such as the one delivered by Mr. Justice Lawrence Quintano in *Il-Pulizija vs Anthony Zahra*, on the 20th June 2014 as based on the views of Carrara. Thus the elements of *ragion fattasi* are :-

- a) att estern li jimpedixxi persuna ohra minn dritt li hija tgawdi, u li jkun sar bid-dissens esplicitu jew implicitu ta' dik il-persuna;
- b) l-imputat irid jemmen li qed jagixxi bi dritt;
- c) ix-xjenza tal-imputat li qed jiehu b'idejh dak li suppost jiehu tramite l-proċess legali;
- d) li l-att ma jinkwadrax ruħu f'reat aktar gravi;

30. While this exposition of the elements of this crime reflects the writings of Carrara, Maltese Courts have also adopted the interpretation propounded by other authors who commented on the defunct Borbonic Code.

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<sup>8</sup> Ibid. Pagna 487, paragrafu 2850.

31. Thus they came to accept that the crime of *ragion fattasi* is not based on the mere disturbance of a right of possession over a thing – whatever form that right may take. In order for this crime to subsist, it must be proven, beyond a reasonable doubt, that the person allegedly falling victim of this crime (passive subject) had a form of right of possession over the thing in question.

32. Thus according to Maltese case law the detention on mere tolerance of a house by a spouse was held to be sufficient for a *ragion fattasi* conviction in case where the other spouse decided to change the lock of the front door (on the same day when a Court declared their marriage null and void). The Court held that the spouse who changed the lock disturbed the right of the other spouse who was holding the tenement on mere tolerance and therefore was guilty of *ragion fattasi*. The reasoning was that the spouse who changed the lock was, by his or her unilateral act, arbitrarily and abusively changing the *status quo* relating to the possession of the thing as prevailing between the parties at that moment in time. This *status quo* should not have been disturbed unilaterally by the active subject but should have only been changed by the competent judicial authorities following the appropriate legal action being instituted by the party feeling aggrieved due to the (continued) possession of the other spouse.<sup>9</sup>

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<sup>9</sup> Vide *Il-Pulizija vs. Joseph Bongailas*, decided by the Court of Criminal Appeal on the 22nd October 2001 wherein it was stated that :

Mela dan l-Artikolu 85 tal-Kodici Kriminali, bl-ewwel rekvizit tieghu, kjarment iqis bhal agir kriminali kull att ta' xi hadd li jfixkel lil xi haddiehor fil-pussess ta' xi haga li qed igawdi. L-imsemmi artikolu, ghalhekk, jittutela l-pussess tal-haga u mhux necessarjament ukoll il-propjeta' taghha. Il-kelma pussess, ghalhekk, tinkludi l-użu jew dgawdija ta' dik il-haga.



33. In a nutshell the spouse who felt that the front door lock should be changed on the same day that their marriage was declared null, should have filed the appropriate Court action in order to be able to change the door lock after the Court would have declared that the other spouse had no further pretence to the property – given that he was occupying the house on mere tolerance. However that spouse did not take this lawful course of action but proceeded to take the law in her own hands by changing the lock of the front door instead – thus excluding access to the house to the other spouse who – till that stage “enjoyed” the detention on mere tolerance of the said house.

34. The active subject therefore can be deemed to *si e' fatto arbitrariamente ragione* and not simply *si e' fatto ragione da se'*.

35. According to a judgment delivered by the Italian Court of Cassation<sup>10</sup> the crime of *ragion fattasi* was not meant to punish *chi si fa ragione da se' ma chi si fa arbitrariamente ragione*<sup>11</sup> such that by his actions the active subject disturbs the prevailing *status quo* at that particular moment in time when the act leading to *ragion fattasi* is deemed to have been committed.

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<sup>10</sup> Sez. VI, sent. 11118 tat-22/11/1985 Mioli.

<sup>11</sup> In this particular case the Court of Cassation held that no crime of *ragion fattasi* was committed the owner of the tenement changed the door locks of a group of offices thereby closing access to the tenants of these office who were previously intimated to use the premises according to the use agreed upon and who failed to adhere to these requests by the land lord.

