



COURT OF CRIMINAL APPEAL

Hon. Mr. Justice Dr. Neville Camilleri
B.A., M.A. (Fin. Serv.), LL.D., Dip. Trib. Eccles. Melit.

Appeal Number 272/2018

The Police

vs.

Salih Usta

Today 25th. of July 2023

The Court,

Having seen the charges brought against the appellant **Salih Usta**, holder of Identity Card Number 22538(A), charged in front of the Court of Magistrates (Malta) as a Court of Criminal Judicature with having on the 18th. of September 2017 at about 23:30hrs as the person responsible for the establishment styled as "Murphy's Bar", situated in Tourists' Street, St. Paul's Bay:

1. operated a loud speaker, gramophone, amplifier or similar instrument made or caused or suffered to be made which was

so loud to have caused a nuisance to his neighbour Christopher Maggi;

2. on the same date, time, place and circumstances played or permitted to be played amplified music without the necessary permits from the competent authority;
3. being in possession of a license, failed to comply with any applicable provision of the Act or with any condition, restriction or other limitation to which a license is subject;
4. becoming a recidivist after he was sentenced with several sentences by the Court of Magistrates in terms of Articles 49 and 50 of Chapter 9 of the Laws of Malta.

The Court was requested that, in the case of finding the accused guilty, to cancel the licence of the said establishment or to suspend it for any time in its discretion.

Having seen the judgment delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 12th. of June 2018 wherein the Court, whilst not finding the accused guilty as a recidivist in terms of Articles 49 and 50 of Chapter 9 of the Laws of Malta, after having seen Article 41(2)(a) of Chapter 10 of the Laws of Malta, Regulation 9 of the Second Schedule of Subsidiary Legislation 441.07 of the Laws of Malta, and Article 43(1)(b) of Chapter 409 of the Laws of Malta, found the accused guilty of the first three charges brought against him and condemned him to the payment of a fine (*ammenda*) of two hundred Euros (€200). In terms of Article 20 of Chapter 441 of the Laws of Malta, the Court ordered the suspension of the licence of "Murphy's Bar", situated in Tourists' Street, St. Paul's Bay for a period of five (5) days with effect from the day of the judgment.

Having seen the appeal filed by the appellant on the 20th. of June 2018 by which he requested this Court to vary: "*the judgment of the Court of Magistrates (Malta) as a Court of Criminal Judicature given on the 12th. of June 2018 in the sense that while confirming that part of the*

judgment whereby he was acquitted of the fourth charge, revokes that part of the judgment whereby he was found guilty of the first three charges and was condemned to the payment of a fine (ammenda) of two hundred Euros (€200) in the sense that he is declared not responsible and consequently not found guilty of the said three charges and be acquitted of the said charges."

Having seen all the acts and documents.

Having seen that this appeal had been assigned to this Court as currently presided by the Hon. Chief Justice Mark Chetcuti on the 9th. of January 2023.

Having seen the updated conviction sheet of the appellant exhibited by the Prosecution as ordered by the Court.

Having seen the transcript of the oral submissions heard by this Court as diversely presided.

Having heard, during the sitting of the 13th. of July 2023, legal counsels declare that they had no further submissions to add to the submissions which were heard by this Court as diversely presided.

Considers

That in his appeal application the appellant submits that "Murphy's Bar" has all the permits and licences necessary for its operation inclusive of the extension in time and allowance for music to be played within a certain time. He says that the First Court appointed an expert who took all the necessary readings and submits that the said Court disregarded the technical conclusions basing itself on assertions which were annihilated by the readings taken. He argues that the First Court based itself on purely subjective considerations instead of relying on scientific and technical data which are in favour of his rights. He argues further that the First Court did not refer to scientific or technical data and that in technicalities it should not have substituted itself

to reach conclusions. He says that it was only the complainant who kept filing reports against him and that the complainant lives down the road from the bar and occupies a converted commercial premises. He also says that the area is 100% touristic and that the complainant knew beforehand about the area's atmosphere. He reiterates that he was within his rights to play the music and that the complainant's evidence was rebutted by him (the appellant) who had taken all the precautions necessary to render his establishment safe by making it sound-proof. He says that the reference made to the permit/licence is gratuitous as this should not have found its way into the *ratio decidendi* of the Court.

