



# THE COURT OF CRIMINAL APPEAL

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

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Appeal number: 220/2020

**The Police**

**vs.**

**Martyn Paul UNDERWOOD**

(holder of British passport number: 557795742)

**Today 24th June 2021**

The Court:

1. This is an appeal from a judgment given by the Court of Magistrates (Malta) on 12th October 2020 against Martyn Paul UNDERWOOD who was charged with having on the :

fourteenth (14th) day of June of the year two thousand and twenty (2020) and in the preceding days in Birzebbuga and/or other places in Malta:

1. Caused another person, namely his former partner Kay Layla Johnston Power, a person with whom he shared the same house, to fear that violence

will be used against her or her property or against the person or property of her ascendants or descendants;

2. Pursued a course of conduct which amounted to harassment against Kay Layla Johnston Power or pursued a course of conduct which he ought to know amounted to harassment;

3. Failed to honour anyone of the conditions of the Protection Order issued in favour of Kay Layla Johnston Power by a Court decree as per Magistrate Dr. J. Mifsud dated 25th January 2019;

4. Committed a crime in an operative period of a Probation Order under which he was discharged by a sentence of the Court of Magistrates (Malta) presided by Dr. J. Mifsud and dated 25th January 2019;

5. Failed to observe any of the conditions imposed by the court in its decree granting bail as per decree by the Criminal Court presided by Madam Justice Dr. Consuelo Scerri Herrera on 24th May 2019.

The Court was requested to issue a protection order in favour of Kay Layla Johnston Power in terms of article 412C of Chapter 9 of the Laws of Malta.

The Court was further being requested to provide for the security of Kay Layla Johnston Power in terms of Article 383 et sequitur of Chapter 9 of the Laws of Malta.

2. That by means of the said judgment, the Court of Magistrates (Malta) found Martyn Paul UNDERWOOD, upon his unconditional guilty plea as guilty of the first, second, third, fourth and fifth charges proffered against him and was condemned to a term of imprisonment of nine (9) months and to the payment of a fine of €500 (five hundred) Euro. Furthermore, the Court decided to issue a Protection Order in terms of Article 412C of Chapter 9 of the Laws of Malta and therefore ordered, for the purposes of providing safety and protection from harassment and/or other conduct which causes fear of violence on the person of Kay Layla Johnston Power, that Martyn Paul Underwood be bound by the Protection Order in favour of Kay Layla Johnston Power, under the following conditions namely:

- i. Prohibits and restricts Martyn Paul Underwood from in any way approaching, or following the movements of, or from contacting or molesting Kay Layla Johnston Power;
- ii. This protection order shall remain in force for the duration of five (5) years from date of this judgment.

3. The Attorney General appealed from this judgment after considering that whilst agreeing with the decision and punishment of imprisonment and fine awarded, opined that the imposition of a Protection Order under Article 412C of Chapter 9 of the Laws of Malta did not form a sound legal basis, and Article 383 of Chapter 9 should have been applied instead. This is since Article 412C refers to a person "*charged or accused with an offence before the court of Magistrates whether as a court of inquiry or as a Court of Criminal Judicature*" and hence refers to orders by the Court **during the proceedings** whereas Article 383 refers to punishment awarded and hence it refers to decisions that can be awarded. Consequently, for the reasons indicated above, the Attorney General requested this Court, so that after considering the argument put forth in this application, to reform the said judgment by:

- i) Confirming that part wherein the Court found the accused guilty as charged of the first, second, third, fourth, and fifth charges proffered against him, and condemned him to a term of nine (9) months imprisonment and to the payment of a fine of €500 (five hundred) Euro;
- ii. Reversing and varying that part where the Protection Order is issued for the period of five (5) years according to Article 412C

of Chapter 9 of the Laws of Malta, and instead to bind respondent according to Article 383 of Chapter 9 of the Laws of Malta.

## **Considered**

### **4. Article 383 of the Criminal Code reads as follows:**

(1) The court may, where it deems it expedient, in order to provide for the safety of individuals or for the keeping of the public peace, in addition to, or in lieu of the punishment applicable to the offence, require the offender to enter into his own recognizance in a sum of money to be fixed by the court.

(2) Such sum shall not be less than one hundred and sixteen euro and forty-seven cents (116.47) nor more than two thousand and three hundred and twenty-nine euro and thirty-seven cents (2,329.37) according to the means of the party entering into a recognizance, and the term of the recognizance shall not exceed twelve months.

(3) Where the offender entering into a recognizance is, in respect of the same offence, sentenced to a punishment restrictive of personal liberty, the term of the recognizance shall commence to run from the day on which the said punishment is served or condoned.

