

**COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE**

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

**THE POLICE
(Inspector Godwin Scerri)**

-Vs-

KEVIN JAMES HODGE

Case number 297/2020

Today 29th July 2021

The Court;

Having seen the charges brought against **KEVIN JAMES HODGE** holder of Maltese residence permit number 30743A who was charged with having on the 30th June 2020 in Triq il-Knisja, San Pawl il-Bahar, and on these Islands by means of several acts committed, even if at different times, which constitute violations of the same provision of the law, and were committed in pursuance of the same design:-

1. Pursued a course of conduct that caused his wife Karen Debra Hodge to fear that violence will be used against her or her property or against the person or property of any of her ascendants, descendants, brothers or sisters or any person mentioned in Article 222(1);

2. Moreover, for having on the same date, place, time and circumstances, attempted to use force against any person, namely his wife Karen Debra Hodge, with intent to insult, annoy or hurt such person or others;
3. Moreover, for having on the same date, place, time and circumstances, uttered insults or threats not otherwise provided for in this Code, or having being provoked, carried his insult beyond the limit warranted by the provocation and this to the detriment of his wife Karen Debra Hodge;

The Court was requested to provide for the safety of Karen Debra Hodge by issuing a Protection Order in accordance with the provisions of Article 412C of Chapter 9 of the Laws of Malta under such restrictions or prohibitions as the Court may consider necessary.

Having seen that during the hearing held on the 2nd July 2020, the proceedings were ordered to be conducted in the English language;

Having heard the Prosecuting Officer read out the charges and confirm them on oath;

Having heard the accused plead not guilty to the charges;

Having seen the consent given by the Attorney General for these proceedings to be dealt with summarily¹;

Having heard the evidence and seen all documents exhibited;

Having seen all the acts of the proceedings;

¹ Dok. PC6, fol. 26.

Having heard the Prosecution declare that it has no submissions to make in addition to the evidence that results from the acts of the proceedings;

Having heard the final oral submissions of defence counsel during the hearing of the 26th July 2021;

Having seen that the cause was adjourned for today for delivery of judgement;

Having considered;

Karen Debra Hodge, the accused's wife, testified that the incident that she reported to the Police occurred when her husband came home very drunk and threatened that somebody was going to die that evening. She explained that he hit her a couple of times by slapping her hard across her leg and then across her arm with a rolled-up t-shirt. He also put his hands around her throat to try and strangle her while verbally abusing her, calling her names ("*a piece of shit*") and telling her that she needs hitting. He also told her "*someone in this house will die tonight*". Witness confirmed that she was terrified of her husband on that occasion as he was never so aggressive towards her and she also recorded the incident in order to eventually be able to show her husband what he was like when he was drunk.

Karen Debra Hodge subsequently testified in cross-examination during the hearing of the 15th July 2021 where she explained that she had been asked by her husband, the accused, to attend Court in order to testify. She also claimed that she wishes the proceedings to stop because the entire process was long drawn-out and had become too much for her. She confirmed that during the past months, the relationship with her husband had improved and that they are now on better terms.

Inspector Paula Ciantar testified about her conversation with Karen Debra Hodge regarding the incident reported to the Police on the 30th June 2020 and ordered a risk assessment to be carried out by the social workers from Appogg, which assessment,

identified by the witness in the acts of the proceedings² transpired to be high risk. Witness also exhibited the audio recording of the incident which was transmitted to her by Karen Debra Hodge via attachments to an e-mail and which was copied personally by her onto a DVD³.

The accused, Kevin James Hodge, testified in his defence during the hearing of the 26th July 2021 where he explained the difficulties that he encountered in his home and in his relationship with his wife because of the presence and undesirable behaviour of his wife's daughter, who moved to Malta from England to live with them and whom he believed to be involved with drugs and bad company. He testified that on the evening of the incident of the 30th June 2020, he was intoxicated and does not recall the precise words that he uttered or gestures that he made in respect of his wife; however he did recall that the incident was caused by the frustration that had been building up due to the problems caused his wife's daughter's unacceptable behaviour in their home, which caused him, on that occasion, to “*snap*”.

Having considered;

At the outset the Court feels that it must consider the statement made by Karen Debra Hodge, the alleged victim of the offences brought against her husband the accused, during her testimony in cross-examination on the 15th July 2021. While it is true that the charges brought against the accused involve domestic violence as defined in article 2 of Chapter 581 and while it is also true that said alleged victim confirmed to the Court that she wants the proceedings to “*stop*”, when pressed by the Court she clarified that she “*needs these proceedings stop*” because they have “*gone on for too long*”. Although when cross-examined by the defence, the alleged victim confirmed that she did forgive her husband for his actions during the incident that she reported to the Police, when she was asked by the Court whether she wants her report to be decided upon, the alleged victim replied in the affirmative and she also stated later on

² As Dok. PC5 at fol. 17 *et seq.* The risk assessment was also identified and confirmed by the risk assessors Alicia Cauchi and Sarah Farrugia during their testimony on the 5th October 2020.