36. According to another jurist, **Carmignani**, who was commenting on the Law of the Duchy of Tuscany before the Unification of Italy, the element of disturbance of the possession of the passive subject must not be merely constructive, but the possession has to be actual; and the action committed by the active subject must lead to the disturbance of the *status quo* between the parties : -

879 Si hanno esempi di questo delitto, 1. Se un creditore riscuote con violenza dal suo debitore la somma dovutagli; 2. Se una cosa mobile od immobile creduta propria vien tolta violentemente a chi ne e' in attuale possesso; 3. Se un colono, finita la locazione, ricusa di lasciare il fondo;....<sup>12</sup>

37. So this means that this Court must assess whether the parte civile had, at least, any basic element of *possession* to the object or right disturbed; to see whether this possession was actual; and whether the action of the active subject ended up disturbing the *status quo* between the parties relating to the possession of this thing or the right.

38. According to **Arabia**,<sup>13</sup> the crime of *ragion fattasi* is not meant to sanction the disturbance of the possession of a thing by a person or a right *per se*; but rather it sanctions and penalises the fact that a private party – the active subject – engages in unilateral personal action enforcing his will on the thing or right in contestation, instead referring the matter to the competent to the public authority for the necessary remedies:

Il che da una parte dimosta che il reato non ista' nella turbativa del possesso, ma nell'uso de' *mezzi dell'autorita' pubblica*. Ma perche'

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<sup>12</sup> *Elementi di Diritto Criminale*, Giovanni Carmignani, Traduzione italiana sulla quinta edizione di Pisa del Profs. Caruana Dingli, Milano, 1863, fol 318.

<sup>13</sup> *I Principi del Diritto Penale applicati al Codice delle Due Sicilie*, Francesco Saverio Arabia, Vol 3, Napoli 1858, Parte III, Art. 164 a 173, pagina 45.

intervenga l'autorità pubblica a porre in atto l'esercizio dell'altrui diritto, sono fuor di dubbio necessariamente due cose, a) che il diritto sia reale, b) che ne sia controverso l'esercizio.

39. Arabia here is focusing on the Borbonic Law of *vie di fatto* – which, as was seen above, was identical to the crime of *ragion fattasi* at Maltese Law. Therefore his understanding may also reflect the correct interpretation that ought to be given to Maltese Law.

40. Jurisprudence still debates the juridical objective behind this crime. The traditional current holds that this crime is based on the violation of the jurisdictional monopoly vested in the public authority which would be violated by the unilateral and arbitrary act of the private individual who, instead of referring the dispute or point of contention to the competent courts decides to take the matter in his hands and proceeds to adopt a factual remedy himself instead. The other school of thought focuses on the fact that the passive subject in the crime of *ragion fattasi* is indeed the *status quo* reflected by the status of possession of rights at a given moment in time. This *status quo* refers to the situation where at a given moment in time a person exercises a right on a thing - even if that person's right is merely apparent. The action of the active party would then disturb that *status quo* relating to the possession of that thing or right even though this possession would be based on an *apparentia iuris*.<sup>14</sup>

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<sup>14</sup> Ara *Codice Penale*, Tullio Padovani, Tomo I, IV Edizione, 2007, Giuffrè Editore, pagina 2610 taht il-vuči "oggetto giuridico".

41. Carrara also claims that “*qui continuat non attentat*”.<sup>15</sup> In paragraph 2851 of his work quoted above, he adds that : -

L'atto esterno deve privare altro *contro sua voglia* di un *bene che gode*. Chi e' nell'attuale godimento di un bene e *continua* a goderne a dispetto di chi non voglia non delinque; perche' la legge protegge lo *stato quo*, il quale non puo' variarsi tranne per consenso degl'interessati, o per decreto dell'autorita' giudiciale.

