



COURT OF CRIMINAL APPEAL

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

Appeal Number 112/2018

The Police

vs.

Tolga Temuge

Today 16th. of November 2023

The Court,

Having seen the charges brought against **Tolga Temuge**, holder of Identity Card Number 35917(A), charged in front of the Court of Magistrates (Malta) as a Court of Criminal Judicature with having on the 25th. of August 2015 between 22:10hrs and 22:30hrs and during the previous days whilst he was in the residence Highlands View, Flat 4, Raddet ir-Roti Street, St. Paul's Bay:

1. pursued a course of conduct which amounted to harassment of his wife Caroline Temuge Muscat;

2. known or ought to have known that it amounted to harassment of Caroline Temuge Muscat;
3. on the 26th. of August 2015 in these Islands by means of an electronic communication network or apparatus threatened and/or insulted the person of his wife Caroline Temuge Muscat with words;
4. on the same date, time and circumstances made improper use of an electronic communication (internet);
5. on the 21st. of September 2015 at about 21:00hrs in the residence Highlands View Court, Flat 4, Raddet ir-Roti Street, St. Paul's Bay, pursued a course of conduct which amounted to harassment of his wife Caroline Temuge Muscat;
6. known or ought to have known that it amounted to harassment of Caroline Temuge Muscat;
7. by his course of conduct caused Caroline Temuge Muscat fear that violence will be used against her or against her property or against the person or property of any of her ascendants, descendants, brothers or sisters or any person.

The Court was requested, in case of guilt, to provide for the security of Caroline Temuge Muscat.

Having seen the judgment delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 27th. of February 2018 wherein the Court declared that all the charges brought against the accused were not proven according the law and hence the accused was acquitted from the same charges.

Having seen the appeal filed by the appellant Attorney General on the 16th. of March 2018 by which reference was made to the appealed judgment and this Court was requested: *"to reform the judgement proffered against accused in these proceedings, whereby after considering all the evidence and all the arguments already put forth and*

also those that will be brought up during the appeal proceedings, the Court: 1. **Confirms** the acquittal of the accused in relation to the first, second, third and fifth charge; 2. **Revokes and reforms** the Court's decision in relation to the fourth charge consequently finding the said Tolga Temuge guilty of this charge preferred against him; and 3. Consequentially, metes out in his respect all the punishments and consequences prescribed by Law."

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 Tolga Temuge exhibited by the Prosecution as ordered by the Court.

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

Having heard, during the sitting of the 17th. of October 2023, legal counsels declare that they had no further submissions to add to the submissions which were heard by this Court as differently presided.

Considers

That the appeal application of the Attorney General is limited to the fourth charge proferred against the defendant. The Attorney General submits that the First Court made an unreasonable interpretation of the law and of the facts and hence made a wrong appreciation of the evidence. The appellant notes that the photos filed do not portray what is referred to as "*happy pictures*" of the couple specifying that the photos are sexual and show the performance of sexual acts. It is stated that according to the accused these photos were snapshotted from a video of the parties together and that the accused is not identifiable in any of the photos but the *parte civile* Caroline Temuge Muscat is fully

recognisable. The appellant affirms that the accused purposely selected parts of the video and intentionally excluded himself from any of them and states that the transmission of these pornographic, sexual photos solely conveying the *parte civile* constitute an improper use of his email. The appellant makes reference to jurisprudence and says that the photos caused considerable discomfort to the *parte civile* especially as these could possibly be transmitted on the social media. The *parte civile* felt that failure to communicate with the accused could lead to such a threat being carried out. The appellant says the behaviour of the accused was not only illicit but also inappropriate. It is also submitted that the First Court made gross misinterpretation of the law which excludes inebriation as a defence when one has drunk (alcohol) voluntarily.