³ Doc. PC7 and PC8 (DVD).

in her testimony that it was her husband who asked her to attend the Court hearing where she requested that the proceedings are not continued.

The Court is entirely unconvinced that the testimony of Karen Debra Hodge of the 26th July 2021 suffices or is to be perceived as a request made in terms of Article 543(e) of the Criminal Code (Cap. 9). In the first place, following her testimony to the Court on the 16th July 2020, the alleged victim never appeared again before she was, admittedly, summoned by her husband the accused, in order to testify in cross-examination a year later. The Court understands that the alleged victim did not attend the said hearing spontaneously in order to request the stay of the proceedings but only attended the hearing upon her husband's request. Although not a requisite *sine qua non* for a request to be made under Article 543(e) of Cap. 9, it is pertinent to observe that at no point did the alleged victim confirm that the parties had reconciled and it does not result either that she communicated her intentions to stay the proceedings to the Prosecuting Officer or to legal representative engaged for the purpose of making her request or to anyone else other than, it appears, in cross-examination.

Moreover, after having heard Karen Debra's Hodge's testimony in cross-examination and observed her evident hesitation on the witness stand and the often contradictory replies to questions put by the Court and later by the defence, the Court is not convinced either of the voluntariness, nor of the certitude of her request for the proceedings to be stayed. Indeed, it is quite evident to the Court that the alleged victim expressed the wish that the proceedings would come to an end not because she wishes them to be discontinued but because, in her view, they have gone on for too long and she requires that a decision is given by the Court in order to be able to put this incident behind her.

In the aggregate of all these circumstances, the Court not only is of the view that the request made by the alleged victim in cross-examination must not be entertained as one made in terms of Article 543(e) of Cap. 9 but is also of the view that in any event and even if for a moment her testimony is to be considered as a request to stay the

proceedings, the request made by the alleged victim must be declined. After all, the measure of discretion afforded to the Court when faced with requests for a stay of proceedings in cases involving domestic violence, is necessary in order to assess the circumstances surrounding the request and to ensure that the request is not only in the best interest of the alleged victim but moreover and most importantly, that the request is also made genuinely, freely and with conviction. In this case, the Court is far from persuaded that these criteria have been satisfied and consequently deems that the proceedings against the accused are to be continued.

Having considered;

That by means of the first charge in the summons, the accused is charged with having committed the crime under Article 251B of the Criminal Code, that is, of pursuing a course of conduct that caused his wife Karen Debra Hodge to fear that violence will be used against her or her property or against the person or property of any of her ascendants, descendants, brothers or sisters or any person mentioned in Article 222(1) of the Criminal Code.

Now it has been consistently held that the crime under Article 251B of the Criminal Code requires as one of its material and essential elements, evidence of incidents having occurred on more than one occasion and which collectively amount to a course of conduct on the part of the accused person which causes alarm or distress to the victim⁴. According to **Blackstone's Criminal Practice** (2012 Ed.), on the matter of harassment:-

“Establishing a course of conduct, rather than a series of unrelated acts, is crucial to the success of any prosecution for harassment, and ‘it is the course of conduct which has to have the quality of amounting to harassment, rather than individual instances of conduct’ (Iqbal v Dean Manson (Solicitors) [2011] EWCA Civ 123 per Rix LJ at [45]). The matters said to constitute the course of conduct amounting to harassment

⁴ See Art. 251C of Cap. 9.

must be properly particularised in the information laid or the indictment (C v CPS [2008] EWHC 148 (Admin)) and must be so connected in type and in context as to justify the conclusion that they amount to a course of conduct (Patel [2005] 1 Cr App R 440; Pratt v DPP (2001) 165 JP 800; C v CPS). The fewer and further apart the incidents, the less likely it is that they will be so regarded, but circumstances can be conceived ‘where incidents, as far apart as a year, could constitute a course of conduct’ (Lau v DPP [2000] Crim LR 580).”⁵

Although the accused is not charged with the crime of harassment under Article 251A of the Criminal Code, the definition of a course of conduct which, as pointed out, constitutes the essential material element of the crime of causing others to fear that violence will be used against them⁶, is equally applicable since the offence under Article 251B of the Criminal Code is considered to be a form of harassment⁷. Therefore, in order to successfully prosecute a charge requiring proof of a course of conduct on the part of the accused, the Prosecution must bring a charge, sustained by sufficient evidence, that the accused, **on more than one occasion**, behaved in a manner that caused his victim to fear that violence will be used against her.

