



Court of Criminal Appeal

The Hon. Mr Justice Giovanni M.Grixti LL.M., LL.D

Appeal Number 184/2018

The Police

Vs

Carillo Montoro Eliseo

Sitting 29th March, 2021

The Court,

Having seen the charge proffered against Carillo Montoro Eliseo, born on the 4th October 1988 and currently residing at the Corradino Correctional Facility, before the Court of Magistrates (Malta) as a Court of Criminal Judicature with having on the 8th November 2017 at around 11.30 hours in Division 3, CCF, assaulted and caused slight bodily harm on the person of Emmanuel Makuochukwu as medically certified by Dr Daniel Makta from CCF in breach of article 221(1) of Chapter 9. The Court was requested to apply article 33A of

Chapter 9 so that the punishment is increased by one or two degrees.

Having seen the judgement of the Court of Magistrates (Malta) as a Court of Criminal Judicature of the 18th April, 2018 in above names by which the Court found the defendant guilty and condemned him to one month imprisonment.

Having seen the appeal application filed by Carillo Montoro Eliseo through which he requested this Court to **revoke** the judgement delivered on the 18th April, 2018 and to declare that the applicant is not guilty of the charge brought against him and to acquit him therefrom;

Having seen the records of the case;

Having seen an updated version of the Conviction sheet;

Having heard submissions of the parties;

Considered that:

1. The main ground of this appeal application is that the Court of Magistrates made a wrong assessment of the facts and brings forward a number of arguments which can be summarised as follows. The Court gave overriding importance to the certificate signed by Dr Makta which certificate was never confirmed on oath. There is no conclusive evidence that it was the appellant who caused the slight injuries. Emanuel Makuochukwu may have caused his injuries himself. Emanuel Makuochukwu also tried to influence CO 175 Noel Mifsud Bonnici against the accused appellant who had made no such

allegation. The Court should have found the version of the appellant more credible than that of Makuochukwu. The fact that the appellant did not suffer any injuries himself does not mean that he was responsible for the injuries suffered by Makuochukwu. There were three other inmates who could have been produced as witnesses particularly about the way the fight had started. Hence the Prosecution failed to produce the best evidence available. Makuochukwu's version of events – that these took place inside Makuochukwu's cell – are contradicted by the testimony of the other witnesses who said that the incident took place in the common area. There is also a conflict on the version of events between Makuochukwu's assertion that all the food and a towel he had in his hand fell to the floor whereas the officers on duty did not see anything like this happening. The Court of Magistrates did not believe Makuochukwu when the latter said that he had been hit by a water bottle. The actual version of events was that when the accused approached the third table in the common area, Makuochukwu left the cell and pushed the accused. The appellant acted in self-defence and therefore fails to understand why the Court of Magistrates rejected this submission which should have taken into consideration all the circumstances of the case. Makuochukwu was aggressive also on the witness stand. Nor did the Court consider the greater physical strength of Makuochukwu against the lighter frame of the accused. In deciding whether there was the necessity of self-defence the test is a subjective one. (Vide *The Police vs Daniel Briffa* decided by the Court of Appeal on the 14th January 2015);

2. Having examined the records of the case, the first Court was presented with the following evidence consisting mainly of witnesses whose testimonies can be summarised as follows.

3. **WPS2 69 M.Lia** by means of an affidavit stated that assistance was requested by the Corradino Correctional Facilities and she therefore acceded on site and informed of an incident between Carillo Montoro Eliseo and Emmanuel Makuochukwu. The latter stated that whilst at the gym, an argument broke out between him and Carillo and on his return to the division was attacked by the said Carillo on confirmed the argument at the gym but that when he went to speak to Makuochukwu at the division, the latter pushed him and he reacted in response. Witness also spoke to CO44 and attached a medical certificate issued by Dr.Daniel Makta MD;

