



MALTA

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

**MAGISTRATE  
DR. CHARMAINE GALEA**

**Today 09<sup>th</sup> May, 2023**

**Compilation of evidence number 716/2019**

**The Police  
(Inspector Joseph Xerri)**

**vs.**

**Ivan Pavlovikj  
(Holder of the Maltese Residence Permit Number: MT7612427  
and  
Identity Number: 0216587A)**

The Court,

Having seen the charges brought against **Ivan Pavlovikj** who has been accused for having on the 23<sup>rd</sup> November, 2019, between half past two in the morning (0230hrs) and quarter past three in the morning (0315hrs) in the area of the Club Class establishment in Triq San Ġorġ, San Ġiljan:-

1. Without the intent to kill or to put the life of **Raimundo Monato Do Nascimento Carvalho** (holder of the British passport number RE4954857) in manifest jeopardy, caused harm to his body or health, which harm is of a grievous nature;

2. Attempted to use force against **Raimundo Monato Do Nascimento Carvalho** with the intent to insult, annoy or hurt him;
3. Uttered insults or threats towards **Raimundo Monato Do Nascimento Carvalho**, or while being provoked, carried their insult beyond the limit warranted by the provocation;
4. Acted or was employed as private guard, specialised private guard, or private guard at a place of entertainment or as community officer without having the necessary licenses.

This Court was kindly asked to issue a Protection Order against the accused to provide for the security of **Raimundo Monato Do Nascimento Carvalho**, or for the keeping of public peace or for the purpose of protecting the injured party or other individuals from harassment or other conduct which will cause a fear of violence in terms of Article 412C of Chapter 9 of the Laws of Malta.

Having seen that during the examination of the accused during the sitting of 28<sup>th</sup> November 2019 done in accordance to article 392(1) of the Criminal Code, the accused pleaded not guilty to the charges against him.

Having seen that on the 15<sup>th</sup> July, 2021, the Attorney General, in terms of Section 370(3)(a) of Chapter 9 of the Laws of Malta, indicated that from the preliminary investigation of the records of the proceedings transmitted to him on the 31<sup>st</sup> May 2021, there might result an offence (or offences) under the provisions of:

- **Articles 214, 215, 216(1)(a), 216(1)(b), 216(1)(c), 218(1)(a), 218(1)(b), 218(2) of the Criminal Code, Chapter 9 of the Laws of Malta;**
- **Articles 339(1)(d) of the Criminal Code, Chapter 9 of the Laws of Malta;**
- **Articles 339(1)(e) of the Criminal Code, Chapter 9 of the Laws of Malta;**
- **Article 25(b) of the Private Guards and Community Officers Act, Chapter 389 of the Laws of Malta;**
- **Articles 17, 31, 532A, 533 of the Criminal Code, Chapter 9 of the Laws of Malta;**

Having seen that during the sitting of 01<sup>st</sup> September, 2019, the Articles of Law for judgment which were sent by the Attorney General were read out, during which sitting the accused declared that he does not object to this case being tried and decided summarily;

Having seen that the prosecution rested its case in the sitting of the 1<sup>st</sup> September, 2021;

Having seen that the defence rested its case in the sitting of the 06<sup>th</sup> October, 2022;

Having seen the acts of the proceedings, examined all the documents exhibited and heard all the testimonies of the witnesses, including that of the accused which was given voluntarily;

Having heard the final submissions by the parties during the sitting of the 10<sup>th</sup> November, 2022;

Having seen that the case has been adjourned for the pronouncement of judgment to be delivered today.

**Having considered:**

**Evidence brought by the Prosecution and the defence**

From the PIRS Report exhibited a fol. 12 *et sequitur* of the acts, the incident was recorded as follows:

*DO NASCIMENTO CARVALHO, RAIMUNDO MONATO called at ST. Julian's police station stating that on the 23/11/2019 between 02:30hrs and 03:15hrs he was hit by a bouncer of Club Class.*

*P.F.R stated that he entered in the establishment at around 01:30hrs with his friend. He stated that a girl from outside picked his friend named 'Rodrigo Alves De Brito Torres' and wanted Rodrigo to go in with her. Since Rodrigo don't speak English Raimundo wanted to go in with him. The bouncer didn't want Raimundo in the establishment, as he told him that only one person is allowed.*

*As soon as Rodrigo went out, Raimundo went in the club. He paid 50 euro for a dance of 2 minutes, she instead danced for 1 minute and he started complaining. Then Raimundo went out, called for the manager a lady which introduced herself as the owner of the club told him that she have everything on CCTV and the dancer did dance for 2 minutes. Raimundo went outside while complaining he got the phone in order to take a photo of the club name, and then the owner grabbed his phone and took it. Raimundo tried to take his phone back*

*and it was at this time that the bouncer hit him in his right eye. He stated that he fell down, his friend picked him up and went to hospital with the Taxi.*

*Raimundo was certified by Dr Jonathan Joslin (number 1920) as suffering from grievous injuries.*