That this Court notes that during the final oral submissions heard by this Court as differently presided, the defence submitted that the appeal application of the Attorney General may fall short of the requirements of Article 419 of Chapter 9 of the Laws of Malta because the Attorney General, though appealing only about the acquittal of the fourth charge in his request for confirmation of the judgment of the Court of Magistrates, failed to mention the sixth and the seventh charges. The defence also submitted that a substantial part of the appeal application deals with intoxication when this plea was never raised before the First Court. The defence also added that the First Court did not make any interpretation of the law and that Article 49 of Chapter 399 of the Laws of Malta is a dangerous one as the offence in question is not properly defined and that there is uncertainty about its nature because one asks what "improper use" amounts to. The defence reiterates that a wide interpretation cannot be given to the words used by the law.

Considers

That at this point it is appropriate that this Court deals with the first point raised by the defence. It is quite clear from the appeal application that the Attorney General failed to mention all the

charges from which the defendant was acquitted. However, it is very clear from the appeal application that the appeal is limited to the fourth charge. Hence, as there is no doubt about what the Attorney General is appealing from and considering that the words *“under pain of nullity”* have been removed from Article 419 of Chapter 9 of the Laws of Malta, this Court is considering the application of the appeal as being valid.

Considers

That before considering the other points raised by the defence, this Court will refer to that part of the evidence where the photos were referred to. The first reference appears in the affidavit of WPS 274 F. Quattromani (*a fol. 6 et seq.*) when the officer refers to the report made by Caroline Temuge Muscat. This results also from the report (Doc. *“GS 1” - a fol. 9 et seq.*) drawn up by the same police officer. In this report it is stated the email with the photos were deleted on the 27th. of August 2015 allegedly by the defendant himself. There is also a reference to the document the defendant sent to the complainant (Doc. *“GS 2” - a fol. 14 et seq.*) where the defendant wrote:

“But when you had the audacity to accuse me of “blackmailing you with our intimate pictures”, I realised that you were not only scared of me but also you had completely lost your mind.

*I would **never, ever** do such a desperate and horrible thing to you or anyone else! You must be really out of your mind to even think that I would do such a thing.”*

That in the same document the defendant added that he had not even used the Identity Card Number of the *parte civile* without her consent and later on he wrote that (*a fol. 15*):

“I looked at our past happy pictures and then found myself into our intimate memories. And as a result of extreme drunkenness, sadness and my lust for you, I must have taken

some snap shots and sent them to you in "a moment of weakness" as you put it.

[...] When I came to my senses, I was extremely embarrassed of what I had done and I was angry with myself. All these months of trying to stay away from you had failed in "a moment of weakness". I waited an email or a call from you all day without knowing how to explain myself. With a clear head (compared to a night before), I could see how much such a desperate and stupid move would have hurt you or pissed you off but I never, ever thought that you could consider my email as a "pornographic blackmail"!".

He also added that he trains NGO's about communications and that he could easily have hidden his identity. He had also given the films to her.

That it ought to be noted that in the statement (Doc. "GS 4" - *a fol. 18 et seq.*) to the Police, the defendant denied sending any emails. On her part, the *parte civile* said that she considered the email a threat because the photos were sent with a message "Let's talk" (*a fol. 26*) and that his head does not appear in the photos.

That on his part PS 266 Stefan Decelis filed a report in which it was stated that the emails had been deleted by the husband of the *parte civile* and that Ms. Tschovikov told him that she had used "Cache Viewer" to access and retrieve the images.

That most of the evidence given on the witness stand by the accused does not deal with the particular charge under consideration. The matter was brought up in the cross-examination. He confirmed Doc. "GS 2" (*a fol. 14 et seq.*) the contents of which have already been referred to above.

That Jeffrey Saliba, Jacqueline Laferla and Tumer Gencturk were three other witnesses for the defence who spoke about the love for the dog Buddy, the way that the defendant reacted for not being allowed access to the dog and relations between the couple. None

of these witnesses considered the defendant as a violent person. No new material about the photos emerged during the cross-examination of these witnesses.

