



## **Court of Criminal Appeal**

**Onor. Imħallef Consuelo Scerri Herrera, LL.D., Dip Matr., (Can)**

**Appeal Number: 1571/2023**

**The Police**

**Vs**

**Rita Spiteri**

**ommisses**

**Today, the 5th of September 2024**

The Court,

Having seen the charges brought against the appellants, Rita Spiteri holder of Maltese ID card number 0422759M wherein she was accused that at the 'The Podium Bar', St Paul's Bay, on 3 December 2022;

1. At nighttime disturbed the repose of the inhabitants by rowdiness or bawling or in any other manner.
2. Also, for wilfully allowing commercial activity located in an urban area generate noise that can be heard from outside the premises that causes annoyance and disturbance to neighbours by playing of music by live bands or amplified music or other means between the hours of 11:00P.M., and 9:00A.M., of the following day and between 1:00P.M., and 4:00P.M.
3. Also, for wilfully permitting and/or allowing, either by day or by night, any singing, or noise in the establishment, which may cause annoyance to neighbours

or otherwise disturb them, failed to remove any person from the establishment who is in a state of drunkenness, or who by words, gestures, or in any other manner may have shown an intention to cause a breach of the public peace.

4. Also, for wilfully failing to put in a frame and exhibit in a visible place in the shop, a copy of the licence or permit granted by the Police and or any other competent authority having reference to the shop, as well as a printed copy of these regulations.
5. Also, for wilfully allowing and/or permitting the playing of music by whatever means, in commercial premises licenced to play amplified music, in such a manner that the music can be heard outdoors after<sup>[11]</sup><sub>[SEP]</sub>01:00A.M.
6. Also, for having, as the persons responsible of the establishment with the name of 'The Podium Bar' situated inside Primera Hotel, Triq il-Korp tal-Pijunieri, St. Paul's Bay, allowed and/or permitted smoking of any tobacco product to be carried out inside any enclosed area within the premises.
7. Having been in possession of a licence failed to comply with any applicable provision of this Act or with any condition, restriction or other limitation to which the licence is subject.
8. Having employed Aleksandar Slavchov as a substitute or agent, without the permission in writing of the Commissioner of Police.

Having seen the judgement of the Courts of Magistrates (Malta) dated 9th April 2024, wherein the appellant was acquitted from the 4th charge and found her guilty of the rest of the charges and the Court sentenced the appellant to the payment of a fine (*multa*) of €2,000 Euro.

Having seen the application of the appellant Rita Spiteri where she is asking that this Honourable Court **reforms** the judgment proffered against her in these proceedings by:

- Reversing the judgment of the Court of Magistrates (Malta) as a court of Criminal Judicature on the 9th April, 2024 where she was found guilty of the first, second, third, fifth, sixth, seventh and eighth charge and instead acquits her of all charges. Alternatively, to reverse the part of the sentence where she was sentenced to a *multa* of €2,000 and instead imposes a more just and fair sentence.

## **REASONS FOR AND GROUNDS FOR APPEAL**

### Grounds of the appeal

That the first ground of appeal is that respectfully the Court of Magistrates could not have neither factually nor legally found the appellant guilty of the charges.

That the prosecution charged the applicant in her personal capacity.

That the prosecution did not present any evidence indicating that the appellant physically committed or is responsible for what happened on the 3rd of December, 2022 at The Podium Bar. The appellant was not present at The Podium Bar. She was never spoken to on the day, and she did not play loud music or give instructions for loud music to be played.

That the only evidence presented by the prosecution which refers to Rita Spiteri is a document entitled Establishment Details at folio 29 of the acts. At the bottom of the document Spiteri is referred to as *REGISTERED OPERATOR ... OBO G&R Turnkey Projects LTD*.

That at best this proves that The Podium Bar is operated by G&R Turnkey Projects LTD. At worst, if anything Spiteri is answerable vicariously in her capacity as representative of G&R Turnkey Projects LTD.

The issue of vicarious responsibility was settled by the Criminal Court of Appeal in the case of **Il-Pulizija Vs Anthony Zahra, Mark Piscopo** (decided 30 October 2019).

