



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

**MAGISTRATE DR. NOEL BARTOLO
B.A., M.A. (Fin. Serv.), LL.D.**

Today 28th October, 2024

**The Police
(Inspector Franceso Mizzi)**

VS

Saibas Sadik Sheikh

Case No. 958/24 NB

The Court,

After having seen the charges brought against the accused: **Saibas Sadik Sheikh** twenty-nine (29) years old, son of Sadik and Shbeera nee' Sayid, born in India on the **twenty sixth (26th) of January the year one thousand nine hundred and ninety-five (1995)**, holder of Indian Passport number R5102985.

Accused with having between the 22nd February 2024 at around eleven thirty o'clock at night (23:30hrs) and the 23rd February 2024 at midnight (00:00hrs) in room 5436 Seabank Hotel, Marfa Road, Mellieha and/or in other parts of the Maltese Islands:

1. Subjected **Jessica Louise Brace** to any act and, or conduct with sexual connotations, including spoken words, gestures and, or the production, display or circulation of any written words, pictures, and, or any other material, where such act, words, and, or conduct is unwelcome to the victim, and could be reasonably be regarded as offensive, humiliating, degrading, and, or intimidating, and/or to an act of physical intimacy towards **Jessica Louise Brace**.
In breach of articles 251A (1)(c)(e) of Chapter 9 of the Laws of Malta.

*The Court is being humbly requested to issue a protection order in terms of **Article 412C of Chap 9 of the Laws of Malta** during the proceedings of this case and in case of guilt applies **Articles 382A, 383, 384 or 385 of Chap 9 of the Laws of Malta** in favour of **Jessica Louise Brace**.*

*The Court is also being humbly requested, that in the case of guilt, in addition to the punishment established by law, orders the person convicted to pay the costs incurred in connection to the employment of any experts as provided in **Article 533 of Chapter 9 of the Laws of Malta**;*

Having seen that in the sitting held on the 24th February 2024 the Court ordered that proceedings be conducted in the English language given that the defendant does not understand the Maltese Language but understands the English Language.

Having seen all the records of the case.

Having seen the evidence tendered by the prosecution and the testimony of accused.

Having heard the final submissions made for the Prosecuting Officer Insp. Francesco Mizzi and by the Defence lawyer Dr. Ilona Schembri during the sitting held on the 28th May 2024.

CONSIDERS

During the sitting held on 18th March 2024 Inspector Francesco Mizzi testified¹ that on the 23rd February 2024 Jessica Louise Brace reported² with the executive police that she was sexually assaulted in Room 5436 at the Seabank Hotel. Following an argument with her boyfriend in her hotel room, a male hotel staff member entered her room under the pretext of addressing a noise complaint. She stated that the person let himself inside the room, pulled her in and forcibly kissed her. He attempted to further kiss her by pulling her towards him and started touching her leg. The duty Magistrate was immediately informed and the Inspector obtained a warrant of arrest against the accused. Upon being arrested the accused released a statement – Dok FM 4 (fol 16 - 17) where he denied all the allegations and that the complainant was drunk.

During the sitting held on the 24th February 2024³ Jessica Louise Brace testified that she was on holiday in Malta when the incident occurred. She stated that the accused entered in her room and proceeded to enter the bathroom to check if anyone was present. Following this, he approached her, pulled her towards him, and attempted to kiss her. She questioned the accused's actions, informing him that she had a boyfriend. Despite her protest, the accused attempted to kiss her again before eventually leaving

¹ Fol 41 to 42

² Fol 37 to 40

³ Fol 21 to 29

the room. She further stated that she sent a text message to her mother, informing her that a man had tried to rape her and had attempted to kiss her. Ms. Brace later clarified that the accused had indeed kissed her but confirmed that, apart from this, no other acts were committed by him.

During cross-examination, she acknowledged that she had consumed alcohol on the night of the incident and that her boyfriend had already left the room by the time the accused entered. She clarified that, during the first kiss, the accused's lips made contact with hers, and his tongue touched her lips. She further stated that during this first kiss, the accused kissed her using his tongue and subsequently attempted to kiss her a second time. Additionally, she testified that the accused touched her legs during the incident. Following these events, she reported the incident to the hotel manager. However, she indicated that she could not recall the details of the conversation as she was in a state of shock at the time. While she confirmed that she had consumed alcohol, she stated that the incident had sobered her up. Ms. Brace also mentioned that when she went to the hotel reception after the incident, she was not actively speaking with anyone, but her mother was.

During the sitting held on the 18th March 2024, PC 288 David Galea testified⁴ that when Jessica Louise Brace attended the police station to report the incident, she appeared visibly frightened and was crying. He further stated that there was no odour of alcohol emanating from her and that she was communicating in a coherent and normal manner.