*Christa Calleja ID: 267083M Rodrigo's friend accompanied him to St. Julian's police station and she stated that if we need we can contact her on the following number 79050583.*

*Raimundo was instructed by the police to meet the police in Paceville in order to recognise the aggressor.*

*Updated by WPC 164 27/11/2019 00:12*

*Raimundo recognised the person who attacked him and was arrested by the police straight away at 00:55hrs.*

*The person is Ivan Pavlovikj Residence permit number 0216587A*

*The manager who took his phone was identified as well: Rodianne Brincat Custo ID 284186M.*

*INSP J. Xerri was informed.*

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*Update by Insp. Joseph Xerri on the 27/11/2019*

*Mr. Pavlovikj was conveyed to entrant's office where he was again given and explained his legal rights. He opted to consult with lawyer Dr. Ann Marie Mangion over the phone between 1535hrs and 1545hrs and decided to have her present during questioning. Mr Pavlovikj thus released a written statement in the presence of his lawyer during which he gave his version of the incident denying hitting the alleged victim and stating that he only pushed him away. He also stated that the alleged victim was drunk at the time and was requesting services which they do not offer and hence he was sent away from the Club.*

*In the statement exhibited a fol. 15 *et sequitur* the accused denied hitting or offending the injured party and stated that the most he did was to put his hand on his chest to tell him to leave the club.*

The injured party **Raimundo Monato De Nascimento Carvalho** (hereinafter referred to as "the injured party") gave evidence before this Court five days after the alleged incident and he stated that between Friday and Saturday morning he went into a club with a friend, he paid fifty euro (€50) for a strip which lasted for less than two minutes. Therefore he complained to the securities when the manager came along and he forwarded his complaint to her. He was then pushed outside the club by two securities and he started taking pictures of the club's name. When the Manager saw this, she took the phone from his hands and someone punched him straight in the face. He stated that there were three securities but it was the accused who punched him whilst another one just pushed him back. His friend helped him to get up from the

floor and they caught a taxi to the Emergency Department and when he was released from hospital on Tuesday he went straight to the Police. That same evening he was accompanied to the club by the Police where he indicated the accused as his aggressor. He explained that when the accident happened there were two other securities who saw the accident happen.

Under cross-examination the injured party denied that he was drunk. He denied that he went to the club for sexual services or that he got angry because he was not offered these services. He stated that he has been teaching Capoeira for ten years and has been practising martial arts for twenty six years.

**Police Inspector Sarah Magri** stated that according to the Police Licensing Office's database, the accused does not hold a private guards licence.

**Joseph Saliba**, a representative of Jobsplus, stated that the accused is registered as being employed as a kitchen helper with Club Class in St. Julian's as from 25th May, 2019.

**Police Inspector Joseph Xerri** stated that the injured party reported at St. Julian's Police Station on the 26<sup>th</sup> November, 2019, stating that he was beaten up by a security of Club Class on the night between 22<sup>nd</sup> and 23<sup>rd</sup> November 2019. He also produced a medical certificate issued by Mater Dei Hospital. The injured party was accompanied by the Police to Club Class whereby the accused was identified by the injured party as his aggressor. The accused was arrested but denied that he had hit the injured party but said that all he did was pushing him with his hands to go out.

**WPS 164 Maria Vassallo** stated that on the 26<sup>th</sup> November, 2019, in the evening, she met the injured party in Paceville so that the bouncer who allegedly caused the injuries would be identified by him. The injured party identified the accused as his aggressor and he was arrested. Under cross-examination the witness stated that there were other securities on site when the injured party recognised the accused but there was not a line-up. She stated that the injured party saw the securities that were outside the Club and those who were inside the Club.

**Rodianne Brincat Custo** stated that her role within Club Class is to take orders of all the shops that are run by her sister and brother-in-law. She testified that the injured party came into the club and asked for services which they did not offer. When he was told that the Club did not offer such services he wanted to speak to the manager and she spoke to him as the manager was talking to another client. She explained to him that the Club doesn't offer the type of services he was asking for and told him to leave. When he went

outside he was going to take photos of the staff outside and she covered his camera because according to her he was not allowed to do that. When he was outside, his friend said that he is very sorry that the injured party caused trouble and that he was very drunk and not capable to walk. She stated that she remembers that the accused was behind her but she did not remember that he hit the injured party. Asked whether the injured party was in his senses or tipsy, the witness explained that as far as she could see he was not drunk. However she said that someone can still be tipsy but it does not show.

Under cross-examination the witness stated that the injured party asked for a blowjob and to have intercourse with the girls. She explained that when the injured party left the Club he had no injuries on his face.

**Dr. Jonathan Joslin** explained that he saw the injured party at the Emergency Department where he told him that he was hit repeatedly on the face. The injured party had multiple serious fractures which were consistent with a blunt, severe trauma with a specific force. He stated that the injuries were in different areas of the face and that the aggressor must have been a big man to hit him once and cause so many fractures. He explained that the injuries sustained by the injured party were more consistent with an assault rather than a fall, unless he fell multiple times.