Zahra was personally charged with causing involuntary grievous bodily harm. The evidence indicated that Zahra was not present when the accident happened and his only connection to the incident was because his company owned the football pitch where the accident happened. The Criminal Court quashed the judgment of the Court of Magistrates and provided that given that Zahra was charged in his personal capacity he could have never been found guilty of events which are not connected to him personally:

*'L-Ewwel Qorti ghalhekk errat meta sabitu hati ta' fatti li dwarhom huwa qatt ma gie mixli u cioe' li holqot ness bejn l-appellant fil-vesti tieghu vikarja mal-event dannuz meta dan il-fatt ma kienx jirrizulta mill-akkuza lilu addebitata.'*

For this reason, the appellant requests this Honourable Court to reverse the judgement given by the Court of Magistrates where she was found guilty of all the charges.

The following grounds of appeal are being brought independently from the first ground.

That the second ground of appeal concerns the finding of guilt for the first, second and third charge.

That based on the evidence presented, it is submitted that the Court of Magistrates could not reasonably find the appellant guilty of the offences presented in first, second and third charge.

In the first place, an essential element of each offence is the 'noise'. Not every type of noise is enough to satisfy this element. The noise must be of a certain level and quality that it disturbed the repose (article 338(m) Chap. 9), causes annoyance and disturbance to neighbours or inhabitants (Reg 9 Second Schedule S.L 441.07) or is so insufferable that it may cause annoyance to neighbours (Reg. 23 S.L. 10.09). It is therefore not enough to establish that there was noise, what may be loud to one person may not be to another. The noise must result in a disturbance, or it is proven that it may result in an annoyance to neighbours or inhabitants. The prosecution did not produce to testify any witnesses, neighbours or inhabitants of St Paul's Bay. Respectfully, an anonymous

call is not sufficient evidence of a disturbance to neighbours. One cannot control the veracity of an anonymous call or infer any motive.

In such cases, the Criminal Court of Appeal has consistently upheld the importance of neighbour or inhabitant testimony. Reference is made to **Il-Pulizija v. Crucifisso Demicoli** (12 ta' Gunju, 2003) and **Il-Pulizija vs Patrick Vella Omissis** (30 ta' Mejju, 2013). In the former case the Court provided that:

*'Din il-Qorti ser tilqa' dan l-aggravju ghas-semplici raguni li mid-deposizzjoni ta' Stephen Azzopardi – l-uniku xhud okulari tal-incident li fih l-appellant beda jaghti fuq il-vettura proprjeta` ta' Baldacchino – ma jirrizultax li dan l-incident sehh bil-lejl meta n-nies ikunu normalment reqdin b'mod li l-istess incident kiser il-mistrieh taghhom.'* (pg 3) (underlining of appellant)

The latter:

*'Il-Qorti jidhrilha illi f'cirkostanzi bhal dawn ma hemmx ghalfejn jigi nominat espert tekniku biex jikkonstata jekk ilment huwiex gustifikat jew le – dak li jkun accettabbli ghall-perit mhux necessarjament ikun hekk ghar-residenti illi jkunu jridu jissaportu l-inkonvenjent il-hin kollu tal-gurnata u lejl. Ghalhekk, jekk xi residenti ilmentaw minn inkonvenjent gej mill-azjenda tal-appellant u dan l-inkonvenjent jigi ippruvat, dana huwa bizzejjed u ma hemmx ghalfejn jigi nominat espert tekniku biex jikkonferma dak illi jkun qal ir-resident.'* (pg 13)

That the offences in issue are all result crimes (material crimes). This means that the offence is consummated only with the realisation of the specified consequences – in this case the annoyance or disturbance. Without evidence of the consequence, it should not be assumed that a crime was committed. An analogy with the current case may be drawn with the crime of indecent exposure cited in Blackstone, Criminal Practice (OUP 2023) A1.2. Blackstone provides:

*' ... Thus, the offence of indecent exposure formerly contained within the Town Police Clauses Act 1847, s. 28, was a result crime, because it required proof that D's conduct caused residents of passengers' to be annoyed, obstructed or endangered'. In contrast, the offence of genital*

*exposure created by the SOA 2003, s. 66, is a conduct crime, because it requires proof only that D exposed himself and intended this to cause alarm or distress. Nobody need actually have suffered alarm or distress. In theory, nobody need even have seen the offending act.'*

Therefore, the prosecutions failure to positively prove the annoyance or disturbance couldn't be overlooked by the Court of Magistrates. Loud music heard from outside a premises is insufficient.

For these reasons, the appellant requests this Honourable Court to reverse the judgement given by the Court of Magistrates where she was found guilty of the first, second and third charge.