During the sitting held on the 18th March 2024, PS 1526 Charlon Borg testified⁵ that he attended the Seabank Hotel in connection with the reported incident. Upon his arrival, Jessica Louise Brace identified the accused as the alleged offender. PS Borg described her as appearing scared, angry, and frustrated, but otherwise behaving in a normal manner. She informed him that the accused had forced himself on her and that she had been abused but managed to stop him. She further stated that the accused attempted to kiss her. PS Borg noted that Jessica Louise Brace later elaborated on the details of the incident when she attended the police station. He also confirmed that while they were still at the Seabank Hotel, Jessica Louise Brace did not mention that the accused had attempted to touch her legs.

On the 28th May 2024, the accused testified that on the 22nd February he commenced his duty as a receptionist at the Seabank Hotel at 11:00 p.m. At approximately 11:30 p.m., a guest lodged a complaint about noise emanating from room 5436. In response, the accused knocked on the door of the room, which was opened by a young woman who was crying. The woman then invited him inside. The accused testified that he approached the area near the bathroom but did not enter further. The woman

⁴ Fol 33 to 36

⁵ Fol 44 to 48

informed him that her boyfriend had been the source of the noise. She then laid on the bed and asked him to join her. The accused stated that he declined her request and advised her to contact reception if she required further assistance, after which he left the room. The accused further testified that later, the woman's mother approached the reception desk, inquiring who had been in her daughter's room and requesting to speak with the hotel manager. During cross-examination, the accused confirmed that the woman had informed him that she was drunk. He also confirmed that he did not make any physical contact with her and that he always kept a distance from her.

CONSIDERS

In the case at hand, the Court is faced with two diametrically opposed versions. Jessica Louise Brace's version that the accused kissed her and forced himself onto her and the accused's version whereby he denies the act.

It very often happens that a Court is confronted with conflicting versions and testimony. In this particular case, as is expected in such circumstances, there are no other witnesses to the alleged incident. The Court is faced with a situation where the guilt or otherwise of the person accused rests solely upon a matter of credibility between the version of the accused and that of the alleged victim.

It is well-established in case-law that the fact that witnesses might have given conflicting accounts of the facts does not necessarily mean that the accused must be acquitted: the Court may decide to assign credibility to one version and dismiss the others, naturally after having taken into account not only the manner in which the persons concerned would have testified, but also the entire compendium of evidence including circumstantial evidence.

The Court of Criminal Appeal in its judgement **Il-Pulizija vs Joseph Thorne (Appeal No 59/2003) decided on the 9th July 2003**, held that not each and every inconsistency in the evidence must necessarily result in an acquittal because in such cases:

... il-Qorti trid tevalwa l-provi skond il-kriterji enuncjati fl-Artikolu 637 tal-Kodici Kriminali w tasal għall-konkluzjoni dwar lil min trid temmen u f'hiex ser temmnu jew ma temmnux.

In the Criminal Appeal in the names **Il-Pulizija vs. Graham Charles Ducker** decided on the 19th May 1997, it was held that:-

It is true that conflicting evidence 'per se' does not necessarily mean that whoever has to judge may not come to a conclusion of guilt. Whoever has to judge may, after consideration of all circumstances of the case, dismiss one version and accept as true the opposing one.

In order to evaluate the credibility of witnesses in such cases, the provisions of Article 637 of the Criminal Code stipulate that the decision as to the credibility of the witness shall lie in the discretion of those who have to judge of the facts, regard being had to the demeanour, conduct, and character of the witness, to the probability, consistency, and other features of his statement, to the corroboration which may be forthcoming from other testimony, and to all the circumstances of the case: Provided that particular care must be taken to ensure that evidence relating to the sexual history and conduct of the victim shall not be permitted unless it is relevant and necessary.

Moreover, in the matter of credibility, Article 638 of the Criminal Code makes it clear that while it is the duty of the Prosecution to take care to produce the fullest and most satisfactory proof available, and not to omit the production of any important witness, 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 principle has been reaffirmed repeatedly in local case-law.

It must also be said that the criminal law does not require that in order for a person to be found guilty of a crime there must be established absolute certainty of the commission of the offence – rarely does one encounter such certainty. In order to establish criminal guilt, the threshold that needs to be reached is conviction beyond a reasonable doubt on the basis of the evidence adduced by the Prosecution, where such evidence has not been neutralised by the defence on a balance of probabilities.

In the case **Il-Pulizija vs Clifford Bugeja (Appeal No 196/19)** decided by the Court of Criminal Appeal on the 5th December 2019, the Court of Appeal stated that:

18. Il-Liġi penali ma teħtieġx li biex persuna tiġi misjuba ħatja tkun trid tiġi stabbilita s-suffiċjenza probatorja taċ-ċertezza assoluta, u dan għaliex Qorti rari ħafna tista' tkun konfrontata b'dan il-livell ta' prova. Fil-Liġi Maltija, b'hal dawk li jsegwu l-proċedura penali imnisla mis-sistema Anglo-Sassoni, huwa biżżejjed li Qorti ta' Ġustizzja Kriminali tkun konvinta lil hinn minn kull dubju dettat mir-raġuni mill-provi imresqa mill-Prosekuzzjoni, u li ma jkunux ġew newtralizzati fuq bażi ta' probabbiltà' mid-Difiza, sabiex tkun tista' ssib ħtija.