The Court of Criminal Appeal in its judgement in the names **Il-Pulizija vs Norman Cascun** made the following considerations:-

*“Din il-Qorti mhix ser tipprova taghti definizzjoni ezawrienti ta’ x’jammonta ghal “course of conduct” ghall-fini tal-imsemmi Artikolu 251B(1) – u anqas ma hi ser tipprova telenka kazijiet, anke jekk biss bhala forma ta’ ezempju, li jammontaw jew ma jammontawx ghal tali “imgieba”, haga li trid tigi deciza minn kaz ghal kaz skond ic-cirkostanzi u bl-applikazzjoni ta’ doza qawwija ta’ saggezza min-naha tal-gudikant. **Dak li qed jigi deciz f’din il-kawza hu biss li incident wiehed (u, per di***

⁵ Blackstone’s Criminal Practice 2012 Ed. - B2.140 p.285. Emphasis made by this Court.

⁶ Ex Article 251B Cap. 9

⁷ Vide : **Il-Pulizija v. Caven Cutajar**, decided by the Court of Criminal Appeal, 15th September 2020.

piu', ta' minuti) ma jammontax ghal "course of conduct" ghall-finijiet tal-Artikolu 251B(1)."⁸ [emphasis made by this Court]

In the case at hand, Karen Debra Hodge testified not only about one instance of such conduct on the part of the accused but also about another incident that occurred around one week prior to the event of the 30th June 2020⁹. She also testified as to the general conduct of the accused in her regard, who would verbally abuse her particularly when he would have consumed alcohol. However, even if it had to result from the aggregate evidence forming part of the acts of the proceedings that the accused behaved aggressively towards his wife or otherwise caused her to fear that violence will be used against her or her daughter¹⁰ on occasions other than the incident that took place on the 30th June 2020, or even regularly, the Court cannot but note that the accused was charged in the summons with having committed this crime by means of a course of conduct "*on the 30th June 2020*". This means that the particulars of time contained in the summons are restricted solely to incidents that took place only on the 30th June 2020 and consequently, the Court cannot take into consideration for the purposes of determining this charge brought against the accused, other episodes that may have taken place on any other day and which, together with the incident of the 30th June 2020, may amount in the aggregate to a course of conduct on the part of the accused, even though the victim might have testified about such other incidents.

While it is correct to state that it has been recognised that there may be cases where a course of conduct might be identified as a result of different episodes occurring on the same day¹¹ and consequently this particular element of the offence under Article 251B of Chapter 9 would be satisfied, in the case at hand, the Court identifies evidence of only one episode that took place on the 30th June 2020. While in the Court's view it is abundantly proven that the aggressive and violent behaviour of the accused on this

⁸ Deciza 12.12.2019.

⁹ In her testimony, Karen Hodge mentioned an episode that had occurred the week before the 30th June 2020, where the accused "*was trying to get to my daughter ... because she moved the island and she was a bit of a nightmare*" and he also "*put his hand around the back of my throat, round the back of my neck but he did let go...*" – fol. 38.

¹⁰ Or as provided by Law in Art. 251B.

¹¹ Vide *Il-Pulizija vs Jeffrey Scicluna*, decided on the 21st February 2012, Court of Criminal Appeal.

particular occasion caused his wife to feel “*petrified*”¹², it is also evident that this behaviour cannot amount to a course of conduct as required by law.

Consequently, in the absence of proof of a course of conduct on the part of the accused, the Court cannot find him guilty of the first charge, that is, the offence under Article 251B of Chapter 9.

Having considered;

That the accused is charged also with the contravention envisaged in Article 339(1)(d) of the Criminal Code, that is of having on the 30th June 2020, attempted to use force against his wife Karen Debra Hodge, with intent to insult, annoy or hurt such person.

The Court observes in the first place that it cannot but disagree with the submission made by the defence that the accused was not proven to have carried out any act or gesture which amounts to an assault on his wife. After having revisited the testimony of Karen Debra Hodge of the 16th July 2020, it the Court’s view that such testimony is unequivocal in that the victim stated in no uncertain terms that the accused did indeed assault her when he acted, in her own words, very aggressively towards her when he entered the bedroom, punched the wardrobe, slapped her across the leg and arm, and also by moved towards her and tried to strangle her. The victim is also heard in the recording Dok. PC8, telling the accused that he already hit her twice, to which statement the accused is heard replying that she “*need[s] hitting*”.