That the third ground of appeal concerns the offence provided for in the fifth charge.

That respectfully the Court of Magistrates was factually and legally wrong when it found the appellant guilty of the fifth offence. An essential element of the fifth offence is that the commercial premises [is] licensed to play amplified music. The prosecution presented no evidence that The Podium Bar is licenced to play amplified music. It seems that the fifth offence is an alternative to the second or third offence, essentially that of playing loud music which can be heard from outside the premises. The appellant should not be found guilty of an offence which can only be committed by persons who hold a specific licence. The Criminal Court of Appeal in the case Il-Pulizija vs Francis Xavier Borg (28 ta' April 2005) provided:

Dan ghaliex, fil-kaz in ezami, kif gja gie deciz fir-rigward tal-ewwel imputazzjoni , l-appellant fil- periodu in kwistjoni ma kellux licenzja . Konsegwentement kif issottometta l-appellant fl-aggravji tieghu, ma jistax jinsab hati li hu kiser il-kondizzjonijiet tal-licenzja, una volta li licenzja ma kellux. Ghalhekk huwa ovvju li din l- imputazzjoni jew inghatat bhala alternattiva ghall-ewwel imputazzjoni, f' kaz li kellu jirrizulta li l-appellant kellu licenzja li tkoprih jew inkella nghatat bi zball. Ghalhekk taht dawn l-aspetti l-aggravji tal-appellant dwar is-sejbien ta' htija skond it-tieni imputazzjoni jidhru fondati.

For these reasons, the appellant requests this Honourable Court to reverse the judgement given by the Court of Magistrates where she was found guilty of the fifth charge.

That the third ground of appeal concerns the sixth, seventh and eighth charges.

That respectfully the Court of Magistrates was also incorrect to find the appellant guilty of the offences provided for in the sixth, seventh and eighth charges. Each offence requires the appellant to be the person responsible for The Podium Bar. That even if one had to ignore the first ground of appeal, i.e that the prosecution did not prove any connection between the appellant in her personal capacity and The Podium Bar, the person responsible for the The Podium Bar and the Primera Hotel is a certain Joseph Fenech. All the certificates presented by the prosecution establish that Mr Fenech is the licensee responsible from the establishment (see documents at folio 27, 29, 31,33,34 of the acts). Given this fact, the appellant was never in possession of a licence (Article 43(1)(b) of Chapter 409) nor the person responsible to employ Aleksandar Salvchov.

For these reasons, the appellant requests this Honourable Court to reverse the judgement given by the Court of Magistrates where she was found guilty of the sixth, seventh and eighth charges.

That the fourth ground of appeal is the punishment imposed. The Court of Magistrates sentenced the appellant to the payment of a fine (*multa*) of €2,000 Euro. That all but the seventh offence (Article 43(1)(b) of Chapter 409) are contraventions and carry an *ammenda* as punishment. The seventh offence carries a *multa* with a minimum of €1,164.69. That the worst that the prosecution are alleging is playing loud music. No victims exist or were brought forward. Moreover, it is abundantly clear that the appellant was not present at The Podium Bar on the day of the incident. She has a clean criminal record and there is no evidence that the incident repeated itself or was a regular occurrence.

Having seen the reply of the Attorney General exhibited in the acts of these proceedings on the 8<sup>th</sup> of July 2024.

Having heard the submissions made by the parties during the sitting of the 11<sup>th</sup> of July 2024.

Having seen the updated version of the conviction sheet of the appellant.

### **Considers**

In her first grievance the appellant submits that she could not have been found guilty of the offences preferred against her as she was summoned in her personal capacity and not vicariously in her capacity as representative of G&R Turnkey Projects Ltd which is the operator of the premises The Podium Bar. Therefore, before this court goes into discussing the legality or otherwise of the appellant being sued in her personal capacity, it feels that it has to examine the evidence brought forward in this case so that the first court was able to pronounce its judgment.

The court took note of the affidavit released by **PC 387** wherein the witness stated that on the 3<sup>rd</sup> of December 2022 at around 03.00 a.m an anonymous caller made a phone call to the Qawra police station alleging that there was loud music being played at the Podium Bar situated in Triq il-Halel, Qawra and was being a nuisance to the neighbours. He together with PS 1364 went on site as they were approaching the mentioned place, loud music could be heard from outside the premises. One of the workers immediately switched off the music and they noticed a male person smoking behind the bar. PS 1384 spoke to a male person who stated that he was responsible for the bar and claimed that he was doing nothing wrong. He then sent one of his workers to collect his identity card from his vehicle. He was identified as Alexandar Slavhov Charshavski.