That this appeal deals with the appreciation of the facts made by the Court of Magistrates. It has been consistently noted that this Court does not disturb the discretion of the Court of Magistrates as long as the Court of Magistrates has used the discretion logically and legally. However, this Court has examined the evidence produced in front of the First Court.

That this Court notes that the First Court took cognizance of a report prepared by expert Dr. Robert Musumeci who went on the spot on the 8th. of July at 2.30pm and carried out a number of tests. He established that the complainant's house is just six metres away from "Murphy's Pub". He used a sound level meter to register the sound from "Murphy's Pub" and from Murphy's front garden and from the bedroom in premises numbered 363, a maisonette. This maisonette is on the same level as Murphy's Pub. The sound levels were registered with the sound at high volume or when the sound was off. The expert took into account various possibilities: with the door of "Murphy's Pub" closed or open (see page 34). In his conclusions, specifically the one which is marked with the number eight "8" the expert says that the sound level registered in the bedroom when the sound level is open at its maximum exceeds the level recommended by the World Health Organization - that is 45dBA. He says that this happened both when the window was open and when the window was closed. In paragraph nine "9" of his conclusions, the expert made this observation: if the level of the sound in "Murphy's Pub" is at its

maximum, it would be very difficult, if not impossible, for patrons inside the pub to communicate with each other.

That the appellant's grievance in his appeal is mostly based that the Court of Magistrates should have relied on the expert's report. The Court notes that the expert's report is limited to the sound of the music coming from the bar. At 2.30pm there were no singers with their amplifiers. For this part of the evidence the Court had to rely on the witnesses. Moreover, the expert held that music played at a high volume at Murphy's would have reached a level which is unacceptable by WHO standards. This point clearly results from the expert's conclusions. The fact that it would be difficult to carry on a conversation in the bar if the music is played at full volume does not mean that the music reaching the bedroom of premises number 363 was being played at a low volume. The impossibility or difficulty of communicating does not rule out a loud volume. This was pointed out by the Prosecution in its submissions. Moreover according to Article 656 of Chapter 9 of the Laws of Malta:

“Those who are to judge are not bound to abide by the conclusions of the experts against their own conviction.”

That this provision of the Criminal Code has never been amended since it was added in the said Code many years ago. Hence, due to the reasons here above-mentioned this Court is dismissing that part of the appeal which submits that the First Court should have followed the expert's advice. The Court is bound to take cognizance of **all** the acts of the proceedings. In this case, there was more than one person who testified *viva-voce* in front of the First Court and who were brought forward by the Prosecution when, according to Chapter 9 of the Laws of Malta, the testimony of one person would have sufficed.

That the complainant may have been the only one filing complaints but one has to consider that the complainant's residence is only six metres away from “Murphy's Pub”. The complainant acknowledged that the appellant has a business to

run but the complainant has also a right to have an undisturbed sleep at night. Nor is the Court accepting the submission that the complainant was aware that he was moving to a touristic area. First of all, the evidence shows that at the time the appellant moved there were plans for a supermarket in the vicinity. The pub appeared later when the idea of building a supermarket fizzled out. Secondly, as the Court of Magistrates noted, the appellant does not have a permit to play amplified music and that no music can be heard from outside the premises that causes annoyance and disturbance to neighbours between 11.00pm and 9.00am of the following day.

That the appellant admitted that the sound was still on at 11.30pm when the police called. Finally, the fact that the location is in a touristic area does not entitle anyone to disturb others. Everyone is entitled to peaceful surroundings in one's own residence. Finally, there are provisions which apply to all licences and the one referred to by the Court refers to all licences. Consequently, the Prosecution was correct to include the second and the third charges brought against the appellant. Hence this Court is dismissing this part of the appeal as well.

Decide

Consequently, for all the above-mentioned reasons, this Court rejects the appeal filed by the appellant and confirms the judgment delivered by the First Court in its entirety and specifies that the suspension of the licence should start from tomorrow.

Dr. Neville Camilleri
Hon. Mr. Justice

Alexia Attard
Deputy Registrar