The Court identifies in this behaviour, the very essence of the contravention under Article 339(1)(d) of the Criminal Code and has little if no doubt at all, that the accused acted in this way with the intention of hurting and insulting his wife, even though it does not result from the evidence that he actually caused her any harm to her body or health in terms of Article 214 of the Criminal Code. Indeed, the victim did not testify

¹² Testimony of Karen Hodge, 16th July 2020.

that she suffered injuries as a result of this assault, and therefore there was no scope to charge the accuse with the crime of having caused bodily harm to his wife.

It is relevant at this juncture to refer to the decision of the Court of Criminal Appeal in the case **Il-Pulizija v. Joseph Pace**¹³, where it was held:-

*“L-ewwel Qorti rravvizat fl-ghemil ta’ l-appellant il-kontravvenzjoni kkontemplata fl artikolu 339(1)(d) tal- Kodici Kriminali. Din il-kontravvenzjoni kontra l-persuna ssehh meta persuna thebb kontra persuna ohra sabiex tingurja, iddejjaq jew taghmel hsara lil dik il-persuna l-ohra jew lil haddiehor, kemm-il darba l-fatt ma jkunx jaqa’ taht xi disposizzjoni ohra tal-Kodici Kriminali. Biex persuna thebb kontra persuna ohra ma hemmx ghalfejn li effettivament ikun hemm kuntatt fiziku; bizzejjed li jkun hemm il-potenzjalita` ta’ tali kuntatt permezz tal-manifestazzjoni ta’ forza fizika indirizzata lejn dik il-persuna ohra. Forsi t-test Ingliz ta’ din il-kontravvenzjoni jiddeskrivi ahjar il-kuncett ta’ ‘hebb’: ‘... attempts to use force against any person with intent to insult, annoy or hurt such person or others ...’ (enfasi mizjuda). **Jekk ikun hemm kuntatt fiziku multo magis wiehed jista’ jghid li wiehed hebb ghal persuna ohra, sakemm il-fatt ma jammontax ghal xi reat iehor jew reat aktar gravi.**” [emphasis made by this Court]*

The accused must therefore be found guilty of the offence imputed in terms of the second charge.

Having considered;

The accused is also charged with having on the same date and in the same circumstances, uttered threats and insults to the detriment of his wife. Again, even after having heard not only the testimony of Karen Debra Hodge, but also the audio recording exhibited in the acts of the proceedings, uncontested by the defence, the Court is satisfied that the Prosecution brought sufficient and satisfactory evidence that

¹³ 9th May 1997.

the accused uttered insults and threats to his wife during the altercation that took place on the 30th June 2020, most notably when he called her amongst other insults, “*a piece of shit*”¹⁴ and also when he said and is heard saying in the audio recording Dok. PC8 “*either you or I will die tonight*”¹⁵. In any event, the defence acknowledged, in its final oral submissions, that indeed there is sufficient evidence to find the accused guilty of this contravention.

In the circumstances, although the accused was charged with having committed a continuous offence in terms of Article 18 of the Criminal Code, the elements of a continuous offence do not result in this case.

Having considered;

For purposes of punishment after finding the accused guilty of the two contraventions under Articles 339(1)(d) and 339(1)(e) of the Criminal Code, brought against him in second and third charges proffered in the summons, the Court takes into account various factors, amongst which the accused’s clean criminal record, the fact that he claims, during his testimony before the Court, to have apologised to his wife for his actions, the fact that his wife forgave him for his behaviour towards her during the reported episode and the fact that it results from the evidence that as from November of last year, the relationship between the accused and his wife has improved significantly and they are frequently in each other’s company. Meanwhile, however, the Court cannot but also take into consideration the accused’s display of aggression towards his wife during the assault and the disturbing fact that after he claimed, during his testimony, to have “*snapped*”, he recalls nothing of what he said and did to her during this assault due to his having been intoxicated at the time.

For these reasons, the Court, while finding the accused not guilty of the first charge and acquitting him thereof, after having seen Articles 339(1)(d) and

¹⁴ This is also heard in the audio recording Dok. PC8.

¹⁵ See also fol. 38, testimony of Karen Debra Hodge, 16th July 2020.

339(1)(e) of the Criminal Code, Chapter 9 of the Laws of Malta, finds KEVIN JAMES HODGE guilty of the second and the third charge and condemns him to a punishment of detention for five (5) days.

Upon application of Article 22 of the Criminal Code, the Courts orders that the time prior to conviction and sentence during which the offender was detained in prison for the offences for which he has been convicted, shall count as the term of detention under this sentence.

Upon application of Article 383 of the Criminal Code, the Court, in order to provide for her safety, binds the offender not to assault, molest or insult Karen Debra Hodge and for this purpose orders him to enter into his own recognisance in the sum of five hundred Euro (€500) for a term of twelve (12) months.

**DR. RACHEL MONTEBELLO
MAGISTRATE.**