**Consultant Mr. Clarence Pace** stated that he had seen the injured party on the 23<sup>rd</sup> November 2019 whereby it resulted that he had fractures to his right orbit, nasal bones and part of his cheek that required surgical intervention. However the injured party opted to undergo surgical intervention in the UK. The witness stated that these type of injuries take six (6) weeks to heal from the day they were inflicted. However if the patient is operated the six (6) weeks start to run from the day of the operation. Under cross-examination he explained that the injuries were all fresh. However he could not rule out that the injured party had previous injuries and if such injuries were inflicted six to eight weeks before the alleged incident, then the bones wouldn't have yet fused completely.

**Dr. Timothy Vella Briffa**, a dentist and an oral surgery trainee at Mater Dei Hospital, stated that he issued the discharge summary of the injured party. However he never had any contact with the injured party and gathered the information shown on the discharge summary from his colleagues.

**Krista Calleja** stated that she practices Capoeira and she knew the injured party through this sport. She testified that on the 23<sup>rd</sup> November, 2019, at about 3.26am she was contacted by Rodrigo Alves De Brito Torres, a friend of the injured party, who told her that the injured party was beaten up by a

bouncer and that they were on their way to hospital in a taxi. As she is a medical doctor, she headed to Mater Dei where she found the injured party being examined by doctors. The injured party was discharged on the 26<sup>th</sup> November, 2019, and she accompanied him to St. Julian's Police Station because he wanted to give his statement. The Police told them to go to Paceville later on that night, which they did, and the injured party entered the Club accompanied by the Police. She stated that as far as she knows the injured party underwent surgery on the 6<sup>th</sup> December 2019 in the UK.

**PC 1520 Liam Vella** stated that on the 26<sup>th</sup> November, 2019, he was stationed in Paceville when the injured party came near the Police van and they went to Club Class to see if he recognised his aggressor. There was a security who was outside the Club but he wasn't the aggressor. They entered the Club with the injured party but there were no other securities inside. He, together with PC 386 and the injured party went outside when another security came and the injured party indicated him as his aggressor. The Sergeant asked him if he was one hundred per cent sure that he was the man who attacked him and the injured party said yes. So they arrested the accused.

**PS 430 Andrew St. John** stated that he was the officer who took the report from the injured party. When he asked the injured party how come they did not seek assistance from the Police who were only a few metres away from where the accident happened, the injured party said that after he was hit he immediately went for a taxi and was conveyed to hospital. He asked the injured party to meet him at around 11.30pm so that they go together to the Club to try to identify the aggressor. When they met, they headed to the Club where they found a security outside the Club but he was not identified as the aggressor by the injured party. So they went inside where he was approached by Ms. Brincat Custo who gave her version of events. The injured party went out again with a police officer and after some time he was informed that the aggressor was identified by the injured party. He asked the injured party whether he was one hundred per cent that the accused was his aggressor and he answered "there's no doubt, it's a hundred percent."

**PC 386 Johann Camenzuli** stated that he accompanied the injured party to Club Class on the night of the 26<sup>th</sup> November, 2019, where the injured party identified the accused as his aggressor. However the accused told them that he just pushed the injured party and denied that he attacked him.

**Dr. Nicholas Bezzina**, a dentist at Mater Dei Hospital, stated that he accompanied Mr. Clarence Pace to assess the injured party. Under cross-examination he testified that if the injured party had previous injuries, the fractures would have been noted on the CT scan, especially if he had to have

surgery, unless he had surgery and the plates were removed later on, in which case one wouldn't be able to tell. He stated that the bruising and swelling which featured on the injured party corroborated the timing of the fractures with the clinical examination.

**Rodrigo Alves De Brito Torres** stated that on the night in question the injured party and himself were in Paceville when at a certain point the injured party came out of a club and a security punched him in the face. The injured party fell on the floor and so he grabbed him up and caught a taxi to Mater Dei Hospital. He remembered that the security was pretty tall and big and had fair skin. He stated that he was not with the injured party inside the club but was outside the club. The injured party stayed in the club for about ten to fifteen minutes. The security hit the injured party only once and he fell back. He testified that the injured party was not drunk as he only drank two shots but he did not exclude that he might have drunk something else. He stated that he doesn't remember telling the securities that the injured party was drunk. What he remembers is saying "my friend, my friend". He stated that there were no signs of trauma on the injured party's face before this incident.

**The accused** testified that on the night in question he saw the manager coming out of the club arguing with the injured party because he wanted some services which the club doesn't offer. Then the injured party took out the phone and the manager put her hand on the phone to cover the camera. He was behind the manager and came next to her and put forward his hand to stop the injured party. Suddenly another man came from the right side, grabbed him and told them "sorry guys he is drunk". Under cross-examination the accused stated that he was working at Club Class as a security but he did not have a licence although he had finished the course. He denied hitting the injured party. Asked how he explains that the injured party identified him as his aggressor he replied that it might be because he had mostly seen his face as he was behind the manager. On the night of the incident there were three club securities who were all foreigners.