4. **Emmanuel Makuochukwu** testified that the incident started in the gymnasium when the appellant started arguing with him to move away from the particular equipment he was using but he refused. Appellant threatened to show him who he was when they return to the division. Appellant then went and hid behind the door of Makuochukwu's prison cell and as soon as he approached the cell he felt a blow to his eyes and another to his mouth. He was holding his food and water which fell to the ground. Since then he could not eat for two weeks and still bears a mark on his arm caused by a scratch from the bottle of water he was holding under his arm. He also complains of not seeing well and denied that appellant acted in self-defence;

5. **Appellant** testified that he was a friend of complainant but days before the incident he informed the latter that he will not be speaking to him any longer as he does not agree with his approach. Complainant tried to get him involved in some trouble and he informed the correctional officers. As for the incident, appellant stated that complainant was on a gym bench but merely seated and talking so he asked a friend to ask him to please move so that they can use the bench. Complainant wanted to know the reason for this request and appellant explained that he would like to use it since he was only talking and not making use of the bench. Complainant refused and started shouting and the gym officer came over to ask them to keep it down but complainant kept shouting. When complainant returned to the division, appellant went to talk to him to put an end to their problem asking him why he had to shout so much. Complainant replied that it's because he refuses to talk to him and pushed appellant who reacted by slapping him and a fight ensued.

6. **Appellant** denied that complainant was holding food or water in his hands. He also stated that he had a scratch on his eye but that was done by the correctional officer when trying to pull them apart from each other. He also refused to lodge a complaint with the police against his aggressor. Appellant denied punching Makuochukwu twice. He then added that when he was younger he was a boxer and so he avoids punching others. He slapped Makuochukwu because the latter had pushed him and stated that "*If I punch someone or he punch anyone punch, at least you break the face*" and denied that Makuochukwu had anything in his hands;

7. **Dr Mario Scerri** appointed as an expert by the Court, testified that the lesion on the left upper lip consisted of a scar which was not very conspicuous and is compatible with an injury inflicted by a sharp instrument like a broken glass. Complainant had informed him that it was caused by a broken glass bottle during an altercation. The lesion is visible but not so conspicuous. It might disappear after a year. Further into his testimony Dr, Scerri explained that the injury is on the arm and not greivous from a medical point of view. [Dr. Scerri's description of the injury being on the left upper lip seems to be incorrect and possibly due to a lapsus or a fault in the transcription since the photos taken by himself and exhibited in his report are of complainant's left upper arm between the arm pit and the elbow. His report actually speaks of a scar "having clean margins on the medial aspect of the left arm(driegh) (See photo number 2)" 4.3 centimetres in length and that "*there were no other lesions in relation to this particular incident*". The report also speaks of "*bottle of water which allegedly smashed and injuring him*" and not of a glass bottle which would otherwise break and not smash. The Court deems that it is pertinent to make the above observation for the sake of clarity.]

8. **CO 175** testified he was informed that during his testimony, Mr. Carillo stated that he was hit by a correctional officer during the altercation. He explained that he was on duty in Division three together with CO 44 when they witnessed a fight some 25 meters away in the middle of the division near a table in front of Makuochukwu's cell and

immediately went to separate Carillo and Makuochukwu from each other. At that time all cells were open. Both men were engaged in a wrestle but he did not see how the altercation had started. He also explained that he tore Carillo's shirt due to pulling him away from the fight and noticed some bruising on him but he declined to be taken to the medical room. Witness does not remember seeing any blood or a broken lip or bruise on Makuochukwu's face but he did ask to be assisted by the prison doctor. He remembers slipping on water but does not recall seeing a bottle;

9. CO 44 was called by CO 175 to render assistance in breaking up the fight. They split up the two inmates and he locked Mr. Makuochukwu. Asked whether he noticed any scratches, bleeding or bruises, witness replied that Mr. Makuochukwu *"had something on his lips because he told me and I told him, "I will take you up to the MIU"*". CO 44 also confirmed the presence of water on the floor near a table [in front of the cell]. The fight took place in the middle of the division which is not Makuochukwu's area, *"no one's area"*. who had some blood on his lips and afterwards he took him to the MIU. Mr. Carillo had made complaints against Mr. Makuochukwu on a number of occasions prior this altercation;