### **5. On the otherhand, article 382A(1) of the Criminal Code states :**

(1) Without prejudice to its powers under the provisions of the following articles of this Sub-title, where the court considers it expedient to do so for any of the purposes mentioned in article 412C(1), it may, in passing judgment against the accused, together with any punishment to which it may sentence the offender, make an order (hereinafter referred to as a "restraining order") which may give effect to any thing provided in sub-article (3) of the said article 412C and the provisions of sub-articles (8) to (11) of the said article 412C, both inclusive, shall *mutatis mutandis* apply.

### **6. That then Article 412C of the Criminal Code reads as follows:**

(1) Where a person (hereinafter in this article and in article 412D referred to as "the accused") has been charged or accused with an offence before the Court of Magistrates whether as a Court of inquiry or as a Court of criminal judicature, the Court may, either *ex officio* or at the request of any party to the proceedings, on reasonable grounds, for the purpose of providing for the safety of the injured person or of other individuals or for the keeping of the public peace or for the purpose of protecting the injured person or other individuals from harassment or other conduct which will cause a fear of violence, issue a protection order against the accused.

7. That it is clear from the cited provisions that **at the moment of the judgment against the accused**, the Magistrates' Court can only impose a restraining order against the accused and not a protection order. And it is precisely for this reason that in Article 382A of the Criminal Code, notably in sub-article number one, the Law empowers the Court of Magistrates to apply those provisions which a Court must make in terms of Article 412C (3) of the Criminal Code. The provisions of sub-articles eight to eleven also apply when the Court comes to impose such a restraining order.
  
8. That Article 412C, read in conjunction with Article 382A of the Criminal Code, allows the Magistrates' Court to impose a protection order only **in the course of proceedings** on a request made by the parties on well-founded grounds or *ex officio*. This interpretation of the Law has been explored several times by Maltese Courts, such as in the case **The Police vs. Oscar Robert Magri**<sup>1</sup> where the Court of Criminal Appeal held the following that this Court has on several occasions stressed that article 412C finds application only *pendente lite*. This is because such an Order can only be issued against an "accused" person rather than against the person found "guilty". In its final decision the Court can issue a Restraining Order in terms of article 382A of Chapter 9 of the Laws of Malta. Therefore the Order issued in terms of article 412C of the Criminal Code did not find application in case of conviction
  
9. That this same interpretation is also found in the case **The Republic of Malta vs. Omissis**<sup>2</sup> where it is stated that the First Court mistakenly

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<sup>1</sup> **The Police vs. Oscar Robert Magri** decided on September 30, 2020.

<sup>2</sup> Decided on February 26,

applied the provisions of article 412C of the Criminal Code and ordered the issuance of a Protection Order against the convicted appellant. Such an Order can only be issued against an "accused" person and not also against the person found "guilty".

10. That in this case, instead of such a protection order or restraining order under article 382A of the Criminal Code, the Attorney General requested a personal recognisance in terms of Article 383 of the Criminal Code. This provision allows a Magistrates' Court to bind the offender to enter into his own recognisance under penalty of a sum of money in **case of** default and this in order to provide for the security of a person or to keep the public good order.
11. That the Attorney General is right to argue that the protection order in terms of Article 412C of the Criminal Code could not be issued following a conviction. The Attorney General requested that the defendant should be obliged to enter into his own recognisance under penalty of a sum of money in **case of** default and this in order to provide for the security of a person or to keep the public good order. This request was made even though the Attorney General could also request that the convicted person be subject to a restraining order under article 382A of the Criminal Code which is more in line with the purpose, wording and spirit of article 412C of the Criminal Code applied by the Court of Magistrates (Malta) in its judgment. Only this Court will not dwell further on the reasoning behind this request of the Attorney General.

# DECIDE

The Court is therefore upholding the Attorney General's appeal by reforming the judgment appealed from by revoking only that part of the judgment in which the Court of Magistrates (Malta) ordered the issue of the protection order in terms of article 412C of the Criminal Code against the defendant Martyn Paul UNDERWOOD and in favour of the injured party Kay Layla Johnston Power and instead, in terms of article 383 of the Criminal Code, decides that together with the punishment imposed in the judgment under appeal, in order to provide for the security of Kay Layla Johnston Power and to preserve the public good order, this Court binds the respondent Martyn Paul UNDERWOOD under his own recognisance for a period of twelve months under penalty of two thousand euros (€2000). Saving that part of the judgment appealed from and varied above, this Court confirms the said judgment in its entirety.

**Aaron M. Bugeja,  
Judge**