**Stanca Edu**, the accused's girlfriend, testified that they have a child and that they have a good relationship. She explained that when this incident happened she was living in Italy and when the accused told her what happened she was shocked because she never saw him do these kind of things. He denied with her that he did anything that he was being accused of.

**Dr. Mario Scerri**, court appointed forensic expert, exhibited his report in the acts of the case whereby he concluded that the injuries inflicted are of a grievous nature and the injured party is still symptomatic and suffering from the effects of post traumatic stress disorder as a direct result of the alleged



beating. Under cross-examination Dr. Scerri stated that the injured party did not hand him any certificates showing that he is suffering from post-traumatic stress disorder. Asked whether the injuries might be the result of multiple blows, he answered in the affirmative and they might have been the effect of a knuckle duster. If the injuries were inflicted without a knuckle duster, the blow had to be extremely severe. He did not rule out that it might have been one blow, but if it were so it had to be a very severe blow. Asked whether the aggressor would show some injuries or bruises on his hand, the witness stated that there are no hard and fast rules since there might be some abrasions, even maybe a fracture, but sometimes surprisingly one finds nothing.

### **Considered that:**

From the evidence brought forward it results that the prosecution is principally relying on the evidence of the injured party to identify the accused as the person responsible for the alleged punch since the person who was accompanying the injured party on the night left the country the following day and was not able to identify the accused when he gave evidence before this Court.

Whilst the prosecution rests primarily on the evidence of the victim, the Court makes reference to article 638(2) of the Criminal Code, which provides

*(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.*

This means that if the evidence of one witness only is believed this can be considered sufficient proof. This principle was further espoused in the case **Pulizija vs Joseph Thorne**<sup>1</sup>:

*“mhux kull konflitt fil-provi ghandu awtomatikament iwassal ghal-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 u tasal ghall-konkluzjoni dwar lil min trid temmen u f’hiex ser temmnu jew ma temmnux.”*

This was further explained in the case **Il-Pulizija vs Matthew Borg**<sup>2</sup>:

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<sup>1</sup> Court of Criminal Appeal (Inferior); 9th July, 2003

<sup>2</sup> Court of Criminal Appeal (Inferior); 10th November, 2014

*“Illi fid-dawl tas-suespost u cioe’ x’inhw l-ahjar prova, il-Qorti tissottolinea li huwa ben saput li l-apprezzament tal-provi ghandu jsir mhux biss b’mod spezzettat w individwali izda l-provi ghandhom jigu analizzati flimkien fl-assjem taghhom sabiex wiehed jara x’inferenzi jew interpretazzjoni ragjonevoli u legali jista’ jaghti lil daww il-provi hekk interpretati. Ma tistax tinstab htija jew nuqqas ta’ htija semplicement fuq analizi ndividwali jew separata tal-provi. Dawn ghandhom jigu kkunsidrati kemm individwalment kif ukoll kompleksivament.”*

The Court also makes reference to the case **Il-Pulizija vs Kieran Vella**<sup>3</sup>:

*“Issa meta l-Qorti tasal biex taghzel bejn verżjoni u ohra, naturalment jittiehdu in konsiderazzjoni id-diversi parametri fosthom il-komportament tax-xhieda biex wiehed jara kemm dak li qed jghidu ghandu mis-sewwa jew le.”*

### **Further considers**

In the Articles of Law for judgment which were sent by the Attorney General on the 15<sup>th</sup> July 2021, the Attorney General indicated that there might result an offence under the provisions of articles 214, 215, 216 (1) (a), 216 (1) (b), 216 (1) (c), 218 (1) (a), 218 (1) (b) and 218 (2) of the Criminal Code.

The Court makes reference to the case **Police vs Joseph Azzopardi**<sup>4</sup> where the principle which regulates the classification of injuries for the purposes of criminal procedure were established:

*“Il-kwistjoni ta’ jekk offiza hiex wahda hafifa u ta’ importanza zghira, hafifa, gravi jew gravissima hi wahda ta’ fatt u ghalhekk rimessa ghall-gudikant tal-fatt (fil-kaz ta’ guri, ghalhekk, rimessa f’idejn il-gurati; fil-kaz odjern rimessa f’idejn il-gudikant ta’ l-ewwel grad...). Ma hix, ghalhekk, kwistjoni, li tiddependi neccessarjament jew esklussivament fuq “opinjoni medika”. It-tabib jew tobbja jispjegaw x’irriskontraw bhala fatt; u, jekk il-qorti tippermettilhom, jistghu joffru l-opinjoni taghhom dwar, fost affarijiet ohra, kif setghet giet ikkagunata dik l-offiza, jew ma’ xhiex huma kompatibbli s-sintomi li jkunu gew klinikament riskontrati. Ikun jispetta mbaghad ghall-gudikant tal-fatt li, fid-dawl mhux biss ta’ dak li jkun xehed it-tabib izda fid-dawl tal-provi kollha, jiddetermina n-natura ta’ l-offiza.”*

Furthermore in the case **Il-Pulizija vs Francis Dingli**<sup>5</sup> it was established:

<sup>3</sup> Court of Criminal Appeal (Inferior); 6th October, 2016

<sup>4</sup> Court of Criminal Appeal, 30th July, 2004

<sup>5</sup> Decided 12th September, 1996

*“... għall-finijiet tal-artikolu 216 jekk hemmx sfregju jew le hi kwistjoni ta’ fatt rimessa għall-gudikant ... u dan kien perfettament intitolat li jasal għal konkluzjoni differenti minn dik li wasal għaliha l-espert tal-Qorti.”*

The Court also makes reference to the case **Il-Pulizija vs Fortunato Sultana**<sup>6</sup> where a distinction was made between articles 216 and 218 of the Criminal Code wherein it was explained:

*“Mir-ritratti ezebiti u li ttiehdu ftit hin wara l-incident meritu ta’ l-akkuza, jirrizulta bl-aktar mod car li dana Curmi soffra offizi ta’ natura gravi fit-termini ta’ l-Artikolu 216(1)(b) tal-Kodici Kriminali. Skond din id-disposizzjoni, l-offiza fuq il-persuna hi gravi jekk, fost cirkostanzi ohra, iggib sfregju fil-wicc. Il-Ligi ma tirrikjedix li dana l-isfregju jipperdura għal xi zmien partikolari, sfregju fil-wicc (jew fl-ghonq jew f’wahda mill-idejn) anke ta’ ftit granet jibqa’ sfregju għal finijiet ta’ l-imsemmija disposizzjoni, il-permanenza ta’ l-isfregju hi relevanti biss meta, abbinata mal-gravita’, taghti lok għal hekk imsejjha “offiza gravissima” skond l-Artikolu 218(1)(b) tal-Kodici Kriminali.”*

The Court also makes refence to what was subsequently espoused in the judgment in the names of **Il-Pulizija vs Antonio sive Anthony Randich**<sup>7</sup>:

*“Kif din il-Qorti kellha l-opportunita` li tirrimarka f’okkazzjonijiet ohra, l-isfregju (‘disfigurement’) fil-wicc (jew fl-ghonq jew fl-id) kontemplat fl-artikolu 216(1)(b) tal-Kodici Kriminali jista’ jkun anke ta’ natura temporanea, bhal, per eżempju, sakemm il-ferita tfiq. Huwa biss fil-kaz tal-hekk imsejjha ‘offiza gravissima’ fl-artikolu 218(1)(b) li l-ligi tirrikjedi l-permanenza (oltre l-gravita’) ta’ l-isfregju. Mir-ritratti esibiti din il-Qorti tara li l-ewwel Qorti setghet legalment u ragjonevolment tikkwalifika l-offiza f’wicc Sultana bhala sfregju (ghalkemm mhux gravi u anqas permanenti) peress li dik l-offiza kienet tid-disturba l-armonija tal-lineamenti tal-wicc u kienet tidher minn distanza normali.”*

The Court in weighing the evidence produced, especially the photograph a fol. 333 of the acts, is not convinced that the injured party suffered injuries to the degree established in article 218 of the Criminal Code and considers the prosecution has succeeded only to proof the injuries to the degree established in accordance to article 216 of the Criminal Code, and this also by application of the principle *in dubio pro reo*. Article 218 of the Criminal Code raises the severity of the injury to that of a permanent level and goes a step further from

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<sup>6</sup> Decided 5th February, 1998

<sup>7</sup> Decided 2nd September, 1999

the requirement of a deformity or disfigurement. In this case, the prosecution did not present proof or evidence that the injury sustained by the victim was of a such a nature that the requisites of Article 218 would have been satisfied.

Having established the nature of the injuries sustained by the injured party, the Court needs to establish who inflicted the same injuries. Whilst the injured party identified the accused both on site and in Court, the accused totally denied that he hit the injured party, both during his statement and in front of this Court. During his testimony before this Court, the injured party stated as follows:

*“Witness: There was three security but only him punched me. The other one just push me back.*

...

*Court: And apart from the accused here when you are telling me that he punched you were there other people who might have seen what happened? Were there other people there that you know of?*

*Witness: These three security saw me when they going to push me back but only me. My friends I tried to get him out, he went outside and he just push me and he saw me when he just pushed me, take me down the floor.”<sup>8</sup>*

On the other hand, Rodrigo Alves de Brito Torres, whilst not being capable of identifying the accused in Court as the incident was too quick and his friend was hit by surprise, explained that the person who hit the injured party was “pretty tall and pretty big” and that he was of a fair skin, but not particularly fair skin. The Court cannot say that the accused is not tall, but he is not big in the sense that his body frame is not of a large built. The Court also observes that the accused is, and was at the time of his arraignment, of fair skin, actually blonde.