42. This is also reflected in more recent Italian jurisprudence which holds that : -

Si e' conseguentemente precisato che ... autore del delitto puo' essere soltanto chi non si trova nel possesso della cosa, poiche solo in tal caso si puo' verificare quella turbativa nel godimento di fatto che costituisce uno degli elementi essenziali del reato (tra le piu' recenti, Cass. VI 13.11.81, Papa, G PEN 1982, II, 648; Cass. VI 7.5.85, Spallina', CP 1986, 1766; Cass. VI 26.3.85 Pirola, CP 1986, 1935). In effetti, soprattutto dalla circostanza che il diritto deve essere <presteso> si ricava come gli elementi sopra indicati descrivano innanzitutto come presupposto del reato l'esistenza di un conflitto di pretese, ovvero il requisito della contenziosita' del diritto.<sup>16</sup>

43. The element of a prior controversy between the parties relating to the exercise of rights was also deemed important under the Borbonic Code. Arabia questions :

Ma che s'intende per dritto posto in controversia? Ogni dritto il cui esercizio e' chiaramente e solennemente controvertito, sia con un fatto giudiziale, sia con un fatto materiale, che l'altro avea dritto almeno apparente di fare. Si supponga p.e. che Tizio abbia concesso a Caio la facolta' di passare pel suo fondo per certo tempo e con certe condizioni. Se essi venissero in controversia sull'esercizio di questa facolta', e Caio citasse Tizio innanzi al magistrato per farsi conservare nel diritto di passaggio, Tizio incorrerebbe nell'art. 168 se facesse qualche opera per cui il passaggio fosse turbato. Abbia o non abbia diritto, viola la legge facendo cio' si spetta all'autorita' pubblica gia' invocata. Per lo contrario, se prima che Caio adisca il magistrato, Tizio pone una siepe o un cancello o altro segno visibile, che chiaramente pone in controversia la facolta' di Caio, questi incorre nell'art. 168, se invece di adire il magistrato, rompa la siepe o il cancello e passi, abbia

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<sup>15</sup> Vide *Programma*, Vol. 5, pagina 488.

<sup>16</sup> *Codice Penale*, Tullio Padovani, op. cit. a fol 2611 “soggetto attivo”.

o non abbia diritto. Nel che notisi che il porre il cancello che fece Tizio puo' essere ingusto, e quindi una turbativa del possesso di Caio, ma egli non puo' essere astretto che con la sole azione civile, perche' quando pose il dette cancello, non dove' distruggere alcun segno visibile del possesso di Caio, onde e' presunta buona fede, non essendovi stata controversia di cui vi siano segni tali, che tolgano ogni dubbio sulla volonta' dell' altro di contraddirgli il possesso, onde si debba aver ricorso all'autorita'. Gli elementi dunque del reato dell'art. 168 sono a) uno de' datti materiali in esso descritti, e tassativamente nominati, cioe' costringere a pagare un debito, turbare il possesso ec. b) che cio' sia fatto per l'esercizio di un dritto messo in controversia e cosi' che sia richiesta l'opera dell'autorita' pubblica a deciderla, poco importando se questo dritto sia o non sia reale; solo che sia chiaramente controvertito.

44. As already mentioned, according to Maltese Case Law the elements of the crime of *ragion fattasi* are as follows :

- a) att estern li jimpedixxi persuna ohra minn dritt li hija tgawdi u li jkun sar bid-dissens esplicitu jew implicitu ta' dik il-persuna;
  - b) l-imputat irid jemmen li qed jagixxi bi dritt;
  - c) ix-xjenza tal-imputat li qed jieh u b'idejh dak li suppost jiehu tramite l-process legali;
  - d) li l-att ma jinkwadrix ruhu f'reat aktar gravi;
- Inoltre, ir-reat ma jissustix meta l-att materjali jikkonsisti fir-ritenzjoni ta' pussess li dak li jkun gja kellu.<sup>17</sup>

45. Hence the fact that a person has a lawful title to a property does not bar an action of *ragion fattasi* against her. This crime may subsist also in the case where the disturbing act is carried out by the active subject in respect of a passive subject who has merely simple possession or even detention on mere tolerance of the property in question or who would have simply had some right of use on the