This level of proof is in effect the highest threshold that the law envisages in our juridical system for the finding by a court of criminal justice of guilt for a criminal charge. Whether this threshold has been satisfied or otherwise requires that the Court in each particular case determines whether and to what degree a person would be stating the truth under oath, by applying the principles outlined in Article 637 of the Criminal Code, cited above.

In the above cited case **Il-Pulizija vs Clifford Bugeja (Appeal No 196/19)** Court of Criminal Appeal further noted that:-

26. Sabiex tara jekk dan il-livell ta' suffiċjenza probatorja intlaħaqx din il-Qorti trid, inter alia, tara jekk u safejn persuna tkun qed tixhed is-sewwa bil-prinċipji provduti lilha fl-artikolu 637 tal-Kodiċi Kriminali. Jekk il-Qorti tqis li, applikati dawn il-prinċipji, xhud ikun qiegħed jixhed is-sewwa, allura tkun tista' toqgħod fuq dak li jkun qed jgħid jew fuq parti minn dak li jkun qed jgħid skont il-każ. Jispetta dejjem lil min ikun irid jiġġudika l-fatti jiddeċiedi jekk, applikati dawn il-prinċipji, jemminx xhud f'dak kollu li jkun qed jgħid jew safejn jemmen minn dak li jkun qed jgħid, u dan japplika wkoll meta x-xhud ikun xhud waħdieni tal-fatti allegati.

27. Huwa biss meta jkun hemm id-dubju veru, bażat fuq ir-raġuni, fuq is-sens komun u fuq il-buon sens, u fuq s'tharriġ dettaljat u b'attenzjoni, b'diliġenza u b'mod imparzjali tal-provi u l-argumenti kollha li jkunu ġew imresqin mill-Prosekuzzjoni u mid-Difiża li jwassal sabiex dak il-livell ta prova lil hinn minn kull dubju dettat mir-raġuni jkun jista' jingħad li ma ntlaħaqx u li allura, b'ħala konsegwenza, l-akkużat ikun irid jiġi dikjarat mhux ħati tal-akkużi miġjuba kontrih.

Therefore, the fact that the accused person testified as to a different version of events to that of the alleged victim and refutes the allegations made by the Prosecution, and the fact that there therefore exists contradictory evidence, does not necessarily mean that the accused must be acquitted. As pointed out, the Court must apply its discretion to weigh the evidence and evaluate the credibility of the respective witnesses and could therefore choose to lend credence to the Prosecution's witnesses, rather than to the testimony of the accused or the witnesses for the defence.

Applying the aforementioned principles to the testimonies provided by both the alleged victim and the accused in this particular case, the Court is compelled to observe the clear inconsistencies in the alleged victim's account. It is undisputed that the accused entered room 5436 in response to a noise complaint. During her examination-in-chief, Jessica Louise Brace testified that the accused attempted to kiss her twice. However, she later sent a text message to her mother alleging that the accused had attempted to rape her. The Court finds it perplexing that if such a serious act had occurred, the alleged victim did not even attempt to leave the room nor did she attempt to contact her mother at that time but simply sent a message.

When asked to describe the events in the room for a second time, the alleged victim added that the accused had not only attempted to kiss her but had, in fact, succeeded in kissing her, followed by a second attempt. She further confirmed that no additional actions were done by the accused. This version differs from her testimony given during cross-examination, where she added that the accused kissed her using his tongue on

her lips. Moreover, in her examination-in-chief, she confirmed that the accused did not touch her elsewhere, whereas in her police report and during cross-examination, she stated that the accused attempted to touch her leg. The Court notes that her police statement was made just a day before her testimony in Court, while the alleged incident occurred just two days prior. Additionally, during cross-examination, the alleged victim stated that she spoke with the manager, but later contradicted herself, asserting that it was her mother who had spoken with the manager.

These inconsistencies raise substantial doubt about the reliability of her testimony, particularly when she initially claimed that she was "*not at all drunk*" in her examination-in-chief but later admitted during cross-examination that she had consumed alcohol.

Furthermore, the Court observes that the accused had been employed at Seabank Hotel for two years prior to the alleged incident. No evidence was submitted suggesting that he had been involved in any similar complaints or accusations in the past.

In light of the conflicting nature of the alleged victim's testimony, the Court finds her account to lack credibility. The Court cannot base its decision on a testimony that is not credible, and given the absence of any corroborating evidence, the Court is unable to establish guilt on the part of the accused beyond a reasonable doubt.

DECIDE

For the above-mentioned reasons the Court finds the accused **Saibas Sadik Sheikh** **NOT GUILTY** of the charges brought against him and therefore acquits him of all the said charges.

Noel Bartolo
MAGISTRATE

Marisa Bugeja
Deputy Registrar

28th October 2024