The Court observes that from the evidence tendered by the Prosecution it results that there were at least two other security guards who witnessed this incident. However it does not result that these Police identified these witnesses. The Court also notes that whilst Brincat Custo stated that the cctv cameras that served the establishment, both inside and outside, did not record but were only live cameras, it does not result that the Police tried to see whether there were any cctv cameras outside other establishments which might have captured the incident. Apart from the friend of the injured party,

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<sup>8</sup> A fol. 31

the only witness brought forward by the Prosecution who was on the scene was Rodianne Brincat Custo who presented herself as the manager of the Club when the incident happened. Brincat Custo denied that the injured party was hit by the accused.

Therefore on the basis of all the evidence gathered and presented, this Court considers that the version given by the injured party and Rodrigo Alves De Brito Torres is plausible and probable and the Court feels morally convinced that the injured party was hit on his face. What this Court has a reasonable doubt about is who hit him. Whilst it is true that the injured party recognised the accused on site, this was not the best possible way of identifying his alleged aggressor.

With regards to identification, reference is being made to the judgment in the names of **II-Pulizija vs Romeo Bone**<sup>9</sup> wherein it was held:

*“Illi l-Qorti ser tibda billi taghmel riferenza ghall-kawza fl-ismijiet **II-Pulizija vs. Massimo Caruso**, deciza fis-17 ta’ Marzu, 2008, fejn il-Qorti tal-Appell Kriminali qalet hekk:*

*“Dwar il-process ta’ identifikazzjoni, il-Qorti ta’ l-Appell Kriminali (Sede Inferjuri) fil-kawza **II-Pulizija vs. Stephen Zammit** deciza fil-15 ta’ Lulju, 1998, (Vol. LXXXII.iv.235) qalet li:*

*“Il-ligi taghna hi partikolarment skarsa dwar regoli li ghandhom x’jaqsmu ma’ l-identifikazzjoni ta’ imputat jew akkuzat. Infatti, l-unika dispozizzjoni tal-ligi in materja – l-Artikolu 648 tal-Kodici Kriminali - hi redatta fin-negattiv, fis-sens li tghid **x’mhux mehtieg** u mhux **x’inhu mehtieg**”. Dik id-dispozizzjoni tipprovdi testwalment hekk:*

*“Biex issir il-prova ta’ l-identita` ta’ persuna li ghandha tigi maghrufa jew ta’ oggett li ghandu jingieb bhala prova, mhux mehtieg, bhala regola, li x-xhud jaghraf dik il-persuna minn fost persuni ohra, jew dak l-oggett minn qalb ohrajn bhalu, hliet meta l-Qorti, f’xi kaz partikulari, ikun jidhrilha xieraq taghmel dan ghall-finijiet tal-gustizzja”.*

*Dik l-istess Qorti ezaminat fid-dettal din il-kwistjoni, u billi huwa rilevanti ghall-kaz odjern se jigi kkwotat in extenso. Hija fil-fatt qalet:*

*“Minn din id-dispozizzjoni jidher car li l-legislatur ma riedx ixekkel lill-partijiet fil-kawza b’reboli rigidi ta’ kif ghandha ssir l-identifikazzjoni ta’*

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<sup>9</sup> Court of Magistrates (Malta) as a Court of Criminal Judicature – 17<sup>th</sup> May 2016

*persuna jew oggett, izda halla fil-gudizzju prudenti tal-Qorti li tirregola ruhha skond il-kaz. Din id-dispozzjoni, naturalment, tapplika ghal identifikazzjoni f'Qorti; meta si tratta ta' identifikazzjoni li tkun saret barra mill-Qorti, bhal, per ezempju, fl-Ghassa tal-Pulizija, u li ghalhekk tkun ipprecediet l-identifikazzjoni fil-Qorti, il-ligi taghna ma tghid xejn. Dan ma jfissirx li ma hemmx regoli ta' prudenza dettati mill-bwon sens li ghandhom jigu osservati, speċjalment f'dawk li jissejhu identification parades; dawn ir-regoli huma intizi fl-interess kemm tal-Prosekuzzjoni kif ukoll tad-difiza bl-iskop li l-identifikazzjoni ta' persuna bhala l-awtur ta' reat jew bhala l-persuna altrimenti involuta fih tkun attendibbli b'mod li l-Gudikant tal-fatt ikun jista' jserrah mohhu li ma hemmx zball f'dik l-identifikazzjoni. Fl-Ingilterra hafna minn dawn ir-regoli huma llum inkluzi fil-Code of Practice D taht il-Police and Criminal Evidence Act, 1984. S'intendi dawn ir-regoli mhumieq applikabbli ghal Malta, izda xi whud minnhom huma utili hafna ghax ighinu biex jizguraw dak li nghad aktar 'il fuq, u cioe l-attendibilita' ta' l-identifikazzjoni. Hekk, per ezempju, wahda minn dawn ir-regoli hi li meta jkun hemm aktar minn xhud wiehed u dawna jkunu ser jintwerew xi ritratti, 'only one witness shall be shown photographs at any one time' (para. 2, Annexe D) u dan bl-iskop ovvju li xhud ma jkunx jista' jinfluwenza lix-xhud l-iehor. Ix-xhud ghandu jigi muri numru sostanzjali ta' ritratti, mhux semplicement wiehed jew tnejn, u 'he shall not be prompted or guided in any way but shall be left to make any selection without help' (para. 4). Ir-ritratti hekk uzati, u speċjalment dak li talvolta x-xhud ikun indika bhala li jirrapprezenta lill-persuna li qed jidentifika, ghandhom jigu ppreservati biex jekk ikun il-kaz, jigu esebiti fil-Qorti. Kwantu ghal identification parades dawn ir-regoli jipprovdu, fost hwejjeg ohra li:*