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<sup>17</sup> See : *Il-Pulizija vs. Anthony Zahra* decided by the Court of Criminal Appeal per Mr. Justice Lawrence Quintano on the 20th June 2014. See also *Il-Pulizija vs. Mario Bezzina* decided by the Court of Criminal Appeal per Mr. Justice David Scicluna on the 26th May 2004; *Il-Pulizija vs. Michael Lungaro* decided by the Court of Criminal Appeal per Mr. Justice Joseph Galea Debono on the 15th May 2002 as well as *Il-Pulizija vs. Eileen Said*, decided by the Court of Criminal Appeal per Mr. Justice Joseph Galea Debono on the 19th June 2002.

property in question, which right would have been disturbed thanks to the action of the active subject.

46. In the appeal *Il-Pulizija vs. Joseph Bongailas*, decided on the 22nd October 2001 this Court, differently presided held as follows:-

L-Artikolu 85 tal-Kodici Kriminali li jittratta dwar ir-ragion fattasi, bl-ewwel rekwizit tieghu, kjarament iqis bhal agir kriminali kull att ta' xi hadd li jfixkel lil xi haddiehor fil-pussess ta' xi haga li qed igawdi. L-imsemmi artikolu, ghalhekk, jittutela l-pussess tal-haga u mhux necessarjament ukoll il-propjeta' taghha. Il-kelma pussess, ghalhekk, tinkludi l-uzu jew dgawdija ta' dik il-haga....Li hu importanti, ai fini ta' l-Artikolu 85 tal-Kap. 9, dejjem riferibbilment ghall-ewwel element kostituttiv tieghu huwa jekk effettivament sa dik in-nhar li sar dan l-allegat att ta'spoll mill-appellant, kellhomx il-kwerelanti l-pussess, ossija l-uzu u/jew id-dgawdija tal-fond in kwistjoni.

47. In *Il-Pulizija vs. John Vassallo*,<sup>18</sup> this Court, differently presided held that:

Taht l-Artikolu 85 tal-Kodici Kriminali ma hemm ebda bzonn illi jigi ppruvat xi element ta' pussess aktar sostanzjali minn hekk. Id-dicitura ta' l-artikolu hija cara u l-legislatur certament ried illi jigi evitat kull tfixkil, hu ta' liema natura hu, anki fis-semplici pussess. Tali pussess jinkludi wkoll kif gie ripetutament deciz minn din il-Qorti, anke s-semplici drittijiet normalment kompetenti lill-persuni koncernati.

48. In another judgment *Il-Pulizija vs. John Dimech*<sup>19</sup> it was held as follows:

id-dispozizzjoni tal-ligi li tikkontempla r-reat ta' raggion fattasi hija ntiza biex il-privat li jippretendi xi drittijiet ma jissostitwix l-azzjoni tieghu ghal dak tat-tribunal meta jista' jirrikorri lejhom. Hi gusta jew le l-pretensjoni tieghu, hu ma jistax minn rajh jezercita dawk id-drittijiet li hu jippretendi li ghandu.

### *Considers further:*

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<sup>18</sup> Presided by Mr. Justice Godwin Muscat Azzopardi on the 22nd March 1991.

<sup>19</sup> Decided by the Criminal Court presided by Mr. Justice William Harding on the 24th June 1961.

49. That after analysing closely and attentively the testimony of the witnesses as well as the documents exhibited by them, and bearing in mind the legal principles mentioned above, this Court is of the opinion that the Court of Magistrates could legally and reasonably arrive at the conclusion that the appellant committed *ragion fattasi* – arbitrary exercise of a pretended right - in this case.

50. The Court of Magistrates based its findings on the version of facts as provided by Peter Paul Portelli on behalf of the Strickland Foundation and John Cachia. After making its due assessment and evaluation of the testimony of these witnesses, as well as the others that testified before it, that Court believed the evidence submitted by Portelli and Cachia to be more credible and reliable than that purported by the appellant.