Considers

That as regards the point raised by the defence where it is submitted that reference by the Attorney General in the appeal application is made to intoxication and that the defence had never raised this defence in its final submissions before the First Court, this Court notes that this is quite true as a close examination of the pages concerned reveal. However, the Attorney General was reacting to the contents of Doc. "GS 2" (*a fol. 14 et seq.*) and ruling out intoxication as a defence. In its judgment, the First Court says the following (*a fol. 202*):

"[...] However the accused explained that he had sent the same attachments after failed attempts to speak to Caroline after the previous episode of the 21st. August 2015 and the episode that happened on that 25th. August 2015 where Caroline refused to speak to him. In a letter the accused sent after he sent the email in question he explains that he found himself drinking and thinking about Buddy and he looked at their past happy pictures and sent them to her. However, in the same letter he explains that when he woke up the following afternoon he was extremely embarrassed by what he had done and was angry with himself. It is very clear that the accused had no intention to insult or threaten Caroline. He sent those photos to remind her of their past happy moments which they spent together and maybe these would soften her heart and let him see Buddy. However Caroline interpreted this email as a threat. However the Court, although it sympathises with the complainant in that she may have felt anxious about the content of the email, does not envisage the required mens rea on the part of the accused for the charge to subsist."

That from a close examination of what has been quoted above it is difficult to conclude that the Court was excluding the element of

mens rea because of the intoxication mentioned by the defendant. The letter and the words of this paragraph show that the defendant regretted what he had done. But the Attorney General could still try to forestall the defence of intoxication because of the circumstances mentioned in the letter.

That the defence also raised the question of whether the First Court had made any interpretation of Article 49(c) of Chapter 399 of the Laws of Malta or any other law. Actually the First Court did not delve into any case-law and did not develop any legal point about Article 49(c) of Chapter 399 of the Laws of Malta. What it did was to establish whether there was *mens rea* or not.

That another point made by the defence was the wording used in paragraph (c) of Article 49 of Chapter 399 of the Laws of Malta. Its basic argument is that Criminal Law must be crystal clear because otherwise there can be problems with Article 39 of the Constitution and the relevant article of the European Convention on Human Rights. It ought to be noted that at times it is inevitable that wide terms are used. Apart from this, this Court has no competence to deal with Constitutional problems.

Considers

That one final point remains. 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. This Court has also considered the Attorney General's submissions about the photos - in particular that these do not show the defendant's face whereas the alleged victim is recognisable. It definitely rules out intoxication as an excuse. This Court understands that the *parte civile* may have felt threatened with the possible misuse of the photos. Despite this, this Court still has a lurking doubt about the *mens rea* of the defendant because Doc. "GS 2" (*a fol. 14 et seq.*) reveals the defendant's embarrassment when he discovered what he had done and the allegation is that he

immediately deleted the email. In fact, this email, sent to the *parte civile*, was never filed as part of the evidence in Court because it is alleged that someone had deleted it. The defendant also expressed his dismay that he was being associated with the possibility of spreading pornography. From the evidence there is ample proof that the defendant was upset because he wanted to have access to Buddy, the dog, but the *parte civile* was not allowing this. The defendant was acquitted of all the charges and the appeal of the Attorney General regards the acquittal of the fourth charge only. This Court notes a certain ambiguity in the situation: was the sending of the photographs a threat or was it a genuine reference to happy moments?

That, considering all that has been noted above, this Court does not find any reason whatsoever to depart from the conclusion reached by the First Court regarding the fourth charge. Hence the appeal of the Attorney General will be rejected.

Decide

Consequently, for all the above-mentioned reasons, this Court rejects the appeal filed by the appellant Attorney General and confirms the judgment delivered by the First Court in its entirety.

Dr. Neville Camilleri
Hon. Mr. Justice

Alexia Attard
Deputy Registrar