*'The parade shall consist of at least eight persons (in addition to the suspect) who so far as possible resemble the suspect in age, height, general appearance and position in life ...' (para. 8, Annexe A, sottolinear ta' din il-Qorti);*

*Jerga' jigi ribadit li n-non-osservanza ta' dawn ir-regoli ma jwassalx ghall-inammissibilita' tal-prova ta' l-identifikazzjoni; ikun ifisser biss li, skond ic-cirkostanzi partikolari tal-kaz, dik l-identifikazzjoni tista' ma tkunx attendibbli bizzejjed. Lanqas ma ghandu dan kollu jfisser jew jigi interpretat bhala li hemm xi regola generali li xiehda okulari (eye-witness testimony) hija minnha nnifisha inattendibbli jew li fiha xi perikoli. Kif fisser Chief Justice Miles fis-Supreme Court of the Australian Capital Territory fil-kawza **Sharrett vs. Gill** (1993) 65 A Crim R. 44:*

*'... I am unaware of any authority in this country or elsewhere... that lays down a general principle that all eye-witness testimony is subject to*

*weaknesses and dangers. It would be surprising if there were such a principle. Of course, everybody knows that everybody else has human failings with regard to such matters as observation, interpretation, recollection and articulateness and such failings are assumed to be taken into account in most cases by the tribunal of fact unless there is some particular need for the fact-finder to refer to or to be referred to some aspect of the case where such failings are relevant. The highest judicial authorities emphasise that, in jury trials, cases of disputed identification require express and precise reference to these human failings ... and this principle has been extended to trials without a jury. However, it is hard to imagine life where people are not able to act safely and sensibly upon their observations of what they see and hear, and even upon their identification of fellow human beings by such observations. The ability to distinguish one human being from another and to recognise a person as one previously encountered are surely basic skills indispensable to social existence, and skills well acquired at an early age. What the lawyers call identification is essentially no different from what is generally known as recognition’;*

*Fi kliem iehor huwa biss f’certu kazijiet li tista’ verament tqum il-kwistjoni ta’ l-attendibilita` ta’ identification evidence. Il-kaz klassiku fl-Ingilterra huwa dak ta’ **Turnbull** (1977) QB 224, fejn il-Qorti esprimiet ruhha hekk:*

*‘First, whenever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided that this is done in clear terms the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ... Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes*

*in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger' (ara Blackstone's Criminal Practice, 1991, pagna 1991; Archbold, 1997, pagni 1255-1256)''*.

*Kif osservat ukoll din il-Qorti fis-sentenza taghha fl-ismijiet **Ir-Repubblika ta' Malta vs Giuseppe sive Joseph Cassar** moghtija fit-22 ta' Marzu, 1988, (Vol. LXXII.v.868), "skond il-ligi taghna ghall-identifikazzjoni ta' l-akkuzat mhux necessarja identification parade". Hija qalet:*

*"Dan il-punt gie ttrattat mill-Qorti ta' l-Appell Kriminali (Sede inferjuri) per W. Harding fil-kawza **'Il-Pulizija vs. Leading Steward Victor Dalmas'** deciza fit-13 ta' Mejju 1961 (Vol. XLV.iv.963), fejn waqt li gie ribadit dak li ghadu kif inghad fuq dan l-artikolu dik il-Qorti qalet ukoll: 'Hu certament desiderabbli li l-identifikazzjoni ssir bla ma dak li jkun imsejjah biex jidentifika jigi b'xi mod, anki involontarjament, suggestjonat, u hi nota l-prattika rakkommandata f'certi kazijiet, fis-sens li f'identifikazzjoni simili, meta jkun jehtieg, jingabru xi persuni, piu` o meno ta' l-istess eta` u klassi socjali tad-detenut, li jkun jista' jiehu post fejn irid fosthom'; M'hemmx dubju li kif qal Lord Parker CJ in R. vs Parks ((1961) I.W.L.R. 1484) 'cases of identification are difficult and can lead to a miscarriage of justice' u certament din il-preokkupazzjoni urietha diga` din il-Qorti fis-sentenza taghha in re **Il-Maesta` Taghha r-Regina vs. Joseph Hallet** moghtija fit-22 ta' Marzu, 1971, fejn inghad li 'certament, il-Qorti tirrikonoxxi r-riskji li ghalihom tista', in generali, tkun esposta l-prova ta' l-identifikazzjoni ta' persuna'. Din il-Qorti f'dak il-kaz li kien jinvolvi identifikazzjoni minn fuq ritratti murija mill-Pulizija, waqt li enfasizzat il-perikoli inerenti ziedet tghid li 'il-Qorti ma tahsibx illi, ghall-finijiet Prattici tal-hajja u l-investigazzjoni ta' delitti, essenzjali ghall-ezistenza ordinata stess tas-socjeta`, dan jista' jigi evitat - basta s'intendi li jsir bil-prekawzjonijiet kollha possibbli biex jigu evitati miscarriages of justice''*.