In cross examination in court on the 23<sup>rd</sup> of January 2024 and confirmed that no person approached him and told him that he was bothered with the music being played. He also confirmed that his sergeant took the details of the person who was smoking inside the bar.

The Court took note of the affidavit released by **PS 1364 C Vella** exhibited in the acts of these proceedings at fol. 9 wherein he confirmed all that was stated by PC 387 in his affidavit. He also stated that they were shown some permits and licenses whilst still on the premises and none of them had a condition that amplified music could be played in the premises. He added that in the bar there were several people smoking



one of which was Nicolo Ptroviski. At the bar was Alexandar Slavhov Charshavski and he was informed that the police would be issuing charges in his regard. He claimed that he made contact with MTA personnel and a copy of the license was sent to him and it transpired that the premises was registered in the name of Rita Spiteri. She was then spoken too and told that charges would be issued against her.

The witness testified in cross-examination in court on the 23<sup>rd</sup> of January 2024 and confirmed that in the same road as the Podium Bar there are three other bars and on the night in question one of them was also open to patrons though no music was being played. He confirms that he issued charges in regard to Nicolo for smoking inside the bar separately.

The court took note of the police report taken on the 3<sup>rd</sup> of December 2023 by PS 1364 Carl Vella.

The court examined the affidavit released by **Malcolm Zerafa** on behalf of Malta Tourism Authority. He exhibited a copy of a license issued in the names of Joseph Fenech c/o Primera Hotel Triq il-Halel Bugibba. It also transpires that there was a change of licensee from Joseph Fenech to Joseph Fenech on behalf of Jolly Bay Hotel Operators Limited. With effect from 28<sup>th</sup> January 2017. Exhibited at fol. 29 of the acts of the proceedings is a license of The Podium (Primiera Hotel Bar) in Triq il-Korp tal-Pijunieri St Pauls Bay and at the bottom of such license there is indicated that Rita Spiteri is the licensed operator on behalf of G&R Turnkey Projects Ltd with effect from 24<sup>th</sup> October 2022.

In cross examination he states that the licensee of the bar The Podium is in the name of Joseph Fenech whereas the operator is Rita Spiteri on behalf of G&R Turnkey Projects.

The court examined the footage taken from the bodycam of the police. It results from an examination of this footage that on the day and time in question there was loud music being played in the bar, which music could be heard from outside. There was also a person smoking inside the bar and that Alexandar Slavhov Charshavski did not show his identity card to the police when asked to. It also results that on the day in

question the police spoke with Alexandar Slavhov Charshavski. Who claimed responsibility for the bar.

From an examination of the judgment delivered by the first court it transpires that the first court understood that the appellant is the registered operator though states that she is an operator 'on behalf of a commercial company' though makes no reference to the documents exhibited by the Malta Tourism Authority through its witness Malcolm Zerafa.

**Considers further.**

In the first aggravation the appellant is of the opinion that she should be acquitted on the premise that she could not be found guilty of the charges relating to the premises entitled The Podium as she was charged in her personal capacity and not on behalf of the commercial entity G&R Turnkey Projects Ltd despite what is provided in the documentation issued by MTA.

From an examination of the charge sheet it transpires that the appellant was charged in her personal capacity and it makes no reference to the commercial company G&R Turnkey Projects Ltd. Now sub-article (2) of article 360 of the Criminal Code provides that:

**“(2) The summons shall contain a clear designation of the person summoned and a brief statement of the facts of the charge together with such particulars as to time and place as it may be necessary or practicable to give. It shall also contain an intimation that, in default of appearance, the person summoned shall be arrested by warrant of the court and arraigned on such day as may be stated in the warrant...”**

From a close examination of the charge sheet it transpires that the particulars of the appellant were correctly indicated and thus, there is no doubt as to her identity. There is neither any doubts with regards to the nature of the charges brought forward against her in the charge sheet. However, it results from the documentary evidence which is also admissible and reliable evidence that she was not the licensee of the premise but the operator though not personally but on behalf of G&R Turnkey

Projects. She was not present on the premises when the police were on site and thus cannot be held personally responsible for the wrong doings of others which led to the transgression of the law.