Having considered further:

10. That with regard to appellant's grievance that the First Court had relied upon the medical certificate issued by Dr. Makta which was not confirmed on oath nor exhibited in its

original form, with due respect, the First Court discarded the medical certificate and was correct in doing so in accordance with article 646 of the Criminal Code. What the First Court considered is that it was still possible to prove bodily harm without reference to a medical certificate and sustained its reasoning on the strength of a judgement of this court in 'Il-Pulizija vs Joseph Azzopardi' of the 30th July 2014 where the Court of Criminal Appeal held that the Court can still find guilt of the offence of bodily harm without a medical certificate. In the case 'Il-Pulizija vs George Stephen Zahra' decided by Mr Justice De Gaetano on the 18th June 2001 (Court of Criminal Appeal) it was held that:

'Mill-banda l-ohra mhux korrett dak li donnu qed jippretendi l-appellant, u cioe' li minghajr certifikati mediċi ma tistax tipprova a sodisfazzjon tal-Qorti li tkun saret offiża fuq il-persuna. Kif din il-Qorti kellha okkażjoni tosserva diversi drabi, tali certifikati jistgħu jkunu meħtieġa biex jiġi determinat jekk l-offiża hix wahda gravi jew gravissima, jew addirutura jekk hemmx offiża (ħafifa, gravi jew gravissima); pero' dawn iċ-certifikati m'humix f'kull każ assolutament meħtieġa: il-prova tal-offiża u tan-natura ta' tali offiża tista', f'ċerti każijiet, issir anke permezz tad-depożizzjoni jew depożizzjonijiet ta' persuni li mhux tobba jew paramediċi.'

11. The First Court therefore relied on the testimony of Mr. Makuochukwu and CO 44 "*(in relation to what CO44 saw as well as the request of Makuochukwu to seek medical attention soon after the incident took place)*. Having again examined the transcripts of the deposition of CO 44 it was not

correct to state that the latter was witness to the bodily harm suffered by complainant. CO 44 stated that as follows when asked by the Court “*whether they had any scratches, any bruises, any bleeding*”: “*Scratches I do not think so; bleeding I think Mr. Emmanuel Makuochukwu had something on his lips because he told me and I told him, “I will take you up to the MIU”, afterwards*”. CO 44 did not therefore notice any blood on complainant and it was the latter that said so. This must also be considered in conjunction with the testimony of CO 175 who only noticed bruises on Mr. Carillo’s shoulder to the extent that he offered to take him to the medical room;

12. It appears that the First Court failed to take into consideration appellant’s unconditional declarations that he did slap complainant and that he approached him with the intention to come to a solution with regard to their problem as he had still seven months to serve in prison and did not want to be involved in any problems. He denies punching complainant twice and that his punch would have had other consequences since he was a boxer in his younger days;

13. The First Court also failed to take into consideration that complainant testified that appellant was waiting for him behind the door of his own cell which, from the deposition of the CO’s and appellant resulted to be untrue. The issue of the bottle smashing under complainant’s arm is also hard to accept when CO 44 dismissed the possibility of there being a bottle since the prison kit includes a cup;

14. It is the opinion of this Court that the above contradictions should have had a decisive role in assessing the credibility of complainant. Now, although it is not for this Court to try the case afresh or to substitute the discretion of the First Court in deciding which version it should uphold, there exist too many circumstances, in the absence of a medical certificate, to conclude that complainant suffered any bodily harm, albeit of a slight nature, as a consequence of the actions of appellant;

15. Appellant's first grievance based on the argument of lack of proof of bodily harm is therefore being upheld. Consequently while abstaining from taking further cognisance of arguments brought forward by appellant, the Court upholds the appeal and revokes the judgement of the First Court, finds the accused not guilty and acquits him of the charge.