*Illi jkun utili wkoll li l-Qorti taghmel riferenza ghad-decizjoni fl-ismijiet **Il-Pulizija vs. Paul Michael Kavanagh** deciza fit-22 ta' Novembru, 2012, fejn il-Qorti tal-Appell Kriminali qalet hekk:*

*"Filwaqt li din il-Qorti tifhem illi l-ewwel Qorti messha uzat kliem ahjar biex tiddekrivi l-hsieb taghha, tapprezza ukoll illi l-ewwel Qorti forsi kellha xi diffikulta biex toqghod fuq l-identifikazzjoni illi taw il-persuni aggredditi biex torbot din l-identifikazzjoni mal-imputat. Huwa veru illi d-deskrizzjoni illi giet moghtija taqbel perfettament ma' dik tal-appellat u cioe illi l-agressur kellu*



*karnagjon cara, xaghru kien ta' lewn car ukoll, ghajnejh cari, irqiq u twil. Dawn il-hames karatteritici japplikaw perfettament ghall-appellat, pero mhux necessarjament ghalih biss, u zgur illi hemm nies ohra f'dawn il-Gzejjer illi jaqghu taht din id-deskrizzjoni, u din il-Qorti tifhem il-preokkupazzjoni tal-ewwel Qorti illi tasal biex tikkonkludi minghajr dubbju dettat mir-raguni illi dawn id-deskrizzjonijiet bilfors jirriflettu ghall-appellat u ghal hadd aktar. Ghalhekk bhala provi indizjarji ma jwasslux ghall-konkluzjoni wahda u kwindi ma tistax torbot fuqhom sabiex iwasslu ghal dak il-grad ta' prova rikjest mil-ligi. Ghalhekk din il-Qorti tifhem il-preokkupazzjoni li kellha l-ewwel Qorti meta giet biex tabbina lill-appellat mas-serqa proprja tal-hanut".*"

After the Court considered all the evidence tendered by the persons who witnessed the incident and all the other circumstances of the case, there results a reasonable doubt whether the aggressor was in fact the accused. Although the injured party identified the accused when after some days he went on site with the Police, no proof was produced as who were the other two securities who were present at the time of the incident. The Court also noted certain inconsistencies in the description which Rodrigo Alves De Brito Torres gave of the aggressor which do not tally with the physical features of the accused. Moreover the version given by the accused tallies in a certain sense with that of the injured party when he says that "there were three security but only him punched me. The other one just push me back."<sup>10</sup> In fact, the accused said that he tried to stop the injured party and it can be that he slightly pushed him away. The Court has a reasonable doubt to believe that it was some other security who might have hit the injured party whilst the accused just pushed him away.<sup>11</sup>

With regards to the second charge, whilst the Court believes that the accused pushed the injured party, it does not transpire that he did this movement with the intention to annoy, insult or hurt him. He wanted that the injured party not to cause trouble outside the establishment and to leave the site. Hence the second charge was not sufficiently proven.

The Court also notes that there was no exchange of words between the injured party and the accused. Hence the Court finds that the third charge was not sufficiently proven. In fact, in his testimony, the injured party stated that the accused didn't say anything.<sup>12</sup>

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<sup>10</sup> A fol. 24

<sup>11</sup> A fol. 520

<sup>12</sup> A fol. 34

With regards to the fourth charge, from the accused's statement and testimony before this Court, it transpires that the accused was working in an entertainment club as a bouncer/security for Club Class in Paceville on the night of the incident.

Article 25(b) of Chapter 389 (Private Guards and Community Officers Act) states:

*Any person who acts or is employed as a private guard, a specialised private guard or a private guard at a place of entertainment or as a community officer in contravention of any of the provisions of this Act or of any licence issued thereunder shall be guilty of an offence and shall be liable, on conviction, to a fine (multa) not exceeding four thousand and six hundred and fifty-eight euro and seventy-five cents (4,658.75) and to imprisonment for a term not exceeding six months or to both such fine and imprisonment.*

Therefore, the Court is going to proceed to find the accused guilty of the fourth charge.

## **DECIDE**

Therefore, the Court, after having seen Article 25(b) of the Private Guards and Community Officers Act, Chapter 389 of the Laws of Malta, finds the accused Ivan Pavlovikj guilty of the fourth charge and condemns him to the payment of a fine (multa) of three thousand Euros (€3,000), whilst acquitting him of all the other charges brought against him.

Since the Court is acquitting the accused from the first charge it is not applying the sanctions of section 533 (1) of the Criminal Code against the accused.

**Dr. Charmaine Galea**  
**Magistrate**

**Antonella Cassar**  
**Deputy Registrar**