51. The Court of Magistrates also had the opportunity to listen to this testimony *viva voce*, hence putting it in a far better position than this Court to assess the credibility and reliability of the testimony of all the witnesses in this case.

52. While the appellant felt aggrieved by the considerations of the Court of Magistrates in its judgment, this Court saw that that Court based its conclusions on the evidence tendered by John Cachia and Peter Paul Portelli. This is also coupled by the fact that the elements of the crime of *ragion fattasi* were satisfied in this case.

53. First of all there is no doubt that the appellant is pretending a right over the property at issue. She clearly considers the villa as her home and she claimed that she acted the way she did only to secure her home as well as her husband's and her rights in relation to the villa and surrounding and adjacent gardens according to the wills of the Honourable late Mabel Strickland. However this Court is a court of Criminal Justice and does not delve into any civil matters or civil rights that the appellant has or pretends to have over the said property. That is clearly the subject matter of a different law suit before the competent Courts of Civil Jurisdiction. It is not up to this Court to establish whether the appellant is entitled to rights that she and her husband claim. What is however clear though is that she evidently believes that she is entitled to act in the way she is acting, according to her, in order to safeguard her privacy and that of the property in which she resides with her husband.

54. Secondly the fact that the passive subject in this case is John Cachia - and not the Strickland Foundation - does not invalidate the action taken. As seen above, the mere use and enjoyment even on mere tolerance was deemed to be sufficient legal title and basis for the crime of *ragion fattasi* to subsist, should that title, minimal as it may be, is disturbed by the actions of the active subject.

55. The rights of access enjoyed by John Cachia to the property rests on the specific delegation given to him by the representatives of the Strickland Foundation - which, according to the parties in this case,



is the legal person in favour of whom this villa and its gardens were bequeathed by the Honourable late Mabel Strickland.

56. It is true that Cachia, personally, enjoys no proprietary rights to the tenements in question. However his rights of access to these tenements and the minimum detention that he may be enjoying on certain parts of these tenements, were conferred to him by the representatives of the lawful owner of these tenements - The Strickland Foundation. So much so that it is undisputed that Cachia possessed the keys to these properties in order for him to be able to perform his duties to the Strickland Foundation. Cachia was exercising his rights during his tenure of office with that Foundation and therefore in execution of the orders and the delegation given to him by the same. Cachia could not be deprived by others in so doing unless a specific legal action to this effect was taken and a final court judgment or order was delivered in that fashion.

57. The evidence in this case left no doubt that John Cachia had access to all parts of the Villa and gardens as an employee of the Strickland Foundation, specifically deployed to take care of the gardening and maintenance works necessary.

58. When the appellant decided to change the padlock without providing a key to John Cachia and/or the Strickland Foundation she deprived him from the free exercise of the rights conferred upon him by the owner of the tenements, in order for him to conduct his duties towards the Strickland Foundation.

59. Thirdly, as has already been indicated, the appellant took matters into her own hands instead of taking lawful action, through the proper legal channels, to deprive Cachia from accessing property if she felt that his presence was disturbing. John Cachia managed to prove, on a balance of probabilities, that he had a lawful right of access to the villa and surrounding gardens granted to him by the Strickland Foundation and therefore he was not a squatter or an intruder. If the appellant felt aggrieved by this, her correct and lawful mode of action was to proceed through judicial channels against Cachia and the Strickland Foundation seeking a remedy that would exclude Cachia or any other person from the villa and surrounding gardens according to her propositions. This Court saw no evidence showing that the appellant proceeded in this direction.

60. Finally it is also clear that the appellant's behaviour was not tantamount to any other more serious offence.

61. Consequently, this Court is of the opinion that the judgment of the Court of Magistrates cannot be disturbed and its conclusions shall be reconfirmed by this Court.

## *Decide*

Consequently, for the above-mentioned reasons, the Court rejects the appeal and confirms the judgment of the Court of Magistrates appealed from in its entirety.

*Aaron M. Bugeja*

*Judge*