In relation to vicarious responsibility article 13 of chapter 249 of the laws of Malta states the following:

*“Where any offence under or against any provision contained in any Act, whether passed before or after this Act, is committed by a body or other association of persons, be it corporate or unincorporate, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such body or association, or was purporting to act in any such capacity, shall be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence.”*

This therefore means that criminal responsibility is personal and not representative or under the pretext *nomine* as commonly used in civil matters. Thus, there is no apparent need that the appellant is charged in her capacity and Director or in representation of the commercial entity. It is enough that it appears from the wording of the charges that she is being summoned or charged vicariously on behalf of G&R Turnkey Projects Ltd and for no other apparent reason. As was outlined in the case delivered by this court presided over by a different judge in the names **Il-Pulizija vs. Joseph Bonnici** decided on the 26th May, 1995:-

**“Meta persuna tigi biex twiegeb ghar-reat kommess minn ghaqda jew korp ta’ persuni in forza ta’ l-artikolu 322 tal-Kodici tal-Ligijiet tal-Pulizija jew in forza ta’ l-artikolu 13 ta’ l-Att dwar l-Interpretazzjoni [Kap.249], it-tahrika ghandha tohrog kontra d-direttur, manager, ecc. f’ ismu personalment, fis-sens li hu personalment irid iwiegeb ghall-akkuza, u f’ kaz ta’ sejbien ta’ htija u imposizzjoni ta’ piena, tali piena, sia jekk pekunjarja sia jekk restrittiva tal-liberta’ personali, tigi inflitta fuqu u tigi skontata minnu.”**

**But:**

**“...meta l-prosekuzzjoni tkun qed tipotizza, kontra tali direttur, manager jew segretarju, reat**

**kommess minn ghaqda jew korp, u li ghalih hu jrid iwiegeb personalment, fl-imputazzjoni jew fl-akkuza – mhux fl-isem tal-imputat jew akkuzat, cioe’ mhux fl-okkju tal-kawza – ghandu jkun hemm xi indikazzjoni li hu qed jigi imsejjah biex iwiegeb ghal reat kommess mill-korp jew ghaqda: cioe’ ghandu jkun hemm xi indikazzjoni li hu qed jigi mharrek jew akkuzat minhabba r-responsabilta’ vikarja tieghu. Jekk mhux ghal xi haga ohra, tali indkazzjoni hi mehtiega sabiex l-imputat jew l-akkuzat ikun jista’ jipprepara d-difiza tieghu.<sup>1</sup>**

Having established these principles in relation to the vicarious responsibility of the appellant it still has to be established whether in her capacity as summoned in the charges namely in her personal capacity she can be held responsible on account of any act of commission or omission. This is being said as the appellant is not raising the plea of nullity of proceedings as the summons was duly issued but whether she can be held responsible personally for the charges given. Her aggravation is limited to the fact that personally she could never be found guilty of the charges as summoned.

The judgment delivered by the first court did not entertain the defence of the appellant with regard to the notion of vicarious responsibility even though admitted that she was operating the bar on behalf of G&R Turnkey Projects Ltd. It clearly transpires that the appellant at no point in time was on the premises when the anonymous report was entertained, and she did nothing in her personal capacity in relation to the charges she is accused. The accused was found guilty of all charges but the second charge in her personal capacity. The prosecution could have known about this from the onset of the proceedings as this could have been evidenced from an examination of the license upon which the charges were finally issued. It also results that the appellant personally or in her capacity on behalf of G&R Turnkey Projects Ltd was not the licensee as this was vested in the person of Joseph Fenech and thus should have investigated the case better. There is absolutely no nexus between the person of the appellant in her own name and the charges issued. This it is evident that the writing

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<sup>1</sup> App. Inf. II-Pulizija vs Patrick Vella – deciza 31/08/2006

of summons is lacking in regard to the identification of the person who had to reply to the above charges, and this is being said as the appellant personally could never ever have been found guilty of such charges which refer to the operation of the bar The Podium when this was being operated by a company namely G&R Turnkey Projects Ltd. In this regard it can be noted too that the Attorney General had nothing much to say in his reply and left the matter to be decided by this same court of appeal.

In view of the fact that the court has upheld the first grievance it does not have to go into the following grieviances.

The Court is thus upholding the first grievance of the appellant and declares the appellant not guilty of the charges as summoned and revokes the judgment delivered by the First Court and acquits her from all charges.

**Dr Consuelo Scerri Herrera**

**Judge**